ELDREDGE & ELDREDGE

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

GIFT OF

Eldredge

ELDREDGE &

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/treatiseonfedera03fost

A TREATISE

ON

FEDERAL PRACTICE

CIVIL AND CRIMINAL

INCLUDING

PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES, FORECLOSURE OF RAILWAY MORTGAGES, SUITS UPON CLAIMS AGAINST THE UNITED STATES, PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION AND THE FEDERAL TRADE COMMISSION,

EQUITY PLEADING AND PRACTICE, RECEIVERS AND INJUNCTIONS

IN THE STATE COURTS

BY

ROGER FOSTER

OF THE NEW YORK BAR

AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE FEDERAL INCOME TAX OF 1894, THE FEDERAL INCOME TAX OF 1913 AND 1914, LIBERTY OF CONTRACT, ATTACHMENT, REMOVAL OF CAUSES, TRIAL BY NEWSPAPER, &C., FORMERLY LECTURER ON FEDERAL JURISPRUDENCE AT THE LAW SCHOOL OF YALE UNIVERSITY.

SIXTH EDITION

REVISED AND ENLARGED

IN FOUR VOLUMES

VOL. III

CHICAGO

CALLAGHAN & COMPANY

1921

Copyright, 1890
by
ROGER FOSTER

Copyright, 1892
by
ROGER FOSTER

Copyright, 1901
by
ROGER FOSTER

Copyright, 1909
by
ROGER FOSTER

Copyright, 1913
by
ROGER FOSTER

Copyright, 1920
by
ROGER FOSTER

T
F 8167f
1920

TABLE OF CONTENTS

VOLUME III.

CHAPTER XXX.

PRACTICE AT COMMON LAW IN CIVIL ACTIONS.

		Page
§ 453.	Common-law practice. In general	2201
§ 454.	Common-law pleading. In general	2209
§ 454a.	Plaintiff's pleading at common law	2210
§ 454b.	Parties in actions at common law	2212
§ 454c.	Joinder of causes of action at common law	2214
§ 454d.	Pleading facts affecting the jurisdiction	2215
§ 454e.	Pleadings by defendant in action at common law	2217
§ 454f.	Demurrers at common law	2219
§ 454g.	Pleading equitable defenses	2221
§ 454h.	Counterclaims and set-offs	2227
§ 454i.	Pleadings in negligence cases	2228
§ 454j.	Pleadings in actions under Federal Employers' Liability Act	2229
§ 454k.	Pleadings in actions at common law under Interstate Commerce Acts	2230
§ 454l.	Pleadings in actions at common law under anti-trust statutes	2231
§ 454m.	Pleading in actions at common law upon patents	2235
§ 454n.	Pleadings in actions at common law upon copyrights	2238
§ 454o.	Pleadings in actions to recover penalties	2240
§ 454p.	Pleadings in actions at common law by the United States to recover taxes	2241
§ 455.	Writs and process. In general	2242
§ 455a.	Service of process	2245
§ 455b.	Amendment of writs and process	2247
§ 456.	Writs of prohibition	2248
§ 457.	The writ of *mandamus*. In general	2252
§ 457a.	Jurisdiction of the Supreme Court to issue writs of *mandamus*	2259
§ 457b.	Jurisdiction of the Circuit Courts of Appeals to issue writs of *mandamus*	2260
§ 457c.	Jurisdiction of the District Courts to issue writs of *mandamus*	2261
§ 457d.	*Mandamus* under the interstate commerce laws	2266
§ 457e.	*Mandamus* against the executive and administrative officers of the United States. In general	2268
§ 458.	Jurisdiction of the Supreme Court of the District of Columbia to issue a writ of *mandamus* to an officer of the United States	2270

709765

Page

§ 459. Practice on application for *mandamus*.... 2276
§ 460. Writs of *certiorari* 2285
§ 461. Writs of *habeas corpus*. In general.... 2291
§ 461a. Jurisdiction to grant the writ of *habeas corpus* because of difference of citizenship.... 2293
§ 461b. Writs of *habeas corpus* issued by State courts.... 2294
§ 461c. The writ of *habeas corpus ad subjiciendum*.... 2294
§ 461d. The writ of *habeas corpus ad testificandum*.... 2295
§ 461e. *Habeas corpus* to protect officers of the United States.... 2295
§ 461f. *Habeas corpus* to protect those acting under authority of foreign states 2298
§ 461g. Errors which may be corrected by the writ of *habeas corpus*.. 2300
§ 462. *Habeas corpus* to review proceedings for extradition.... 2306
§ 462a. *Habeas corpus* to protect alien enemies.... 2310
§ 463. *Habeas corpus* for immigrants and to review orders for deportation 2312
§ 464. Discharge of soldiers from the army by the writ of *habeas corpus* 2340
§ 465. Suspension of writ of *habeas corpus*.... 2342
§ 466. Practice on application for *habeas corpus*.... 2345
§ 467. Appeals in *habeas corpus* proceedings.... 2360
§ 468. The writ of *quo warranto*. In general.... 2368
§ 468a. Writs of *quo warranto* in the District courts.... 2369
§ 468b. Jurisdiction of the Supreme Court to review decisions in proceedings upon *quo warranto*.... 2377
§ 468c. Writs of *quo warranto* in the Supreme Court of the District of Columbia 2377
§ 469. Writs of *scire facias*.... 2379
§ 470. Attachment of property.... 2385
§ 471. Arrests 2397
§ 472. Consolidation at law and in equity.... 2401
§ 473. Right to trial by jury.... 2404
§ 473a. Continuances and adjournments.... 2406
§ 473b. Selection of jury.... 2409
§ 473c. Effect of state statutes on procedure at a jury trial.... 2412
§ 473d. Introduction of evidence before jury.... 2413
§ 473e. Discharge of jury and withdrawal of juror.... 2417
§ 473f. Election by plaintiff.... 2418
§ 473g. Non-suits and dismissals.... 2418
§ 473h. Direction of verdict.... 2419
§ 473i. Arguments of counsel.... 2423
§ 473j. Charge to jury.... 2425
§ 473k. Verdicts 2431
§ 474. Trials by court.... 2434
§ 475. References 2442
§ 476. Agreed statement of facts.... 2446
§ 477. Rules of decision at common law.... 2448
§ 477a. Common law of the United States.... 2455

Page

§ 477b. The effect of decisions of State courts establishing Rules of Property 2459
§ 477c. Effect of State statutes creating or regulating rights upon the decisions upon the Federal courts..... 2464
§ 477d. Notice of *lis pendens*..... 2471
§ 478. New trials 2472
§ 479. Bills of exceptions..... 2484
§ 480. Judgments 2502
§ 480a. Lien and docket of judgments..... 2506
§ 481. Correction of judgments by courts that rendered them..... 2508
§ 482. Condemnation proceedings 2513

CHAPTER XXXI.

PRACTICE IN CRIMINAL CASES.

§ 483. Sources of federal criminal law..... 2526
§ 483a. Concurrent criminal jurisdiction..... 2528
§ 483b. Concurrent criminal jurisdiction in prohibition cases..... 2529
§ 483c. Criminal jurisdiction over land ceded by the states or reserved, purchased or otherwise acquired from them..... 2533
§ 483d. Jurisdiction over criminal cases arising in the land or naval forces 2536
§ 483e. Criminal practice. In general..... 2544
§ 483f. Prosecuting officer in the Federal courts..... 2546
§ 483g. United States Commisioners..... 2547
§ 483h. Criminal jurisdiction of national park commissioners..... 2549
§ 484. Arrests without warrants..... 2550
§ 485. The complaint in a criminal case..... 2552
§ 486. The warrant 2554
§ 487. Search warrants. In general..... 2557
§ 487a. Search warrants under the national prohibition law..... 2570
§ 487b. Effect of unlawful seizure..... 2574
§ 487c. Return of books, papers and property unlawfully seized..... 2576
§ 487d. The manner of making objections to search warrants..... 2578
§ 488. Preliminary examination 2578
§ 488a. The commitment 2582
§ 489. Warrants of removal..... 2583
§ 490. Extradition to foreign countries..... 2590
§ 490a. Extraditable offenses 2595
§ 490b. Complaint for extradition to a foreign country..... 2595
§ 490c. Evidence upon applications for extradition to foreign countries 2596
§ 490d. Custody and protection of persons extradited from foreign countries 2600
§ 490e. Extradition of seamen..... 2601
§ 490f. Extradition from the Philippines..... 2601

Page

§ 491. Extradition fron one State to another..... 2602
§ 492. Summons in criminal cases..... 2608
§ 493. Bail 2608
§ 493a. Presentments 2626
§ 494. Informations 2627
§ 495. Indictments 2631
§ 496. Captions of indictments..... 2632
§ 497. Body of indictment 2633
§ 497a. Pleading matters of inducement and collateral matters..... 2641
§ 497b. Pleading negatives in indictments..... 2642
§ 497c. Allegations as to time in indictments..... 2643
§ 497d. Allegations of place in indictments..... 2644
§ 497e. Allegations of intent in indictments..... 2645
§ 497f. Pleading documents in indictments..... 2647
§ 497g. Bad grammar and spelling in indictments..... 2648
§ 497 h. Proper names in indictments..... 2648
§ 497i. Repugnancy in indictments..... 2650
§ 497j. Surplusage in indictments..... 2651
§ 498. Signature of indictments..... 2651
§ 499. Indorsements of indictments..... 2652
§ 499a. Margin of indictments..... 2653
§ 500. Duplicity in indictments..... 2653
§ 501. Joinder of counts..... 2657
§ 502. Misjoinder of counts..... 2661
§ 503. Election between counts in an indictment..... 2662
§ 504. Joinder of defendants to indictment..... 2662
§ 505. Consolidation of indictments..... 2663
§ 505a. Severance 2665
§ 505b. Amendment of indictments..... 2666
§ 506. Indictments for the violation of the national banking laws.. 2666
§ 506a. Indictments for fraudulent use of the mails..... 2679
§ 506b. Indictments for mailing or expressing obscene matter..... 2682
§ 506c. Indictments for conspiracy..... 2685
§ 506d. Indictments for conspiracy under the civil rights laws..... 2690
§ 506e. Indictments for conspiracy to restrain or monopolize interstate or international commerce..... 2697
§ 506f. Indictments under the interstate commerce law..... 2700
§ 506g. Indictments under the White Slave Traffic Act..... 2703
§ 506h. Indictments for larceny and receiving stolen goods..... 2705
§ 506i. Indictments for embezzlement..... 2707
§ 506j. Indictments for counterfeiting..... 2708
§ 506k. Indictments under the tobacco laws..... 2709
§ 506l. Indictments under the Oleomargarine Laws..... 2710
§ 506m. Indictments under the Pure Food and Drugs Act..... 2711
§ 506n. Indictments for smuggling..... 2714
§ 506o. Indictments for the offense of receiving smuggled opium..... 2715
§ 506p. Indictments under the Anti-Narcotic Law..... 2716

Page

§ 506q. Indictments for offense against the prohibition law and other liquor laws 2717
§ 506r. Indictments for perjury and for subornation and for false notarial certificates 2722
§ 506s. Indictments under the Land Laws..... 2724
§ 506t. Indictments arising out of bankruptcy and therewith connected 2726
§ 506u. Indictments for personation of an officer of the United States 2731
§ 507. Ordinance in Constitution as to juries in criminal prosecutions 2732
§ 508. Writ of *venire facias* 2733
§ 509. Qualifications of grand and petit jurors..... 2736
§ 510. Selection of grand and petit jurors..... 2739
§ 511. Proceedings of grand jury..... 2744
§ 511a. Inspection of the minutes of the grand jury..... 2750
§ 512. Challenges to grand jurors..... 2751
§ 513. Manner of taking objections to an indictment..... 2752
§ 514. Arraignment 2752
§ 515. Motions to quash an indictment..... 2754
§ 516. Demurrers to indictments..... 2757
§ 517. Pleas in abatement..... 2759
§ 518. Plea of *nolo contendere*..... 2765
§ 519. Plea of pardon..... 2766
§ 520. Plea of former jeopardy or of former acquittal or conviction.. 2769
§ 520a. Pleas of statutes of limitations..... 2777
§ 520b. Plea of guilty..... 2778
§ 520c. Plea of not guilty..... 2779
§ 521. Proceedings upon pleas..... 2779
§ 522. Bills of particulars..... 2780
§ 522a. *Nolle prosequi* 2781
§ 522b. Compromise of prosecutions under the Internal Revenue Laws and Prohibition Law..... 2782
§ 522c. The right to confrontation..... 2783
§ 522d. Compelling attendance of witnesses for the Government..... 2786
§ 522e. Compelling attendance of witnesses for the defendant..... 2788
§ 522f. Statutory presumptions in criminal cases..... 2789
§ 523. Evidence in criminal cases..... 2792
§ 523a. Cross-examination and impeachment of witnesses..... 2793
§ 523b. Documentary evidence in criminal cases..... 2794
§ 523c. Competency of witnesses in criminal cases..... 2796
§ 523d. Testimony of accomplices..... 2796
§ 523e. Testimony of defendant..... 2798
§ 523f. Cross-examination of defendant..... 2798
§ 523g. Confessions 2801
§ 523h. Evidence of other crimes..... 2803
§ 523i. Evidence of identity..... 2804
§ 523j. Evidence of presence of defendant in locality of crime..... 2805
§ 523k. Proof of hand writing in criminal cases..... 2805
§ 523l. Evidence in prohibition cases..... 2805

Page

§ 523m. Evidence in prosecutions for conspiracy 2806
§ 523n. Evidence in trials for treason 2807
§ 523o. Right to a speedy trial 2811
§ 524. List of jurors and witnesses 2812
§ 525. Place of trial 2814
§ 525a. Place of trial of offenses committed upon the high seas 2815
§ 525b. Place of trial of offenses begun in one district and completed in another 2818
§ 525c. Place of trial of offenses under Interstate Commerce Law 2819
§ 525d. Place of trial for capital offenses 2820
§ 525e. Place of trial for conspiracies 2821
§ 525f. Place of trial of offenses against the Prohibition Law 2821
§ 525g. Place of trial of offenses against the Pure Food and Drugs Act 2822
§ 525h. Right to a public trial 2823
§ 526. Challenges to petit jurors 2825
§ 526a. Right to counsel 2832
§ 527. Trials in criminal cases 2833
§ 527a. Statements and arguments of counsel 2837
§ 527b. Charges in criminal cases 2841
§ 527c. Verdicts in criminal cases 2846
§ 527d. Requests for instructions to the jury 2849
§ 528. Summary trials of offenses against navigation laws 2850
§ 529. Practice in prosecutions under the civil rights laws 2852
§ 530. New trials 2853
§ 531. Motions in arrest of judgment 2854
§ 532. Sentence and judgment in criminal cases 2856
§ 533. Suspension of judgments in criminal cases 2861
§ 534. Punishments for crimes against the United States 2861
§ 534a. Excessive fines, and cruel and unusual punishment 2861
§ 534b. Capital punishment 2865
§ 534c. Punishment by imprisonment 2867
§ 534d. Punishment by fine 2870
§ 534e. Commutation of term of imprisonment 2871
§ 534f. Release of poor convicts 2872
§ 535. Bills of exceptions in criminal cases 2873
§ 536. Writs or error by the Government in criminal cases 2875
§ 536a. Writs of error by defendant in criminal cases 2877

CHAPTER XXXII.

REMOVAL OF CAUSES.

§ 537. History of legislation upon removals from State and Federal courts 2885
§ 537a. Removal of causes from one Federal court to another 2887
§ 537b. Removal of suits arising under the Constitution or laws of the United States 2889

Page

§ 537e. Removals of suits where the cause of action arose on ceded territory 2891
§ 537d. Removal of suits under the Employers' Liability Law..... 2891
§ 537e. Removal of suits against common carriers for loss in transportation 2892
§ 537f. Removal of suits to which aliens are parties..... 2893
§ 537g. Removal of suits between citizens of different States..... 2895
§ 537h. Effect upon removal of residence of parties..... 2898
§ 537i. "The proper district" for a removal..... 2899
§ 537j. Effect of counter-claim upon removal..... 2900
§ 537k. Nature of the right of removal..... 2901
§ 5371 l. Interference by the States with the right of removal..... 2902
§ 537m. Stipulations against removals..... 2903
§ 537n. Waiver of right to removal..... 2904
§ 538. Cases which are the subject of removal..... 2906
§ 538a. Removal of criminal proceedings..... 2908
§ 538b. Removal of applications for the writ of mandamus..... 2910
§ 538c. Removal of *habeas corpus* proceedings..... 2910
§ 538d. Removal of *quo warranto* proceedings..... 2911
§ 538e. Removal of proceedings in State courts of probate and of those affecting the administration of decedent's estates... 2911
§ 538f. Removal of condemnation proceedings 2913
§ 538g. Removal of proceedings to settle water rights..... 2915
§ 538h. Removal of proceedings to assess betterments..... 2915
§ 538i. Removal of proceedings to collect claims against counties... 2916
§ 538j. Removal of creditors' bills 2916
§ 538k. Removal of ancillary and supplemental suits..... 2917
§ 538 l. Removal of proceedings to assess and collect taxes..... 2922
§ 538m. Removal of divorce suits..... 2922
§ 539. Removals when there are improper parties plaintiff..... 2922
§ 540. Removals when there are improper parties defendant..... 2923
§ 540a. Improper parties defendant to negligence cases..... 2927
§ 541. Separable controversies 2930
§ 541a. Separable controversies in suits for accountings 2941
§ 541b. Separable controversies in suits affecting the title to land... 2942
§ 541c. Separable controversies in condemnation proceedings 2943
§ 541d. Separable controversies in foreclosure suits 2945
§ 541e. Separable controversies in stockholders' suits 2947
§ 541f. Separable controversies in suits to enforce the liability of stockholders 2948
§ 541g. Separable controversies in suits for the administration of the assets of a debtor..... 2949
§ 541h. Separable controversies in actions upon promissory notes.... 2949
§ 541i. Separable controversies in negligence cases..... 2950
§ 541j. Separable controversies in suits affecting subrogation in fire insurance 2952
§ 541k. Separable controversies in suits affecting wills..... 2952
§ 542. Parties who may remove cases..... 2952

Page

§ 543. Time of removal 2959
§ 543a. Extensions of time as affecting right of removal..... 2965
§ 543b. Removals after defaults..... 2967
§ 543c. Amendment by plaintiff as affecting time for removal..... 2968
§ 543d. Effect of consolidation upon time for removal..... 2969
§ 543e. Effect of new parties upon time for removal..... 2969
§ 543f. Effect upon right to removal of dismissal as to other defendants 2970
§ 543g. Change of venue affecting time of removal..... 2972
§ 543h. Removals before trial 2972
§ 544. Practice on removals. In general..... 2976
§ 544a. Notice of application for removal..... 2980
§ 545. Petition for removal in ordinary cases..... 2982
§ 545a. Second petition for removal..... 2993
§ 545b. Allegations to show that suit comes under constitution of laws of the United States..... 2993
§ 545c. Allegations as to value of matter in dispute..... 2994
§ 546. Amendment of petition 2995
§ 547. Bond 3000
§ 548. Order of State court upon removal..... 3007
§ 548a. Practice upon removal for fraudulent joinder of parties.... 3008
§ 549. Removal for prejudice or local influence..... 3012
§ 550. Removal of suits between citizens of the same State claiming land under grants of different States..... 3024
§ 551. Removal of proceedings against officers and soldiers of the United States, court officers, House officers and persons having defenses under the Revenue Laws..... 3025
§ 552. Removal of cases where the defense depends upon the Civil Rights Laws 3033
§ 553. Filing of record..... 3035
§ 554. Proceedings in the State court after removal..... 3041
§ 555. Proceedings in Federal court after removal..... 3052
§ 555a. Pleading to a petition or removal..... 3059
§ 555b. Repleader after removal 3061
§ 555c. Amendment of pleadings after removal..... 3064
§ 555d. Effect of removal upon previous proceedings in the State court 3067
§ 555e. Effect of removal upon attachments in the State court..... 3069
§ 555f. Effect of removal upon injunctions previously granted..... 3070
§ 555g. Effect of removal upon receivers previously appointed..... 3071
§ 555h. Effect of removal upon depositions and examinations in the State court 3072
§ 555i. Effect of removal upon contempt proceedings..... 3072
§ 555j. Injunctions to stay proceedings in a State court after a removal 3073
§ 556. Remand 3075
§ 556a. Waiver of right to a remand..... 3084
§ 556b. Evidence upon motion to remand..... 3087

Page
§ 556c. Costs upon remand 3090
§ 556d. Order of remand 3091
§ 556e. Second motion to remand 3091
§ 557. Review of order of remand 3092
§ 557a. Review of proceedings of the State courts when the right of removal has been denied 3093
§ 558. Review of order denying remand 3095
§ 559. Proceedings after remand 3098

CHAPTER XXXIII.

ADMIRALTY AND SEIZURES.

§ 560. Admiralty jurisdiction—In general 3099
§ 560a. Contracts enforceable in admiralty 3103
§ 560b. Liens enforceable in admiralty 3108
§ 560c. Jurisdiction of admiralty over torts 3116
§ 560d. Jurisdiction of admiralty over claims for negligence 3119
§ 560e. Jurisdiction of admiralty over death claims 3122
§ 560f. Effect of State Workmen's Compensation laws upon admiralty 3124
§ 560g. Concurrent jurisdiction of State courts over maritime matters. 3126
§ 560h. Limitation of jurisdiction of admiralty by residence 3127
§ 560i. Jurisdiction over controversies between foreigners 3128
§ 560j. Claims by foreign seamen against foreign vessels 3129
§ 561. Libel 3130
§ 561a. Joinder of causes of action in libel 3134
§ 562. Security for libelant's costs 3135
§ 563. Parties 3136
§ 564. Mesne process 3138
§ 565. Process *in rem* 3140
§ 566. Cases in which the *res* cannot be arrested 3141
§ 566a. Libels *in personam* against the United States 3144
§ 567. Process *in personam* 3148
§ 567a. Foreign attachment 3149
§ 567b. Garnishee process 3151
§ 567c. Arrests in admiralty 3152
§ 568. Return of process and defaults 3153
§ 568a. Opening of default in admiralty 3154
§ 569. Release of property from custody of marshal 3154
§ 570. Security by claimant for costs 3155
§ 571. Stipulation for value 3155
§ 572. Bond to the marshal 3158
§ 573. Appraisement 3159
§ 574. Petition to bring in additional parties 3160
§ 575. Answer 3162
§ 576. Laches in admiralty 3166
§ 577. Tender 3168

Page

§ 578. Exceptions 3168
§ 579. Amendments 3170
§ 580. Cross-libel 3171
§ 580a. Security by cross libelant 3172
§ 580b. Security for damages of cross libelant 3172
§ 580c. Abatement and revivor in admiralty 3173
§ 581. Interrogatories and discovery 3174
§ 581a. Dismissal of libel by the libelant 3176
§ 581b. Dismissal for failure to prosecute in admiralty 3177
§ 582. Trial 3177
§ 582a. Trial by jury in admiralty 3178
§ 582b. New trials in admiralty 3179
§ 583. Evidence in admiralty 3179
§ 583a. Depositions in admiralty 3181
§ 583b. Documentary evidence in admiralty 3181
§ 584. Interlocutory decree and reference 3182
§ 585. Final decree 3184
§ 586. Sales 3186
§ 587. Sales as perishable 3188
§ 588. Intervenors 3189
§ 589. Petition against proceeds of sale 3190
§ 590. Priorities 3192
§ 590a. Costs in admiralty 3195
§ 591. Libel of review 3195
§ 592. Appeals 3196
§ 592a. Further proof on appeal in admiralty 3204
§ 593. Limitation of the liability of shipowners 3207
§ 593a. Vessels in respect to which limitation of liability may be obtained 3214
§ 594. Court where petition for limitation of liability may be filed .. 3215
§ 595. Privity or knowledge of owner 3216
§ 596. The libel or petition for limitation of liability 3219
§ 597. Surrender to secure limitation of liability 3222
§ 598. Appraisement in proceedings for limitation of liability 3224
§ 599. Injunctions in proceedings to limit liability 3226
§ 600. Monition 3227
§ 601. Proofs of claim in proceedings for limitation of liability 3228
§ 602. Answer in proceedings for the limitation of liability 3230
§ 603. Trial of proceedings for limitation of liability 3231
§ 604. Summary proceedings to collect sailors' wages 3233
§ 605. Proceedings in prize causes 3239
§ 606. Proceedings on seizures 3244
§ 607. The Pure Food and Drugs Act 3250

CHAPTER XXXIV.

BANKRUPTCY.

§ 608. Courts of bankruptcy and their jurisdiction 3254
§ 608a. Jurisdiction of courts of bankruptcy over attorneys 3263

Page

§ 609. Jurisdiction in bankruptcy by consent 3265
§ 610. Jurisdiction of courts of bankruptcy over plenary suits 3268
§ 611. Extra-territorial jurisdiction of courts of bankruptcy 3274
§ 612. Ancillary jurisdiction in bankruptcy 3276
§ 612a. Effect of bankruptcy upon State insolvency proceedings 3279
§ 613. Jurisdiction of State courts in cases affecting bankruptcy proceedings 3280
§ 614. Jurisdiction in bankruptcy as affected by residence or place of business 3285
§ 615. Practice in bankruptcy proceedings. In general 3291
§ 616. Individuals who may become bankrupts 3293
§ 617. Corporations who may be bankrupts 3297
§ 617a. Bankruptcy of unincorporated associations 3299
§ 618. Partnerships in bankruptcy 3300
§ 619. Creditors who may petition for involuntary bankruptcy 3307
§ 620. Acts of bankruptcy 3313
§ 621. Fraudulent transfers. Concealment or removal of property as acts of bankruptcy 3314
§ 622. Transfer of property with the intent to create a preference 3316
§ 623. Preferences by legal proceedings as acts of bankruptcy 3320
§ 624. General assignments for the benefit of creditors as acts of bankruptcy 3322
§ 625. Appointments of receivers or trustees as acts of bankruptcy 3323
§ 626. Admission in writing as act of bankruptcy 3326
§ 627. Petitions in bankruptcy 3327
§ 627a. Schedules 3333
§ 628. Amendments to petitions in bankruptcy 3335
§ 629. Process and notices to creditors 3339
§ 630. Pleadings by the respondents in bankruptcy 3342
§ 631. Warrants of seizure 3345
§ 632. Arrest of bankrupt 3347
§ 633. Injunctions in aid of bankruptcy proceedings 3348
§ 634. Receivers in bankruptcy 3356
§ 635. Summary orders for the payment of money or delivery of property 3363
§ 636. Dismissal of petitions 3373
§ 637. Trials and adjudications of bankruptcy 3375
§ 637a. Setting aside an adjudication in bankruptcy 3381
§ 638. References 3385
§ 638a. Examination of bankrupt 3398
§ 638b. Examination of strangers to bankruptcy proceedings 3402
§ 639. Evidence in bankruptcy 3405
§ 640. Meetings of creditors and appointments of trustees 3409
§ 641. Qualification of trustees 3415
§ 641a. Bankruptcy sales 3416
§ 642. Duties of trustees 3420
§ 643. Title and powers of trustees 3427

Page

§ 644. Right of trustee to set aside preferences, liens and conveyances 3440
§ 645. Proof and allowance of claims 3463
§ 646. Time for proof of claims 3476
§ 647. Provable claims 3478
§ 648. Set-offs and counter-claims 3481
§ 649. Priorities and liens 3489
§ 649a. Reclamations 3502
§ 650. Exemptions of bankrupt property 3504
§ 651. Exemption of bankrupt from arrest 3512
§ 652. Declaration and payment of dividends 3514
§ 653. Compositions 3518
§ 654. Reopening estates in bankruptcy 3525
§ 655. Discharge of bankrupts 3527
§ 656. Grounds for refusing discharge 3538
§ 657. Obligations released by discharge 3545
§ 658. Revocation of discharge 3550
§ 659. Costs and fees 3552
§ 660. Clerk's fees 3556
§ 661. Marshal's fees 3557
§ 662. Referee's fees 3558
§ 663. Trustee's fees 3560
§ 664. Receiver's fees 3563
§ 665. Attorney's fees 3564
§ 666. Review by Circuit Courts of Appeals 3569
§ 667. Practice on appeals in bankruptcy 3578
§ 668. Practice upon petition for a revision 3587
§ 669. Review by the Supreme Court of the United States 3592

FEDERAL PRACTICE

VOLUME III.

CHAPTER XXX.

PRACTICE AT COMMON LAW IN CIVIL ACTIONS.

§ 453. Common law practice. In general. Actions at common law are either civil or criminal. The Supreme Court considers the practice of the court of King's Bench in England as affording outlines for its practice at common law.[1] In civil actions at common law the District Courts follow in general the practice in the courts of the State where they are held, except in those particulars which are regulated by Federal statute.[2]

The Revised Statutes provide, that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."[3] A proceeding begun by an attachment is a civil cause within the meaning of the statute.[4] So is a proceeding to establish a will under the Missouri statute.[5]

§ 453. [1] Supreme Court Rule 3. Amy v. Watertown, 130 U. S. 301, 304, 32 L. ed. 946, 947; Bradley, J.: "The statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading, form and mode of pleadings, must conform to the State Laws and the practice of the State Courts, except where Congress itself has legislated upon a particular subject and prescribed a rule." A substantial compliance with the statute is sufficient. Hein v. Westinghouse Air Brake Co., 168 Fed. 766.

[2] U. S. R. S., § 914.

[3] U. S. R. S., § 914, Comp. St. § 1537.

[4] Citizens' Bank v. Farwell, C. C. A., 56 Fed. 570.

[5] Sawyer v. White, C. C. A., 122

The phrase "as near as may be" has been held not to mean "as near as may be possible" nor "as near as may be practicable;"[6] but to devolve upon the Federal courts the duty of construing and deciding, and to give them the power to reject any subordinate provision in such State statutes, which in their judgment would unwisely incumber the administration of the law, to tend to defeat the ends of justice in their tribunals.[7]

The State practice will not be so far followed as to permit a suit founded upon a right that is purely equitable to be tried upon the common law side of the court[8] nor, before the Act of March 3, 1915,[9] was the State practice followed so far as to permit an equitable defense[10] or an equitable set off, to be pleaded in an action at common law.[11] It has been held that an action brought in a Federal court at common law may, by consent, be transferred to the equity side of the court.[12]

Fed. 223, 227; Foster v. Rochester, S. D. N. Y., Jan'y. 1912.

6 I. & St. L. R. Co. v. Horst, 93 U. S. 291, 301, 23 L. ed. 898, 901; Phelps v. Oaks, 117 U. S. 236, 239, 29 L. ed. 888, 889.

7 I. &. St. L. R. Co. v. Horst, 93 U. S. 291, 301, 23 L. ed. 898, 901; Phelps v. Oaks, 117 U. S. 236, 239, 29 L. ed. 888, 889. See Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602.

8 Fenn v. Holme, 21 How. 481, 16 L. ed. 198; Hooper v. Scheimer, 23 How. 235, 16 L. ed. 452; Smith v. McCann, 24 How. 398, 16 L. ed. 714; Sheirburn v. De Cordova, 24 How. 423, 16 L. ed. 741; Strother v. Lucas, 6 Pet. 763, 8 L. ed. 573; Swayze v. Burke, 12 Pet. 11, 9 L. ed. 980; Claggett v. Kilbourne, 1 Black, 346, 17 L. ed. 213; *infra*, §§ 454, 477; Goodyear Shoe Machinery Co. v. Dancel, C. C. A., 119 Fed. 692, in which the author was counsel. If the objection is not raised upon the trial it will be waived. Union Pac. Ry. Co. v. Harris, C. C. A., 63 Fed. 800; Highland Boy Gold Min. Co. v. Strickley, C. C. A., 116 Fed. 852; Cook v. Foley, C. C. A., 152 Fed. 41, 52.

9 Jud. Code § 274b, 38 St. at L. 956, ch. 90, § 2, Comp. St. § 1251b quoted *infra*, § 454g.

10 Doe v. Roe, 31 Fed. 97; Bennett v. Butterworth, 11 How. 669, 13 L. ed. 859; Montijo v. Owen, 14 Blatchf. 324; Parsons v. Denis, 7 Fed. 317; Buller v. Slidell, 43 Fed. 116; Schoolfield v. Rhodes, 82 Fed. 153; Davis v. Davis, C. C. A., 72 Fed. 81; Young v. Mahoning County, 51 Fed. 585, 590. See N. Pac. R. Co. v. Paine, 119 U. S. 561, 30 L. ed. 513; Wilcox & Gibbs Guano Co. v. Phenix Ins. Co., 61 Fed. 199; McManus v. Chollar, C. C. A., 128 Fed. 902; Tegarden v. LeMarchel, 129 Fed. 487; *infra*, § 454g.

11 Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059; Waldo v. Wilson, C. C. A., 231 Fed. 654.

12 U. S. v. Wells, 203 Fed. 146. *Contra*, Waldo v. Wilson, C. C. A., 231 Fed. 654; *infra*, § 454g.

Ejectment in a Federal Court cannot be sustained upon a title which is purely equitable, although the State practice would have permitted such a suit in the State court.[13] Ejectment cannot be sustained upon a land warrant;[14] nor upon an entry made with a register and receiver of the land office, although the State Legislature authorizes a suit in such a case.[15] An action of ejectment will not lie when the defendant is in possession under a contract, which plaintiff avers to be void, because obtained by a breach of trust.[16] Where a deed, contract or sale is void for fraud, an action of ejectment may be maintained by a rightful owner of the property, without resorting to equity to set the same aside.[17] In ejectment, it is immaterial which party has the best equitable title.[18]

A bondholder cannot sue at common law, in a Federal court, to recover damages from a former receiver, who has, by his fraudulent acts, injured the mortgaged property before its sale, although a State court might afford such relief.[19] It has been held that a suit by a party to a contract, to compel its performance by a stranger to the same, who has assumed its obligations in a subsequent contract with the promisor, can only be enforced in equity, although the State practice would permit such an action to be maintained at common law.[20] The fact that a prayer for an accounting is joined with one for the recovery of the possession of land will not entitle the plaintiff to appeal to a court of equity.[21]

13 Sheirburn v. De Cordova, 24 How. 423, 16 L. ed. 741; Swayze v. Burke, 12 Pet. 11, 9 L. ed. 980; Fenn v. Holme, 21 How. 481, 16 L. ed. 198; Hooper v. Scheimer, 23 How. 235, 16 L. ed. 452; Smith v. McCann, 24 How. 398, 16 L. ed. 714; Claggett v. Kilbourne, 1 Black, 346, 17 L. ed. 213; Beatty v. Wilson, 161 Fed. 453.

14 Strother v. Lucas, 6 Pet. 763, 8 L. ed. 573; Fenn v. Holme, 21 How. 481, 16 L. ed. 198.

15 Hooper v. Scheimer, 23 How. 235, 16 L. ed. 452.

16 Mead v. Chesbrough Bldg. Co., C. C. A., 151 Fed. 998.

17 Mead v. Chesbrough Bldg. Co., C. C. A., 151 Fed. 998, 1006; Mead v. Gallatin, C. C. A., 151 Fed. 1006.

18 Mead v. Chesbrough Bldg. Co., C. C. A., 151 Fed. 998.

19 Fletcher v. Burt, 126 Fed. 619.

20 Goodyear Shoe Machinery Co. v. Dancel, C. C. A., 119 Fed. 692; in which the author was counsel. But see Willard v. Wood, 135 U. S. 309, 34 L. ed. 210. *Contra*, Union Mutual Life Ins. Co. v. Hanford, 143 U. S. 187, 190, 6 L. ed. 118, 120.

21 Hipp v. Babin, 19 Howard, 271, 15 L. ed. 633.

In the following particulars the practice at common law in civil cases in the District Courts of the United States is regulated by Federal statutes and decisions, and the State practice is not followed: writs and process;[22] the manner of raising objections to jurisdiction over the person of the defendant;[23] service by publication or without the district;[24] pleading in actions for the infringement of patents[25] and copyrights;[26] amendments;[27] provisional remedies;[28] abatement and revivor;[29] consolidation of suits;[30] evidence, testimony and depositions;[31] selection of juries;[32] trials;[33] motions for new trials;[34] the power of the court when setting aside a verdict to enter final judgment;[35] judgments;[36] correction of judgments;[37] costs;[38] executions and proceedings supplementary

22 *Infra*, § 455. But see Stewart v. Justices of St. Clair Co. Court, 47 Fed. 482, 484; Leas & McVitty v. Merrimann, 132 Fed. 510.

23 Meisukas v. Greenough Red Ash Coal Company, 244 U. S., 54 *supra*, § 62a.

24 *Supra*, § 166.

25 U. S. R. S., § 4920; *infra*, § 454m.

26 U. S. R. S., § 4969; *infra*, § 454n.

27 U. S. R. S., § 954; *infra*, § 455b.

28 *Infra*, §§ 470, 471.

29 *Supra*, § 220.

30 *Infra*, § 472.

31 *Supra*, chap. XXI. It has been held that § 11497 of the general code of Ohio, so far as construed by the State courts so as to give a party an unlimited right to call and cross-examine his adversary is not a matter of procedure nor a rule as to the competency of testimony or witnesses; but a matter of trial administration which does not bind the Federal court, American Issue Pub. Co. v. Sloan, C. C. A., 248 Fed. 251, 253. The court in Massachusetts followed the rule established by the State decision, that the former testimony of a witness may be introduced to impeach his testimony upon the trial without calling his attention thereto, unless he has been called by the party seeking to impeach him. Am. Agricultural Chem. Co. v. Hogan C. C. A., 213 Fed. 416, 420.

By an Act of Congress the competency of witnesses in civil actions is determined by the State laws 34 St. at L. 618 *supra*, § 339.

32 U. S. R. S., §§ 800, 882; *infra*, § 473.

33 U. S. v. Oppenheim, 228 Fed. 220; Waldo v. Wilson, C. C. A., 231 Fed. 654; *infra*, §§ 473-476.

34 *Infra*, § 478.

35 Slocum v. N. Y. License Co., 228 U. S. 364; McKeon v. Central Stamping Co., C. C. A., 264 Fed. 385.

36 *Infra*, § 480.

37 *Infra*, § 481.

38 *Supra*, ch. XXVII. But see Huntress v. Epsom, 15 Fed. 732; New Hampshire L. Co. v. Tilton, 29 Fed. 764; Primrose v. Fenno, 113 Fed. 375, 376. It has been said that,

thereto;[39] contempts;[40] the manner of taking exceptions, and reserving objections for review during a trial;[41] bills of exceptions;[42] the determination as to what constitutes a final judgment which is reviewable;[43] the computation of time within which to sue out writs of error;[44] the practice in suing out writs of error and the proceedings upon them,[45] including the power of the court of review in respect to the judgment to be entered upon a reversal.[46] "Such proceedings are governed entirely by the acts of Congress, the common law, and the ancient English statutes."[47]

A Federal court is not bound to follow a State statute providing that the case must be dismissed unless proceedings are therein taken within one year after a reversal by the State Supreme Court.[48]

The Revised Statutes provide "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering

in determining who is the successful party, the Federal courts should follow the State statutes and decisions. Scatcherd v. Love, C. C. A., 166 Fed. 53. See § 408, *supra*. As to security for costs, see Henning v. W. U. Tel. Co., 40 Fed. 658; O'Brien v. Hearn, 125 Fed. 95; *supra*, § 425.

39 *Supra*, § 427; Kaill v. Board of Directors, C. C. A., 194 Fed. 73.

40 *Supra*, §§ 428-436.

41 Chicago Great Western R. Co. v. Le Valley, C. C. A., 233 Fed. 384.

42 Consumers Cotton Oil Co. v. Ashburn, C. C. A., 81 Fed. 331, 333; *infra*, § 479.

43 Chicago Great Western R. Co. v. Le Valley, C. C. A., 233 Fed. 384.

44 Siegelshoffer v. Penn License Co., C. C. A., 248 Fed. 226.

45 Western Dredging Co. v. Heldmaier, 116 Fed. 179; Francisco v. Chicago & A. R. Co., C. C. A., 149 Fed. 354; Richmond & D. R. Co. v. McKee, C. C. A., 50 Fed. 906; McClellan v. Pycatt, C. C. A., 50 Fed. 686; Kentucky L. & A. Ins. Co. v. Hamilton, C. C. A., 63 Fed. 93; *infra*, chapter XXXVI on Writs of Error and Appeals; Farmer v. Atlantic Coast Line R. Co., 205 Fed. 319; McBride v. Neal, C. C. A., 214 Fed. 966; Western Union Telegraph Co. v. Aldridge, 219 Fed. 836.

46 Farmer v. Atlantic Coastline R. Co., 205 Fed. 319, 323.

47 Camp v. Gress, C. C. A., 250 U. S. 308, 318.

48 Manitowoc Malting Co. v. Feuchtwanger, 196 Fed. 506.

and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."[49] This authorized those courts to direct that writs, issued from them, shall be returned within a different time than that prescribed by the State laws.[50]

It has been held that as to the following matters the District Courts will, in civil actions at common law, follow the statutes of the respective states where they are held: form of writ,[51] except the teste and signature,[52] indorsement of writ,[53] indorsement of summons;[54] the return of process;[55] but not when the court otherwise directs;[56] right of assignee to sue in his own name;[57] personal service of writ and process on individuals[58] and on corporations,[59] at least if domestic corpo-

49 U. S. R. S., § 918, Comp. St. § 1544.

50 Gokey v. Boston & Maine R. Co., 130 Fed. 992; aff'd Boston & Maine Railroad v. Gokey, 210 U. S. 155, 52 L. ed. 1002. U. S. v. U. S. F. & G. Co., C. C. A., 186 Fed. 477.

51 Brown v. C. & O. C. Co., 4 Fed. 770. See Baltimore & O. R. Co. v. Hamilton, 16 Fed. 181. It has been held that a suit in the United States Circuit Court for the penalty provided by the Act of 1885, ch. 164, § 3, for violation of the provisions of the act relating to alien contracts for labor, may be properly begun by capias in accordance with the State law. U. S. v. Banister, 70 Fed. 44. But see Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602.

52 *Infra*, § 455.

53 Brown v. Pond, 5 Fed. 31, 37. But see § 455, *infra*.

54 U. S. v. Rose, 14 Fed. 681.

55 Gokey v. Boston & M. R. Co., 130 Fed. 992; aff'd as Boston & Maine Railroad v. Gokey, 210 U. S. 155, 52 L. ed. 1002.

56 U. S. R. S., § 918; Gokey v. Boston & M. R. Co., 130 Fed. 992; aff'd as Boston & Maine Railroad v. Gokey, 210 U. S. 155, 52 L. ed. 1002; *infra*, § 455.

57 Edmunds v. Illinois C. R. Co., 80 Fed. 78, where the cause of action arose under a Federal statute, the Interstate Commerce Act. Where there is no State statute, the suit must be brought in the name of the assignor. Nederland L. I. Co. v. Hall, 84 Fed. 278; Shaffer v. Federal Cement Co., 225 Fed. 893; *infra*, §§ 454b, 454c.

58 Shampeau v. Connecticut R. L. Co., 37 Fed. 771; Wilson v. Fine, 37 Fed. 789; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946. See *supra*, §§ 163-166. So held as to the form of a return of service. Trimble v. Erie El. M. Co., 89 Fed. 51; Wilson v. Hurst, Peters C. C. 441; U. S. v. Lotridge, 1 McLean, 246.

59 *Re* Louisville Underwriters, 134 U. S. 488, 493, 33 L. ed. 991, 994; Miller's Adm'r v. Norfolk & W. R. Co., 41 Fed. 431; McCormick H. Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833; *Société* Foncière v. Milliken, 135 U. S. 304, 34 L. ed. 208. See *supra*, §§ 164-164d.

rations;[60] joinder of parties;[61] joinder of causes of action;[62] joinder of defenses;[63] form of pleading;[64] verification of pleading;[65] time,[66] and manner[67] of service of pleading and amendment of pleading,[68] except as to defects of form;[69] matters that may be proved under the general denial;[70] set off and counterclaim of cause of action at common law;[71] interpleader;[72] notice of trial or of argument;[73] time of filing referee's report;[74] time of bringing a case on for trial and of entry of judgment for insufficiency of answer;[75] discontinuance;[76] compulsory dismis-

60 Amy v. Watertown, 130 U. S. 30, 32 L. ed. 946.

61 Perry v. Mechanics' Mut. Ins. Co., 11 Fed. 478; Delaware Co. Com'rs v. Diebold S. Co., 133 U. S. 473, 488, 33 L. ed. 674, 680; *infra*, § 454b. Nonjoinder of husband in action by wife, although the woman is an alien. Morning Journal Ass'n v. Smith, C. C. A., 56 Fed. 141.

62 Castro v. De Uriarte, 12 Fed. 250. But see O'Connell v. Reed, C. C. A., 56 Fed. 531; Bowden v. Burnham, C. C. A., 59 Fed. 752; Holt v. Bergevin, 60 Fed. 1.

63 Cole v. Carson, C. C. A., 153 Fed. 278; Leonard v. Merchants' Coal Co., C. C. A., 162 Fed. 885.

64 U. S. v. Atlantic Coast Line R. Co., 153 Fed. 918.

65 West v. Home Ins. Co., 18 Fed. 622; Cottier v. Stimson, 18 Fed. 689.

66 Ricard v. Inhabitants New Providence, 5 Fed. 433. But not necessarily as to the return day. Ewing v. Burnham, 74 Fed. 384.

67 Wilson v. Fine, 38 Fed. 789.

68 Rosenbach v. Dreyfuss, 1 Fed. 391. But see U. S. R. S., § 954; Erstein v. Rothschild, 22 Fed. 61; *supra*, §§ 208, 211, and *infra*, § 454.

69 Manitowoc Malting Co. v. Muechtwanger, 169 Fed. 983. See §§ 208, 211, *supra*.

70 Yocum v. Parker, C. C. A., 130 Fed. 770; *infra*, § 454e.

71 Partridge v. Felix Mut. L. I. Co., 15 Wall, 573, 21 L. ed. 229; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810; Charnley v. Sibley, C. C. A., 73 Fed. 980. *Contra*, Jewett Car Co. v. Kirkpatrick, 107 Fed. 622, holding to the contrary of the cases in the Supreme Court that no affirmative judgment can be awarded upon a counterclaim. But not of equitable set-off. Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059.

72 Harris v. Hess, 10 Fed. 263. In the absence of statute, interpleader or the bringing in of a new party cannot be ordered at common law. Bertha Z. & M. Co. v. Clarico, 61 Fed. 132, 136. For the practice in equity, see *supra*, § 157. Huxley v. Pennsylvania Warehousing & S. D. Co., C. C. A., 184 Fed. 705.

73 Rosenbach v. Dreyfuss, 2 Fed. 23. But see Osborne v. Detroit, 28 Fed. 385.

74 Parker v. Ogdensburg & L. C. R. Co., 79 Fed. 817.

75 Springs v. James, 172 Fed. 626.

76 Nussbaum v. Northern Ins. Co., 40 Fed. 337; Gassman v. Jarvis, 94 Fed. 603. Where the State statute permitted a plaintiff to dismiss, without prejudice, before the final

sal or non-suit;[77] form of a verdict;[78] manner of entering and recording judgment, including provisions for the entry of judgment against one or more defendants;[79] assessment of damages after judgment by default;[80] the right to open judgment by default;[81] but in the Second Circuit a default was opened in a case where this would not have been permitted by the State practice;[82] and it has been held that a Federal court at common law can not set aside, after the term of entry, a judgment by default,[83] although the State practice authorizes such an order; practice upon application to open a default;[84] suspension of judgment pending writ of error.[85]

In following a State statute, the Federal courts usually read the word "county" as "judicial district."[86] A State stat-

submission of the case to the jury, it was held to be error to refuse to allow the plaintiff to do this before a peremptory instruction for the defendant, although the motion was not made until after the judge had said that he would sustain the defendant's motion for a verdict. Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368. See *infra*, § 473g.

77 Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 29, 39, 11 Sup. Ct. 478, 481, 35 L. ed. 55.

78 Glenn v. Sumner, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. ed. 301; Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368, 372.

79 Sawin v. Kenny, 93 U. S. 289, 23 L. ed. 926; Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368, 372.

80 Loewe v. Union Savings Bank, 226 Fed. 294.

81 Brown v. Phila. W. & Br. Co., C. C. D. Delaware, 9 Fed. 183; Wylie Permanent Camping Co. v. Lynch, C. C. A., 195 Fed. 386, 388, 392, 402. But see *infra*, § 481.

82 Phila. & Reading Coal & Iron Co. v. Kever, C. C. A., 2 Ct., 260 Fed. 534, 541; *certiorari* denied 250 U. S. 665, 40 Sup. Ct. 213, 64 L. ed. But see the strong dissenting opinion of Manton J. As the author was of counsel in the case below, he forbears the expression of his own opinion. *Contra* Wylie Permanent Camping Co. v. Lynch, C. C. A., 195 Fed. 386, 388, 392, 402.

83 U. S. v. One Trunk, 155 Fed. 651. See Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013; Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, 609, 43 L. ed. 1103, 1105; *infra*, § 481. *Contra*, Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., C. C. A., 76 Fed. 479, 481; Travelers' Protective Ass'n v. Gilbert, 55 L.R.A. 538, 111 Fed. 269, 276.

84 Brown v. Phila. W. & Br. Co., 9 Fed. 183.

85 U. S. v. Sturgis, 14 Fed. 810.

86 Lung Chung v. No. Pac. Ry. Co., 19 Fed. 254, 257; Treadwell v. Seymour, 41 Fed. 579; Miller's Adm'r v. Norfolk & W. R. Co., 41 Fed. 431.

ute authorizing an action to be brought in a firm name was not followed in an action at common law in the Federal court there held.[87] A State statute allowing an association consisting of seven or more to sue and be sued in the name of one of its officers, was followed at common law in the Federal court sitting in such State,[88] but not in a Federal court sitting in another State.[89] A State statute providing that a county can be sued only in a specified court;[90] or that a foreign corporation cannot sue until it has complied with certain statutory requirements,[91] or that an action cannot be brought upon a judgment without leave of the court that rendered it,[92] or that a special appearance for the purpose of objection to the jurisdiction is equivalent to a general appearance,[93] or regulating the practice in applying for, and giving the right in certain cases to postponements of trials or to continuances,[94] is not binding on a Federal court. The fact that the State practice permits an original application by a municipal bondholder for a *mandamus* does not deprive a Federal court of jurisdiction over an action by him to recover a judgment which can only be enforced by such a writ.[95] It has been held that a motion to dismiss an action at common law as frivolous may be made at any time.[96] Exemptions from service of process have been discussed in the chapter on subpœnas.[97]

§ 454. Common law pleading. In general. In actions at common law in civil causes, the District Courts of the United

87 Adams v. May, 27 Fed. 907.

88 Hoey v. Coleman, 46 Fed. 221, 225. See *supra*, § 48.

89 Chapman v. Barney, 129 U. S. 677, 682, 32 L. ed. 800, 801. See *supra*, § 48.

90 Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766; Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 546.

91 Bank of British N. A. v. Barling, 44 Fed. 641; aff'd as Barling v. British Bank of N. A., C. C. A., 50 Fed. 260.

92 Phelps v. O'Brien Co., 2 Dill. 318; Union Tr. Co. v. Rochester & P. R. Co., 29 Fed. 609; *supra*, § 83.

93 So. Pac. Co. v. Denton, 146 U. S. 202, 209, 36 L. ed. 943, 945. *Cf.* Mexican C. Ry. Co. v. Pinckney, 149 U. S. 194, 37 L. ed. 699.

94 Texas & Pac. Ry. Co. v. Nelson, C. C. A., 50 Fed. 418; *infra*, § 473a.

95 Shepard v. Tulare, 94 Fed. 1.

96 O'Connell v. Mason, C. C. A., 132 Fed. 245; Webb v. Fisher, 109 Tenn. 701, 60 L.R.A. 791, 72 S. W. 110.

97 *Supra*, § 167.

States follow the forms and rules of pleading observed in the courts of the States where they are held, except in those particulars that are regulated by Federal statutes.[1] This rule applies: as regards the verification of pleadings,[2] the time when pleadings must be served,[3] after the return day,[4] the manner of service of pleading[5] and the time within which pleadings may be amended as of course.[6] It has been held that the State law concerning what constitutes a fatal variance between the facts and the pleadings must be followed.[7] The extent to which pleadings may be amended is not dependent upon the State practice[8] but in determining the effect of an amendment the decisions of the State courts should ordinarily be followed.[9]

The courts should construe pleadings as alleging what they fairly would convey to an ordinarily intelligent lawyer by a fairly exact use of English speech.[10]

§ 454a. Plaintiff's pleadings at common law. The designation of the complaining party as "plaintiff" or as "complainant" has no effect upon the determination whether the action is brought in law or in equity.[1] The charge that fraud and concealment exists or that there has been a conspiracy in the matter, does not prevent an action for the payment of money

§ 454. 1 U. S. R. S., § 913; Moy v. Mercer County, 30 Fed. 246; Myers v. Cunningham, 44 Fed. 346 per Ricks, J.; Marvin v. C. Aultman & Co., 46 Fed. 338, 339.

2 West v. Home Ins. Co., 18 Fed. 622; Cottier v. Stimson, 18 Fed. 689.

3 Ricard v. Inhabitants New Providence, 5 Fed. 433.

4 Ewing v. Burnham, 74 Fed. 384. See § 455, *infra*.

5 Wilson v. Fine, 38 Fed. 789.

6 Rosenbach v. Dreyfuss, 1 Fed. 391; Hannum v. Jerome, 184 Fed. 179. But see Erstein v. Rothschild, 22 Fed. 61.

7 Norfolk & A. Terminal Co. v. Rotole, C. C. A., 4th Ct., 179 Fed. 639, 645, where it was said that an application to amend upon the trial should have been granted. See Kansas City Southern R. Co. v. Kaw Valley Drainage District, 233 U. S. 75. Central Vermont Ry. Co. v. White, 238 U. S. 507, 513; Truckee River General El. Co. v. Benner, C. C. A., 211 Fed. 79.

8 Erie R. Co. v. Schmidt, C. C. A., 255 Fed. 513; Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983. But see *Re* Griggs, C. C. A., 233 Fed. 243.

9 Central Vermont Ry. Co. v. White, 238 U. S. 507, 513.

10 Kansas City Southern R. Co. v. Kaw Valley Drainage District, 233 U. S. 75.

§ 454a. 1 Motley, Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389.

or for the recovery of real or personal property from being prosecuted upon the common law side of the court.[2]

The right of the plaintiff to reply[3] and the matter which can be set up in a reply, such as the tolling of the Statute of Limitations,[4] are governed by the State practice.

The opening of a default upon condition that defendant plead within a specified time deprives him of the right to object because he had no notice of the plaintiff's pleading.[5] The plaintiff may so allege the facts as to leave himself free to evolve any theory at the trial which is supported by them.[6] When his cause of action depends upon an express contract his part of which has been performed and nothing remains to be done except payment by defendant, he may set forth the common counts in general assumpsit and prove the special contract as the measure of his damage.[7] The facts showing that the plaintiff has sustained damages must be averred.[8] If such facts are alleged, and a specific sum is claimed, an averment that damages have been sustained, is not required.[9] It has been held that annexing to a complaint, as an exhibit, a copy of the contract sued upon, with a reference to the same in the body of the pleading, is not equivalent to positive allegations in the complaint of the terms of the contract according to their legal effect or *in hæc verba*.[10] And that a suit upon a special contract not executed must be on a count setting out the special contract; but when the special contract has been executed the common counts are sufficient.[11]

2 South Penn Oil Co. v. Miller, C. C. A., 175 Fed. 729.

3 Hartley v. Lapidus & Holub Co., C. C. A., 216 Fed. 92.

4 Boatmen's Bank of St. Louis, Mo., v. Fritzlen, 221 Fed. 145.

5 Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712.

6 Gimbel Bros. v. Adams Express Co., 217 Fed. 318.

7 Dermott v. Jones, 2 Wall 1, 17 L. ed. 762; Dubois v. Canal Co., 2 Wendell (N. Y.) 285; Ward, J.; in dissenting opinion, Cowen Co. v. Houck Mfg. Co., C. C. A., 249 Fed. 285, 289.

8 U. S. v. Bell, 127 Fed. 1002. See Maryland Casualty Co. v. Price, C. C. A., 231 Fed. 397.

9 Murphy v. Mitchell, 245 Fed. 219. See De St. Aubin v. Paul Guenther, 232 Fed. 411.

10 Penrose v. Pacific Mutual Life Ins. Co., 66 Fed. 253.

11 Chesapeake & O. C. Co. v. Knapp, 9 Peters, 541, 563, 9 L. ed. 222, 230; Dawes & Co. v. Peebles' Sons Co., 6 Fed. 856, 858.

In an action upon a foreign judgment the State practice must be followed.[12]

In an action upon a judgment of a State court, an allegation that such court was one of general jurisdiction is sufficient, even when the judgment is one for divorce and alimony.[13]

An allegation that a postmaster has not been removed according to law, is a conclusion of law which should be disregarded.[14] An averment that the Postmaster General has assumed the authority to remove a postmaster, of his own act and decision, without facts showing that the removal was unauthorized, does not negative the legality of the removal; since it will then be presumed, that the Postmaster General acted by direction of the President.[15]

In a complaint to recover back subscriptions to stock obtained by fraud; allegations that the corporation was never legally organized, nor authorized to transact business, because its capital was never paid in and that was insolvent, are not inappropriate.[16]

§ 454b. Parties in actions at common law. By the Judicial Code which reenacts the Act of February 24, 1839,[1] and the Revised Statutes[2] in this respect: "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."[3]

In an action against parties jointly liable, those who cannot

12 Cruz v. O'Boyle, 197 Fed. 824.

13 Cotter v. Cotter, C. C. A., 225 Fed. 471.

14 Porter v. Coble, C. C. A., 246 Fed. 244, 245.

15 Ibid.

16 Kelton v. Du Pont, 256 Fed. 546.

§ 454b. 1 36 St. at L. 1101.

2 U. S. R. S., § 737.

3 § 50, 36 St. at L. 1101, Comp. St. § 1032. See *supra*, § 120.

be sued within the district,[4] or whose residence,[5] or citizenship,[6] would defeat the jurisdiction, need not be joined.

The liability for tort is joint and several.[7] Consequently one or more of the tortfeasors may be made party defendant to an action for a tort.[8] This is the case in an action against trustees for the negligent management of their trust.[9] The failure to prove a conspiracy charged in a civil action is not a ground for its abatement.[10]

The United States may sue at common law upon a contractor's bond for the benefit of subcontractors, laborers, and material men, when the liability of the sureties is contested.[11] When there is no such contest, the suit is treated as if brought for the distribution of a fund in court and must be brought in equity.[12] An action may be brought at common law in the name of the United States upon the bond of a clerk of a Federal court [13] or of a postal clerk [14] for the benefit of the persons injured, by the defendant's misconduct, or other defalcation.

Where it appears that one of two or more joint plaintiffs have no interest in the relief prayed, the action should be dismissed.[15] It was so held where one of them had consented to the act of which complaint was made.[16]

4 Clearwater v. Meredith, 21 How. 489, 493.

5 Ibid, Camp v. Gress, 250 U. S. 308, 316, affirming, C. C. A., 244 Fed. 121.

6 Clearwater v. Meredith, 21 How. 489, 493.

7 Mississippi & Missouri R. R. Co. v. Ward, 2 Black 485, 17 L. ed. 311, *supra*, § 119.

8 Ibid.

9 Parsons v. Howard, 2 Woods, 1, 5; Heath v. Erie Ry. Co. 8 Blatchf. 347, *supra*, § 119.

10 Medlin Milling Co. v. Moffatt Commission Co., 218 Fed. 686.

11 Illinois Surety Co. v. U. S. to the use of Peeler 240 U. S. 214, 223.

12 Ibid., 240 U. S. 214, 225; *supra*. § 5a.

13 U. S. v. Bell, 127 Fed. 1002. See Kinney v. U. S. Fidelity & Guaranty Co., 182 Fed. 1005 holding that in such an action for the clerk's refusal to enter judgment and issue execution against a garnishee, the burden rests upon plaintiff to prove that the judgment could have been collected if the execution had been issued.

14 U. S. v. U. S. Fidelity & Guaranty Tr. Co., C. C. A., 742 Fed. 16; holding that in such an action the defendant could not move for an interpleader.

15 Southern Ry. Co. v. Meaher, 238 Fed. 538. But see Morton v. Ft. Lyon Canal Co., 238 Fed. 501.

16 Southern Ry. Co. v. Meaher, C. C. A., 238 Fed. 538.

Otherwise, the State practice as regards the joinder of plaintiffs [17] or defendants [18] in actions at common law is usually followed. This is the case as regards the omission of a woman, even when she is an alien.[19]

§ 454c. Joinder of causes of action at common law. The State practice is usually followed as to the right to join different causes of action at common law in the same suit.[1]

Before the act of March 3, 1915,[2] legal and equitable causes of action could not be joined in the same suit, although this was permitted by the State practice.[3]

A count upon a special contract for the performance of services or the sale of material can usually be joined with a count upon a *quantum meruit*.[4] So in an action by the assignor of a contract, may be a count to recover in his own right with one to recover for the benefit of the assignee.[5] In trespass on the case, two causes of action held by the plaintiff which arise out of substantially the same transactions and depend upon substantially the same evidence may usually be joined.[6] Such are claims for criminal conversation with the plaintiff's wife and for alienation of her affections.[7] In an action by the United States to recover the value of imported merchandise forfeited because of false invoices and declarations, the plaintiff's pleadings may aver both a false invoice presented to a consul in France and a false declaration upon a written entry in the United States.[8] Under the Alaska statute in a suit against

17 Delaware Co. Com'rs v. Diebold S. Co., 133 U. S. 473, 488, 33 L. ed. 674, 680; Perry v. Mechanics' Mut. Ins. Co., 11 Fed. 478; United Mine Workers of America v. Coronado Coal Co., 258 Fed. 829.

18 Columbia Digger Co. v. Rector, 215 Fed. 618.

19 Morning Journal Ass'n v. Smith, C. C. A., 56 Fed. 141.

§ 454c. 1 Castro v. De Uriarte, 12 Fed. 250 Columbia Digger Co. v. Rector, 215 Fed. 618; United Mine Workers of Am. v. Coronda Coal Co., C. C. A., 258 Fed. 829. But see O'Connell v. Reed, C. C. A., 56 Fed. 531; Bowden v. Burnham, C. C. A., 59 Fed. 752; Holt v. Bergevin, 60 Fed. 1.

2 38 St. at L. 956, quoted *supra*, § 206.

3 Berkey v. Cornell, 90 Fed. 711.

4 Guerini Stone Co. v. Carlin Constr. Co., 248 U. S. 331.

5 Light v. Gray & Davis, 250 Fed. 631; Light et al. v. Gray & Davis, Inc.

6 Harper v. Harper, 252 Fed. 39.

7 Ibid.

8 U. S. v. Leon Rheims Co. et al., 246 Fed. 179.

officers and directors of a bank a cause of action for permitting subscribers to surrender stock may be joined with one for declaring an illegal dividend.[9] In a suit for personal injury to an employee averments of negligence in failing to provide a safe place to work and by employing an incompetent fellow servant do not state separate causes of action.[10] In the districts of New York injury to the person and injury to the property caused by the same acts of negligence are two separate causes of action.[11]

Where causes of action which might have been joined as separate counts are improperly joined in a single count the plaintiff cannot be compelled upon the trial to elect between them.[12]

§ 454d. Pleading facts affecting the jurisdiction. The plaintiff's pleading must show the jurisdiction, including the defendant's residence.[1] Where the State practice permits the institution of a suit by a notice of motion, the notice must show the facts essential to confer the Federal jurisdiction.[2]

It is the safer practice to plead an objection to the jurisdiction by a special plea in abatement, no matter what the State statute may be;[3] but this is not always indispensable where the State practice permits matters in abatement to be joined with other defenses.[4] Where the State practice so permits, a general denial in the defendant's answer puts in issue the allegations in plaintiff's pleading concerning citizenship.[5] In actions of as-

9 Jesson et al. v. Noyes, C. C. A., 245 Fed. 46; U. S. v. Leon Rheims Co., 246 Fed. 179.

10 Balaklala Consol. Copper Co. v. Whitsett, C. C. A., 221 Fed. 421.

11 Borden's Condensed Milk Co. v. Joseph Mosby, C. C. A., 250 Fed. 889. See Reilly v. Alphalt Paving Co., 170 N. Y. 40.

12 Balaklala Consol. Copper Co. v. Whitsett, 221 Fed. 421.

§ 454d. 1 Laskey v. Newton, 50 Fed. 634.

2 West Fork Glass Co. v. Innes-Weld Glass Co., C. C. A., 178 Fed. 205.

3 Imperial Ref. Co. v. Wyman, 38 Fed. 574; Jones v. Rowley, 73 Fed. 286; National Masonic Ass'n v. Sparks, 83 Fed. 225. See Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725; Foster v. Cleveland, C., C. & St. L. Ry. Co., 56 Fed. 434; Bjornquist v. Boston & A. R. Co., C. C. A., 250 Fed. 929. It has been held that this cannot be done in the districts of Ohio. Kimball v. Detroit, M. & T. S. L. Ry., 189 Fed. 409.

4 Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986; Cole v. Carson, C. C. A., 153 Fed. 278; Leonard v. Merchants' Coal Co., C. C. A., 162 Fed. 885.

5 Roberts v. Lewis, 144 U. S. 653,

sumpsit brought in one of the districts of Virginia a plea of non-assumpsit does not raise this issue.[6] In the Second Circuit the State practice is not followed and a defense upon the merits waives an objection to the jurisdiction founded upon the residence of either party although the two defenses are joined.[7]

If the defendant had no knowledge or information sufficient to form a belief that the plaintiff's averments of citizenship and residence were untrue at the time when he filed his original pleading and until after the expiration of the period within which he might amend as of course, he may be granted leave to file a plea in abatement, denying the allegations of citizenship or residence as the case may be.[8] He must then, however, withdraw his other defenses since the plea to the jurisdiction should not be joined with a plea to the merits.[9] If he insists upon both, it may be held that he waived the objections to the jurisdiction, if this affected the residence only and was consequently capable of waiver.[10] If the plea to the jurisdiction is overruled upon the law or the facts, the defendant may be granted leave to plead a defense to the merits.[11]

If the allegations concerning the jurisdiction are denied in the answer, the burden of proof to establish difference of citi-

36 L. ed. 579; Roberts v. Langenbach, C. C. A., 119 Fed. 349; Lindsay-Bitton Live Stock Co. v. Justice, C. C. A., 191 Fed. 163.

6 Donati v. Cleveland Grain Co., C. C. A., 221 Fed. 168.

7 Kever v. Reading Coal & Iron Co., C. C. A., 260 Fed. 534, 542, in which the author was counsel. Roman v. Lehigh Valley Coal Co., 242 Fed. 595, a defendant, who removed an action against him by a citizen of the State in which the action was brought and answered to the merits, waived jurisdiction over his person so long as plaintiff was a citizen of that State; but, when an alien was substituted as plaintiff, defendant then had a right to withdraw his answer and interpose a plea to the jurisdiction.

8 Lehigh Valley Coal Co. v. Washko, C. C. A., 231 Fed. 42, 46, modifying Lehigh Valley Coal Co. v. Yensavage, C. C. A., 218 Fed. 547.

9 Lehigh Valley Coal Co. v. Yensavage, C. C. A., 218 Fed. 547; Kever v. Phila. & Reading Coal & Iron Co., 234 Fed. 814, S. C. 241 Fed. 883; Lehigh Valley Coal Co. v. Washko, C. C. A., 231 Fed. 42, 47.

10 Ibid. See *supra*, § 62a.

11 Philadelphia & Reading Coal & Iron Co. v. Kever, C. C. A., 260 Fed. 534. Certiorari denied, 250 U. S. 665, 40 Sup. Ct. 13. See Bryan v. Louisville & N. R. Co., C. C. A., 244 Fed. 650.

zenship is upon the plaintiff.[12] When the issue as to citizenship or residence[13] or as to the amount in controversy[14] is set up by a plea in abatement, the burden of proof is upon the defendant.

A defense that there is a lack of the requisite diversity of citizenship[15] or the cause of action is not within the Federal jurisdiction[16] cannot be waived and may be asserted whenever it appears in the record or the evidence.

§ 454e. Pleadings by defendant in action at common law. In general. In actions at common law, the defendants' pleadings must usually conform to the State practice.[1] This is the case as regards the joinder of defenses.[2]

It has been said that where the United States sues to enforce a Federal statute, the State laws and practice are considered as those of a foreign jurisdiction and need not be followed.[3]

The subject of demurrers is subsequently discussed.[4]

Where the plaintiff's pleading is not alternative or double, a traverse in a plea at common law other than the general issue is technically improper.[5] Where, however, the previous pleading has incorporated therein a traverse of a possible plea in avoidance thereof, the adversary may incorporate in a plea of confession and avoidance a traverse of such anticipatory traverse.[6] In such a case this traverse cannot be disregarded nor stricken out[7] and may render the plea good as against a demurrer.[8]

When the general issue has been pleaded, or there is a similar

12 Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579.

13 Sheppard v. Graves, 14 How. 505, 14 L. ed. 518; Philadelphia & Reading Coal & Iron Co. v. Kever, C. C. A., 260 Fed. 534, 542.

14 Hunt v. New York Cotton Exchange, 205 U. S. 322, 333, 27 Sup. Ct. 529, 51 L. ed. 821.

15 Kever v. Reading Coal & Iron Co., C. C. A., 260 Fed. 534, 542.

16 Lewicki v. John C. Wiardi & Co., 213 Fed. 647.

§ 454e. 1 McIntyre v. Modern Woodmen of America, C. C. A., 200 Fed. 1; Patterson v. Jacksonville Traction Co., C. C. A., 213 Fed. 289; Block v. St. Louis, I. M. & S. Ry. Co., C. C. A., 230 Fed. 113; Kalloch v. Hoagland, C. C. A., 239 Fed. 252.

2 Cole v. Carson, C. C. A., 153 Fed. 278; Leonard v. Merchants' Coal Co., C. C. A., 162 Fed. 885.

3 U. S. v. Rubin, 227 Fed. 938.

4 *Infra*, §§ 45, 46.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

traverse in another plea, a traverse containing a plea of confession and avoidance will, at least in the District of New York, be stricken out.[9]

The traverse of a conclusion of law will be stricken out.[10] So it has been held will be a traverse of an allegation that damages were suffered from a breach of contract.[11]

The defendant cannot deny upon information and belief, the existence of a statute.[12]

A plea in discharge or avoidance of a bond must state the defense positively and in direct terms by allegations of facts and leave nothing to inference or conjecture.[13]

Payment is matter in bar and not in set-off, and particular appropriations of payment, and objections to appropriations, may be made under such a defense.[14]

The rule that admissions in one plea are not admissible in the trial of an issue upon another applies only to inconsistent defenses and not where a plea of the general issue is coupled with another containing an explanatory text thereof.[15]

It has been said of the general issue that this "in strictness, operates only as a denial of the matters alleged in the petition; but this strictness has been so far relaxed that at present, under the general issue in assumpsit upon the common courts, the defendant may show that upon almost any ground he was under no legal obligations to the plaintiff for the cause of action set out in the petition; and, under this plea, he may also show a partial or total failure of consideration." [16]

9 Ibid.

Where a defendant pleaded the general issue and special pleas, as authorized by the Code of Alabama (1907, § 5331); it was held prejudicial error for the trial court, over defendant's objection, to strike out such special pleas, compel defendant to plead in short form, and enter on the docket, without his consent, that any matter of defense might be given without reference to the pleading, and that the record should show an agreement that any legal matter might be introduced without reference to the pleas.

Western Union Telegraph Co. v. Aldridge, C. C. A., 219 Fed. 836.

10 Ibid.

11 Ibid.

12 De St. Aubin v. Paul Guenther, 232 Fed. 411.

13 Martin v. Kennecott Copper Corporation, 252 Fed. 207.

14 Illinois Surety Co. v. U. S., C. C. A., 229 Fed. 527.

15 Lee Line Steamers v. Robinson, C. C. A., 218 Fed. 559.

16 Dawes & Co. v. Peebles' Sons

Where the general issue is pleaded, the overruling of a special plea does not justify judgment against the claimant.[17] In the districts of Tennessee, the falsity of a slanderous statement is admitted when the general issue is pleaded, but there is no plea of justification.[18]

The parties cannot by a stipulation subsequent to the trial, raise an issue for the consideration of the court of review which was not considered by the trial court.[19]

§ 454f. Demurrers at common law. Although demurrers have been abolished in equity,[1] they are still used at common law. The pleading is so entitled, because the defendant demoratur or will go no farther.[2]

By the Revised Statutes, "no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."[3]

An objection to the form of a pleading can consequently only be raised by a special demurrer pointing out the defect to which objection is made.[4] A general demurrer to a declaration which

Co., 6 Fed. 856, 859; *per* Swing, J., citing: Greenleaf on Evidence, Vol. II, 135, 136; Thornton v. Wynn, 12 Wheat. 183; Mason v. Eldred, 6 Wall. 231; Cutter v. Powell, 2 Smith's Lead. Cas. 17.

17 Ladd & Tilton Bank v. Lewis A. Hicks Co., C. C. A., 218 Fed. 310.

18 Buckeye Cotton Oil Co. v. Sloan, C. C. A., 750 Fed. 717.

19 Great Northern Ry. Co. v. U. S., C. C. A., 218 Fed. 302.

§ 454f. 1 Eq. Rule 29; *supra*, § 364.

2 3 Blackstone's 314.

3 U. S. R. S., § 954.

4 Brooks v. Pullman Co., C. C. A., 213 Fed. 445.

contains matters of evidence and conclusions of law was overruled.[5]

A demurrer is also used to set up the defense that the plaintiff's pleading does not set forth a cause of action, although this objection can be also raised at the trial.[6] It has been doubted whether a misjoinder of defendants can be raised upon demurrer.[7]

It has been held that a demurrer to a negative plea which is overruled does not prevent the trial of the issue raised by such plea.[8] The court need not consider a demurrer to a special defense which is in effect no more than a repetition of other denials in the answer.[9] Conclusions of law are not admitted by demurrer.[10]

Where one count in a declaration is good, a general demurrer to the whole declaration cannot be sustained, except in part. The same rule applies where matter divisible in its nature is alleged by different paragraphs in the same count which state different causes of action.[11]

Unless a demurrer is clearly interposed for delay, or there is a stipulation to the contrary, it is the general practice in all jurisdictions on the overruling of a demurrer to the plaintiff's initial pleading, to grant leave to the defendant to withdraw the demurrer and plead over.[12] A State statute forbidding such a practice cannot control the discretion of the Federal courts in this respect.[13] The refusal to allow a party to withdraw a demurrer which has been overruled has been held to be no cause for a reversal when no request to withdraw was made below.[14] Upon the overruling of a plea which raises only a question of law the judgment should be respondeat ouster.[15]

5 Ibid.

6 Denver & R. G. R. Co. v. Wagner, C. C. A., 167 Fed. 75, 79.

7 U. S. v. Comet Oil & Gas Co., 187 Fed. 674.

8 California Adjustment Co. v. Southern Pac. Co., 226 Fed. 349.

9 Berry v. Pullman Co., C. C. A., 249 Fed. 816.

10 Brooks v. Pullman Co., C. C. A., 213 Fed. 445.

11 Burgess v. Mazetta Mfg. Co., C. C. A., 198 Fed. 855.

12 Thullen v. Triumph Electric Co., 215 Fed. 939.

13 Boultbee v. International Paper Co., C. C. A., 229 Fed. 951.

14 U. S. v. Oregon-Washington R. & Nav. Co., C. C. A., 251 Fed. 211.

15 Philadelphia & Reading Coal & Iron Co. v. Kever, C. C. A., 260 Fed. 534, 537, 541.

When a demurrer is overruled with leave to amend, the service of an amended pleading waives any error in overruling the demurrer;[16] unless, the amended pleading is stricken from the files.[17]

§ 454g. Pleading equitable defenses. The Act of March 3, 1915, adds two sections to the Judicial Code, as follows:

"§ 274a. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.[1]

"§ 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."[2]

A technical ruling in the Second Circuit holds that this does not authorize the plaintiff in an action at law to obtain equitable relief against a defense unless there is a prayer for affirmative

16 Snowden v. Ft. Lyon Canal Co., C. C. A., 238 Fed. 495.

17 Ibid.

§ 454g. 1 38 St. at L. 956, Comp. St., § 1251a.

2 38 St. at L. 956, Comp. St., § 1251b.

relief in the defendant's answer or plea.[3] The better reasoning is in the dissenting opinion [4] and the case is not likely to be followed.

[3] Keatley v. U. S. Trust Co., C. C. A., 249 Fed. 296, 298, 299, per Ward, J.: "The distinction between legal and equitable procedure has been jealously preserved by the Supreme Court. Bennett v. Butterworth, 10 How. 669, 675, 13 L. ed. 859; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059. We think it quite clear that Congress did not intend by the above amendment to the Judicial Code to abolish all distinctions between actions at common law and suits in equity and to establish one form of civil action, for all cases. The provisions of the section apply, with one exception, presently to be considered, to defendants only:

" 'The defendant shall have the same right * * * as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief * * * may thus, be obtained by answer or plea.'

"Two references to the plaintiff create some uncertainty: 'That in all actions at law equitable defenses may be interposed by answer, plea or replication. * * * In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication.'

"We should construe the word 'replication' in the same sense in each case, if possible. The general replication, which is a mere denial intended to put the cause at issue, has been generally abandoned in the Code states and by the Supreme Court in admiralty rule 51 (29 Sup. Ct. xliv), and the present equity rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii). Full effect is given to the provision that an equitable defense may be interposed by replication, by construing 'replication' as a special replication setting up a defense to an answer interposing an equitable defense and asking affirmative relief. Such an answer is what is known at as a 'counterclaim.' The answer in the present case sets up a purely legal defense. It is not even a counterclaim. To such a defense the section as we construe it does not permit a replication interposing an equitable defense. The plaintiff should have applied by bill in equity for cancellation of the release."

[4] Ibid, per Learned Hand, J.: "It seems to me that we should not construe so narrowly section 274b. The phrase, 'equitable defenses may be interposed by * * * replication without the necessity of filing a bill on the equity side of the court,' can only mean, I think, this: That where the defendant interposes a bar valid at law, the plaintiff may set up in his next pleading facts avoiding the bar in equity. The suggestion is that it might give the plaintiff the right to plead to the defendant's 'equitable defenses' set up in the answer, but that is independently provided for in the fourth sentence of the act. Besides the defendant's answer to a suit in equity cannot properly be said to be interposed by 'filing a bill on the equity side of the court' which is the language of the first sentence.

"So far as we may look to the purpose of the section I cannot think

It has been held in the Eighth Circuit that, when an equitable defense is interposed or equitable relief is sought, the right thereto should be determined by the judge sitting as a chancellor before the issues at common law are submitted to the jury;[5] but the soundness of this ruling has not yet been established.

there is any doubt. Congress can hardly be thought to have any predilection for plaintiffs' suits in equity rather than defendants' and we must leave a capricious exception in practice, if we do not include a case like this. I agree that the language of the section is not what a Mitford or a Langdell would have used; but the purpose seems to me to be perfectly plain, and we ought, I think, to try to effect it if we can.

"Section 274a (as added by March 3, 1915, Comp. St. 1916, § 1251a), does not perhaps fit verbally, certainly not if I am wrong about section 274b, but it shows the purpose to avoid recourse to independent suits in equity with their attendant delays. Indeed, without section 274b I should have thought that a replication at law to avoid the release would fall under section 274a, as a 'suit at law' which 'should have been brought in equity' and that the plaintiff might have amended in the very action and proceeded. It can hardly be that section 274b takes away such a right."

[5] Union Pac. R. Co. v. Syas, C. C. A., 8th Ct., 246 Fed. 561, 566, 567, per Carland, J.: "We are clearly of the opinoin that, when equitable relief is asked in an action at law under the statute above quoted, the case for equitable relief should be tried as a case in equity, and that the great weight of authority is in favor of the practice of trying the case in equity first, for this practice serves to keep the equitable matter distinct, and to prevent what must otherwise frequently ensue confusion and embarrassment in the progress of the action. * * * In the case before us, and all others like it, where it appears that no damages can be recovered until the release is out of the way, orderly procedure and a due regard for the rights of the parties demands that the equitable issues should be first tried by the court sitting as a court of equity. It is true the chancellor may take the advice of a jury, but in such cases the issues to be passed upon by the jury should be carefully framed, and the jury should not be the one which also tries the action at law, as the desire of the jury to render a verdict in the law action in favor of the plaintiff or defendant may so cloud their judgment as to render their advice unsafe to follow. We are of the opinion that the failure of the trial court to try the equitable issues raised by the pleadings as a court of equity prior to the trial of the action for damages, as requested by counsel for the defendant, was prejudicial error, in view of the character of the evidence and the charge of the court." To a similar effect are Fay v. Hill, 8th Ct., 249 Fed. 414, 418; Cavender v. Virginia Bridge & Iron Co., N. D. Georgia, 257 Fed. 877.

The statute obviates the former necessity of an injunction against an action at law to which an equitable defense exists.[6]

In the Fourth Circuit it has been said that this statute does not authorize a transfer to the equity side of the court of an action improperly brought at common law;[7] but it has been held in the Second Circuit to the contrary.[8] The proper method of raising such an objection is a motion to transfer the case to the equity side of the court.[9] In a suit in equity when the defendant filed a plea to the jurisdiction because there was an adequate remedy at law and failed to move to transfer the case to the common law side of the court, it was held that the objection was waived.[10]

Before the Act of March 3, 1915, an equitable defense could not be pleaded at common law,[11] although this was permitted by the State practice.[12]

6 United Timber Corp. v. Bivens, 248 Fed. 554.

7 Waldo v. Wilson, C. C. A., 231 Fed. 654, 656, 658 per Pritchard, J.: "This section relates only to the power of the court in a case where a suit has been improperly brought, either on the equity or the law side of the court and provides that the same be amended so as to have the pleading conform to the proper practice * * * under the circumstances the court should have dismissed the suit, instituted on the law side of the court with leave to institute a suit on the equity side, and this could only have been done by filing a bill and issuing a subpœna as required by the equity rules."

8 Illinois Surety Co. v. U. S., C. C. A., 212 Fed. 136.

9 Illinois Surety Co. v. U. S., C. C. A., 212 Fed. 136, 139, 140 per Ward, J.: "The better way to have raised the question would have been by moving to have the cause transferred from the law to the equity calendar but it has been sufficiently raised * * *. The judgment is reversed, and the court below directed, to transfer the cause to the equity calendar for hearing. The mandate may be modified so as to provide that the judgment be reversed, without prejudice to a motion in the District Court to transfer the cause to the equity calendar." The objection was there raised when the cause was reached on the common law calendar, "That the causes of actions and the complaints were in equity and not at law and that the court had not jurisdiction to try the suit."

10 Fay v. Hill, C. C. A., 8th Ct. 249 Fed. 415, 417, *supra*, § 366a.

11 Bennett v. Butterworth, 11 How. 669; Montijo v. Owen, 14 Blatchf. 324; Parsons v. Denis, 7 Fed. 317; Doe v. Roe, 31 Fed. 97; Buller v. Slidell, 43 Fed. 116; Young v. Mahoning County, 51 Fed. 585, 590; Davis v. Davis, C. C. A., 72 Fed. 81; Schoolfield v. Rhodes, 82 Fed. 153.

12 Ibid.

An equitable estoppel might be pleaded in an action of ejectment at common law.[13]

The defense of mistake as to a material fact which induced the execution of a contract had to be tried on the equity side of the court, when it is not denied that the parties knew the nature of the paper which was executed,[14] although a material provision of the contract was omitted by mutual mistake.[15] A defense of fraud which related to the execution of the contract such as a misreading or mis-statement of its contents[16] or the surreptitious substitution of one paper for another[17] or the obtaining by some other trick or device an instrument which the pleader did not intend to give,[18] before the statute, might be pleaded at common law. So it was held in some cases might be the defense of any fraudulent representation, when the instrument was not under seal.[19] Where the contract was under seal,

13 Dickerson v. Colgrove, 100 U. S. 578, 582, 25 L. ed. 618, 620; Wehrman v. Conklin, 155 U. S. 327, 39 L. ed. 173; Marine Iron Works v. Wiess, C. C. A., 148 Fed. 145; Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79; Nat. Nickel Co. v. Nevada Nickel Syndicate, C. C. A., 112 Fed. 44, 46; Cheatham v. Edgefield Mfg. Co., 131 Fed. 118. But see Mulqueen v. Sehlichter Jute Cordage Co., 108 Fed. 931; Highland Boy G. Min. Co. v. Strickley, C. C. A., 116 Fed. 852.

14 U. S. v. Rosenthal, 210 Fed. 555; see Wellman v. Bethea, C. C. A., 228 Fed. 882, an action at law for a personal injury. Held that it was no objection to a release, offered in evidence by the defendant, that the plaintiff did not know when he signed it, that it was a general release, or that he had sustained any physical injury, there being no proof of fraud, misrepresentation or mental incompetency at the time of its execution. Simpson v. Pennsylvania R. Co., C. C. A., 159 Fed. 423. But see Great Northern Ry. Co. v. Reid, C. C. A., 9th Ct., 245 Fed. 86, *infra*.

15 Holbrook, Cabot & Rollins Corp. v. Sperling, C. C. A., 239 Fed. 715.

16 Union Pac. Ry. Co. v. Harris, C. C. A., 63 Fed. 800; Drobney v. Lukens Iron & Steel Co., C. C. A., 204 Fed. 11; Standard Portland Cement Co. v. Evans, C. C. A., 205 Fed. 1; Cline v. Southern Ry. Co., 231 Fed. 238.

17 Standard Portland Cement Co. v. Evans, C. C. A., 205 Fed. 1.

18 Ibid, Union Pac. Ry. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. ed. 1003.

19 Wagner v. National License Co., C. C. A., 90 Fed. 395; Such v. Bank of State of N. Y., 127 Fed. 450; American Sign Co. v. Electro-Lens Sign Co., 211 Fed. 196; Columbia-Knickerbocker Trust Co. v. Abbot, C. C. A., 247 Fed. 833; Levi v. Mathews, C. C. A., 145 Fed. 152; *Contra*, Maine N. W. Development Co. v. Northern Commercial Co., 213

before the statute it could only be set aside in a suit in equity,[20] unless the plaintiff was deceived as to the contents of the paper which he executed, so that it was not in fact his deed.[21]

It has been held that a general release of personal injuries resulting from an accident does not cover an injury, such as hernia, not in contemplation of the parties and then unknown to each.[22]

Ordinarily, a contract could not be attacked at law for fraud unless the plaintiff first returned or tendered upon the trial, the money received as the consideration for its execution;[23] except in cases where it was conceded or indisputably proved, that he was entitled to as much as he had received.[24] It has been held that this rule does not apply where the fraud consisted in a misrepresentation as to the nature of the paper executed.[25] A tender upon the trial is in any event sufficient.[26] In equity an

Fed. 103. See Hartshorn v. Day, 19 How. 211, 222, 15 L. ed. 605; Ivinson v. Hutton, 98 U. S. 79, 25 L. ed. 66; George v. Tate, 102 U. S. 564, 570, 26 L. ed. 232; Shampeau v. Lumber Co., 42 Fed. 760; Johnson v. Granite Co., 53 Fed. 569; Vandervelden v. Railroad Co., 61 Fed. 54; Kosztelnik v. Iron Co., 91 Fed. 606; Hill v. Northern Pac. Ry. Co., C. C. A., 113 Fed. 914, 917.

20 Whitcomb v. Shultz, C. C. A., 222 Fed. 268; Union Pac. R. Co. v. Syas, C. C. A., 246 Fed. 561; Miller v. Williams, 258 Fed. 216. *Contra dicta* in Wagner v. National License Co., C. C. A., 90 Fed. 395; Maine N. W. Development Co. v. Northern Commercial Co., 213 Fed. 103.

21 Maine N. W. Development Co. v. Northern Commercial Co., 213 Fed. 103, 104. But see Standard Portland Cement Corporation v. Evans, C. C. A., 205 Fed. 1.

22 Great Northern Ry. Co. v. Reid, C. C. A., 245 Fed. 86.

23 Hill v. Northern Pac. Ry. Co., C. C. A., 113 Fed. 914; Price v. Connors, C. C. A., 146 Fed. 503; Heck v. Missouri Pac. Ry. Co., 147 Fed. 775; North Chicago St. Ry. Co. v. Chicago Union Traction Co., 150 Fed. 612; Cook v. Fidelity & Deposit Co., C. C. A., 167 Fed. 95; Mahr v. Union Pac. Ry. Co., C. C. A., 170 Fed. 699; Standard Portland Cement Co. v. Evans, C. C. A., 205 Fed. 1; Maine N. W. Development Co. v. Northern Commercial Co., 213 Fed. 103; Columbia Digger Co. v. Rector, 215 Fed. 619.

24 Billings v. Aspen Mining & Smelting Co., C. C. A., 51 Fed. 338, 350; App. Div. (N. Y.) 286; Johnson v. Chicago M. & St. P. Ry. Co., 224 Fed. 196, 199.

25 Muller v. Old Colony R. R. Co., 127 Mass. 86; Cleary v. Municipal El. L. Co., 47 N. Y. State Rep. 172, aff'd 139 N. Y. 613; Herman v. Fitzgibbons Boiler Co., 136 App. Div. (N. Y.) 286.

26 Yuharsze v. Carnegie Steel Co., C. C. A., 2nd Ct., June 8, 1915, in which the author was counsel.

offer to return the money was all that was required,[27] and where the return was impossible, a provision for its credit to the defendant might be made in the final decree.[28] Where the fraud consisted in the conduct of an officer of a corporation in inducing its execution of a contract, in which he was interested, it was held that the contract was illegal as against public policy, and that such a defense was available at law.[29] When by contract, payments were to be made upon the certificates of an architect or engineer the better opinion was, before the statute, that such certificates could be attacked for fraud by a defense to an action at common law.[30] They could not be attacked for a mistake except in equity.[31] The defense of failure of consideration,[32] subrogation;[33] non-assignability,[34] and it has been held champerty[35] could be pleaded at law.

§ 454h. Counterclaims and set-offs. Set-offs and counterclaims should be pleaded in accordance with the State practice.[1]

An equitable set-off can now be pleaded in an action at common law under the statute previously quoted.[2] Before this enactment, the pleading of an equitable set-off was not allowed at common law;[3] but where the State practice so permitted, the

27 Allerton v. Allerton, 50 N. Y. 670; Gould v. Cayuga County Nat. Bank, 86 N. Y. 75, 83, *supra*, § 153.

28 Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. ed. 486.

29 Maine N. W. & Dev. Co. v. Northern Commercial Co., 213 Fed. 103.

30 Louisville-Evansville & C. Ry. Co. v. S. P. Meyer, U. S., C. C. D. Ky., per Barr, J.: aff'd by divided court 30 L. ed. 689, which contains the opinion below; Chism v. Chiffer, 51 N. J. Law 1; Baltimore & O. Ry. Co. v. Polly Woods Co., 14 Grattan (Va.) 448; School District v. Randall, 5 Nebraska 408, 410. *Contra*, Wood v. Chicago, S. F. & C. Ry. Co., 39 Fed. 52; Cook v. Foley, C. C. A., 8th Ct., 152 Fed. 41, 51; Herrick v. Belknap & Vt. C. R. Co., 27 Vt. 673. See South Eastern Ry. Co. v. Warton, 2 Foster & Finlayson, 457, 464.

31 Newlan v. Duncan, 60 Ill. 233.

32 Am. Sign Co. v. Electro-Lens Sign Co., 211 Fed. 196.

33 Platte Valley C. Co. v. Bosserman-Gates Live S. & L. Co., C. C. A., 202 Fed. 692.

34 General Film Co. v. Sampliner, 6th Cir., C. C. A., 252 Fed. 443.

35 Ibid. But see Byrne v. Kansas City Ft. S. & M. Ry. Co., 55 Fed. 44.

§ 454h. 1 Act of March 3, 1915, 38 St. at L. 956 Comp. St. § 1251b quoted *supra*, § 454g.

2 I. & St. L. R. Co. v. Horst, 93 U. S. 291, 301, 23 L. ed. 898, 901; Phelps v. Oaks, 117 U. S. 236, 239.

3 Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059.

defendant might plead as a set-off or counterclaim a cause of action at common law against the plaintiff, and obtain a favorable judgment for such excess as he could prove.[4] In an action by the United States the defendant could not recover an affirmative judgment against the government on a counterclaim, although it may be determined that there is a balance due him.[5]

An allegation of citizenship or residence of either party contained in a plea of set-off may be taken as an admission.[6]

A plea of set-off which is defective in form,[7] or which lacks an affidavit [8] may be cured by an amendment.

§ 454i. Pleadings in negligence cases. In action to recover damages for negligence when the plaintiff does not rely upon a Federal statute the State pleadings should follow the State practice [1] except as regards the allegations which show the Federal jurisdiction.[2] When an act by the defendant, injurious to the plaintiff is set forth, a general allegation of negligence is sufficient;[3] but when the negligence is specified the plaintiff cannot without amending his pleading recover upon any other ground [4] even it has been held under the presumption of *res ipsa loquitor*.[5]

It has been held: that the defense of contributory negligence must be pleaded if the State statute requires this;[6] that, where there is a mere general averment upon the subject, a motion to make the same more specific or definite and certain will be

4 Partridge v. Felix, Mut. L. I. Co., 15 Wall. 573, 21 L. ed. 229; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810; Charnley v. Sibley, C. C. A., 73 Fed. 980; Arkwright Mills v. Aultman & Taylor Machinery Co., 128 Fed. 195; Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477. *Contra*, Jewett Car Co. v. Kirkpatrick, 107 Fed. 622.

5 U. S. v. Gillies, 144 Fed. 991.

6 Kawin & Co. v. American Colortype Co., C. C. A., 243 Fed. 317.

7 Bedford v. J. Henry Miller, C. C. A., 212 Fed. 368.

8 Ibid.

§ 454i. 1 Gadonnex v. New Orleans Ry. Co., 128 Fed. 805; Hardy v. Chicago St. P. M. & O. Ry. Co., 172 Fed. 454; Patterson v. Jacksonville Traction Co., C. C. A., 213 Fed. 289.

2 *Supra*, § 454d.

3 Tatum v. Louisville & N. R. Co., C. C. A., 253 Fed. 888.

4 White v. Chicago G. W. R. Co., C. C. A., 246 Fed. 427.

5 Ibid.

6 Gadonnex v. New Orleans Ry. Co., 128 Fed. 805, 806; Hardy v. Chicago, St. P., M. & O. Ry. Co., 172 Fed. 454.

granted, when the State practice permits such motions as to any matter of special defense;[7] but that where the common law prevails, such a defense may be proved under the plea of the general issue.[8]

When the acts or omissions constituting the contributory negligence are specified by the defendant he cannot defeat the plaintiff because of any other carelessness.[9]

§ 454j. Pleading in actions under Federal Employers' Liability Act. A suit arises under the Federal Employers' Liability Act[1] where the complaint alleges and the proof establishes that the employee was engaged in interstate commerce when the injury occurred and that the occurrence was in the course thereof.[2] A concession that the parties were engaged in interstate commerce at the time of the injury cannot give the court jurisdiction where the evidence shows the contrary.[3] In such a case, the allegations concerning interstate commerce should be stricken out.[4] In an action for the death of an employee of a railway company who was struck by an engine an allegation that the employer was engaged in interstate commerce at the time of the action does not sufficiently show that the engine was then so engaged.[5]

The complaint may be so drawn as to permit the plaintiff to recover under either the Federal or the State Liability Acts or under the common law as supplemented by other statutes of the State, whichever the evidence may permit.[6] A complaint or declaration which refers to a State statute may by amendment bring the case within the Federal Employers' Liability Act when the allegations of negligence are the same.[7] A previous action

7 Gadonnex v. New Orleans Ry. Co., 128 Fed. 805.

8 Canadian Pac. Ry. Co. v. Clark, C. C. A., 73 Fed. 76, 81; C. C. A., 74 Fed. 362.

9 American Car & Foundry Co. v. Uss., 211 Fed. 862.

§ 454j. 1 Act of April 22, 1908, ch. 149, 35 St. at L. 65, Comp. St. §§ 8657-8665; Central Vermont Ry. Co. v. White, 238 U. S. 577.

2 Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42.

3 Delaware, L. & W. R. Co. v. Yurkonis, 220 Fed. 429.

4 Delaware, L. & W. R. Co. v. Yurkonis, 220 Fed. 429.

5 Illinois Central R. Co. v. Rogers, C. C. A., 221 Fed. 52.

6 Delaware, L. & W. R. Co. v. Yurkonis, 220 Fed. 429.

7 Mo. K. & T. Ry. Co. v. Wulf, 260 U. S. 570; Seaboard Airline Ry. v. Koennecke, 239 U. S. 352; Seaboard Airline Ry. v. Renn, 241 U. S. 290; Smith v. Atlantic Coast

at common law or under a State statute for the same injury does not constitute an election of remedies which will bar a subsequent suit under the Federal statute provided at least that the former suit was previously discontinued.[8]

Where the complaint or declaration sets forth two causes of action for the injury one under a State law, and the other under the Employers' Liability Act, and shows that at the time of the injury plaintiff and defendant were engaged in interstate commerce, the Federal law controls both the liability and the right of recovery.[9]

§ 454k. Pleadings in actions at common law under Interstate Commerce Acts. A declaration or petition to recover damages awarded by the Interstate Commerce Commission as reparation for excessive or discriminating rates must show that such rates were wrongful in one of these respects.[1] An averment that the Commission has so found is insufficient,[2] but where such a declaration did not in terms allege the particular rates upon which the commission passed, but set out the citations of the cases where the determination was reported for the purpose of incorporating the pertinent facts of such decisions into the pleading by reference, it was held that the court was authorized to examine the facts set out in such decisions when deciding a demurrer.[3] An allegation that the charges were unjust, unreasonable, and in violation of law is sufficiently specific to resist a general demurrer.[4] In an action by a carrier for the difference between the amount paid for freight and the legal rate as fixed by its schedules and tariffs filed with the Interstate Commerce Commission, the plaintiff's pleading is not insufficient when it omits to set forth in full the schedules and tariffs and the cer-

Line R. Co., C. C. A., 210 Fed. 761; O'Dell v. Southern Ry. Co., 248 Fed. 343, 345. See Lucchetti v. Phila. & R. Ry. Co., 233 Fed. 137, *supra*, § 210b.

8 Hogan v. New York Cent. & H. R. R. Co., C. C. A., 223 Fed. 890.

9 Peek v. Boston & M. R. R., 223 Fed. 448.

§ 454k. 1 Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 200 Fed. 614. See *supra*, §§ 32a, 77b.

2 Ibid.

3 A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 195 Fed. 12. See Jacoby v. Pennsylvania R. Co., 200 Fed. 989.

4 Denver & R. G. R. Co. v. Baer Bros. Mercantile Co., C. C. A., 209 Fed. 577.

tificates of concurrence in the rates published by another railroad upon which it relies.[5]

In an action against a common carrier for loss or damage in transit to goods shipped in interstate commerce under the Carmack Amendment[6] to the Interstate Commerce Act, it will be presumed that the defendant issued a bill of lading in accordance with the statute, although the complaint is silent in that respect.[7]

§ 4541. Pleading in actions at common law under anti-trust statutes. The better opinion is that a count is not bad for duplicity in an action under the Federal Anti-Trust Act of July 2, 1890,[1] when it alleges that the defendant has entered into a contract, combination and conspiracy in restraint of trade.[2] In

5 McFadden v. Alabama Great Southern R. Co., C. C. A., 241 Fed. 562.

6 Act of January 24, 1914, 38 St. at L. 278.

7 Southern Pacific Co. v. Stewart, 245 U. S. 359.

§ 4541. 1 26 St. at L. 209, ch. 647, §§ 1, 2, Comp. St. §§ 8820-8830.

2 Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., 196 Fed. 514; Cilley v. United Shoe Machinery Co., D. Mass., 202 Fed. 598; Strought v. United Shoe Machinery Co., D. Mass., 202 Fed. 602; citing: Swift v. U. S., 196 U. S. 375, 396, 25 Sup. Ct. 276, 279, 49 L. ed. 518; U. S. v. Am. Tobacco Co., 221 U. S. 106, 184, 31 Sup. Ct. 632, 650, 55 L. ed. 663. *Contra*, Rice v. Standard Oil Co., D. N. J., 134 Fed. 464. A declaration was held to be sufficient, which alleged in detail: the establishment of the shoe machinery business of the plaintiff at Boston in 1893, his engaging thereafter in interstate commerce, his building up of the business, his procuring of patents and the construction of shoe machines thereunder, the expenditure of nearly $100,000 to develop the business, the profits of the business immediately prior to the alleged wrongful acts of the defendant and the entire loss of profits thereafter, a list of the customers with whom he had done business and persons with whom he was negotiating for further business, the trade conditions prior to the organization of the defendant company, the illegal combination and conspiracy of its pro-concerns, its utilization of leases and licenses as an instrumentality to create an illegal monopoly and combination (the general forms of leases and licenses being set forth verbatim in an exhibit), the effect of these leases and licenses in excluding the plaintiff from the market, the attempt through the leases and licenses to extend the scope and operation of the defendant company's patents, the superior merit and efficiency of the plaintiffs' line of shoe machinery, the threats of the officers of the defendant company to the plaintiff made in pursuance of its scheme to monopolize, the destruction of the established business

the Southern District of New York, where the complaint set

and interstate commerce of the plaintiff, the diversion of his customers, the destruction of the value of his patent interests, and other injuries to his business and property.'' And further: ''13. Accordingly, the plaintiff says that the defendant is and has been since its organization an illegal combination in restraint of trade and a monopoly existing wrongfully and in violation of the act of Congress of July 2, 1890, chapter 647, commonly known as the Sherman Act; that each and every one of the leases, copies of which are hereto annexed, is a contract in restraint of trade and commerce among the several states and with foreign nations, in that the effect has been to prevent practically all of the shoe manufacturers in the United States from purchasing, leasing, or otherwise acquiring or obtaining in any of the states of the United States or in any foreign market or elsewhere, except from the defendant shoe machinery and mechanisms; that said group or system of leases which the defendant has required and secured to be signed by nearly all the shoe manufacturers in the United States have created and now maintain a conspiracy and combination in restraint of trade and commerce among the several states and with foreign nations, to which the defendant and all its acquired concerns and companies are parties, whereby the defendant has monopolized and now monopolizes substantially the entire trade and commerce in shoe machinery and mechanisms among the several states and with foreign nations and suppresses all competition therein, and has entirely excluded the plaintiff from participation in such trade and commerce; that said leases are essential parts of an illegal scheme, combination, and conspiracy in restraint of trade and commerce, and have been utilized by the defendant as an important instrumentality in creating and supporting its illegal monopoly in the business of dealing in and with shoe machinery and mechanisms.

''14. That through and by reason of the said conspiracy and monopoly acquired by the defendant company of practically the entire business of manufacturing shoe machinery throughout the United States the plaintiff has been prevented from selling the shoe machinery manufactured by him, including machines covered by said patents relating thereto enumerated in paragraph 1 to the manufacturers included in Exhibit A and to the other shoe manufacturers in the various states of the United States, and by means of each and all acts done by the defendant in pursuance of said monopoly the defendant has utterly destroyed the interstate trade and commerce of the plaintiff with said shoe manufacturers by the loss of many orders and customers directly resulting therefrom, the interests of the plaintiff in the aforesaid patents enumerated in paragraph 1 have been rendered valueless, and the plaintiff has otherwise been greatly injured in his business and property by reason of said monopoly and the acts of the defendant done in pursuance thereof, and to carry the

forth in the same cause of action facts which were violations of

same into effect, which are declared to be unlawful by the aforesaid act of Congress of July 2, 1890, chapter 647, to the amount of three hundred thousand ($300,000) dollars, to recover threefold which damages and costs of suit, including a reasonable attorney's fee under section 7 of said act, this suit is brought.'' Cilley v. United Shoe Mach. Co., 202 Fed. 598, 599, 600.

A declaration was held to be sufficient which alleged in substance that the plaintiff is trustee of the Goddu Sons Metal Fastening Company, duly appointed by the Supreme Judicial Court of Maine in proceedings for the dissolution of that corporation; that as such trustee he holds title to all property and rights of action of the Goddu Sons Metal Fastening Company; that the Goddu Sons Metal Fastening Company, after its organization in 1897, acquired certain patents pertaining to shoe machinery, and that it made preparations to place upon the market machines constructed under its patents, and spent a considerable sum in advertising that it constructed machines ready for sale or lease; that a number of shoe manufacturers were desirous of using these machines upon terms beneficial to the company; that the company was prepared and intended to engage in trade and commerce, and to do a large and profitable business in shoe machinery among the several states and with foreign nations; that the defendant the United Shoe Machinery Company was organized in 1899, for the purpose of acquiring by legal and illegal means certain companies engaged in manufacturing and dealing in shoe machinery, and of driving out of business other companies or concerns engaged in that business, and of preventing other companies or concerns from entering into that business, thereby suppressing and preventing competition and acquiring and maintaining a monopoly of the shoe machinery business, and that it has acquired and now maintains a practical monopoly of that business; that the defendants Winslow, Brown, and Hurd are, and have been since the organization of the United Shoe Machinery Company, officers and directors and members of the executive committee of that corporation, exercising management and control of its business affairs; that in pursuance of the plan to suppress and eliminate competition, and to support and protect the monopoly of the United Shoe Machinery Company, the individual defendants, or some of them, entered into negotiations with certain of the stockholders of the Goddu Sons Metal Fastening Company for the purchase of their stock, and that as a result of these negotiations the United Shoe Machinery Company acquired a majority of the stock and the control and management of the Goddu Sons Metal Fastening Company; that in pursuance of its plan to eliminate competition, and to support and protect its monopoly, the United Shoe Machinery Company caused its president, the defendant Winslow, to be elected president of the Goddu Sons Metal Fastening Company, its own treasurer, the defendant Brown, to be elected treasurer of the Goddu Sons Metal Fastening Company, and

the Act of July 2, 1890, with other facts which were violations of the Clayton Act of October 15, 1914,[3] the plaintiff was ordered to make a separate statement of them as separate causes of action.[4] It has been held that a declaration in an action to recover damages under the Anti-Trust law is bad for duplicity, when it alleges, in a single count, that defendant entered into a contract, combination and conspiracy in restraint of trade,[5] and that it is bad for duplicity and uncertainty, when it gives no information concerning the combination and conspiracy, "except that the combination is in the form of a trust, and that the combination and conspiracy are in restraint of trade," not stating when, how, by whom, or for what purpose they were formed.[6]

a part of its own directors, including the defendant Hurd, to be elected as the entire board of directors of the Goddu Sons Metal Fastening Company; that the persons so elected have ever since been continued in their respective offices by means of the stock control exercised by the United Shoe Machinery Company; that the control thus acquired by the United Shoe Machinery Company has been exercised, not for the purpose of carrying on and developing the business for which the Goddu Sons Metal Fastening Company was organized, but for the purpose of preventing that company from doing business, thereby preventing and destroying its competition, and protecting and supporting the monopoly of the United Shoe Machinery Company; that the officers of the Goddu Sons Metal Fastening Company, in pursuance of the plan and purpose of the United Shoe Machinery Company, have continuously declined to cause the Goddu Sons Metal Fastening Company to make any use of its patents and patent rights, or to permit it to do any business, that the assets of the Goddu Sons Metal Fastening Company have thus remained idle and have become wasted, and thus that its patents are now about to expire and have become practically worthless; that the United Shoe Machinery Company and the individual defendants have thus accomplished their purpose of destroying the competition of the Goddu Sons Metal Fastening Company, and of sustaining the monopoly of the United Shoe Machinery Company; that the Goddu Sons Metal Fastening Company has been greatly injured in its business and property; and that the plaintiff is entitled, under the Sherman Anti-Trust Act, to recover threefold damages, costs of suit, and a reasonable attorney's fee." Stow v. United Shoe Mach. Co., 202 Fed. 602, 603, 604.

3 38 St. at L. 730, ch. 323, Comp. St. §§ 8835a-8835i.

4 Baran v. Goodyear Tire & Rubber Co., 256 Fed. 570.

5 Rice v. Standard Oil Co., 134 Fed. 464. But see Buckeye Powder Co. v. E. I. Du Pont de Nemour Powders Co., 196 Fed. 514.

6 Rice v. Standard Oil Co., 134 Fed. 464, 468.

In the Third Circuit plaintiff was compelled to elect whether he should continue his suit under section 1 of the Sherman Act for a contract, combination of conspiracy in restraint of trade, or under § 2 for monopolizing or attempting to monopolize or combining or conspiring to monopolize trade or commerce.[7]

§ 454m. Pleading in actions at common law upon patents. By the Revised Statutes: "Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."[1]

It has been held in the Sixth Circuit that the pleadings of both the plaintiff and the defendant in such an action must conform to the rules of pleadings in actions on the case at common law,[2] but there seems to be no reason why the State practice, except in so far as this has been changed by an act of Congress, should not be followed.[3]

The plaintiff should allege either that he has fixed the word "patented," together with the day and year the patent was granted on the patented article, or when, from the character of the article, this cannot be done by fixing to it, or to the package in which one or more of them is enclosed, a label containing a like notice; or else that the defendant was duly notified that he was infringing the patent and continued the infringement after such notice.[4] When the articles were thus marked, no further notice is required.[5]

7 Buckeye Powder Co. v. E. I. Du Pont de Nemours P. Co., C. C. A., 223 Fed. 881.

§ 454m. 1 U. S. R. S. § 4919; Comp. Stat. § 9464. As to damages see *supra*, § 389c.

2 Myers v. Cunningham, 44 Fed. 346, per Ricks, J.; Moy v. Mercer County, 30 Fed. 246; Marvin v. C. Aultman & Co., 46 Fed. 338. 339; Walker on Patents, § 442. *Contra*, Cottier v. Stimson, 20 Fed. 906, 907.

3 U. S. R. S. § 914; *supra*, § 454.

4 U. S. R. S. § 4900; Comp. Stat. § 9416; Sprague v. Bramhall-Deane Co., 133 Fed. 738; *supra*, § 146.

5 Munger v. Perlman Rim Corp., C. C. A., 244 Fed. 799.

The plaintiff must show: that he or the person through whom he claims was the inventor or discoverer of the thing or process patented;[6] that it had not been previously patented nor described in any printed publication,[7] in this or in any foreign country;[8] nor patented in any foreign country in the twelve months or in the case of a design patent in the four months, prior to the application;[9] that it was not in public use or on sale for more than two years before the application.[10] He must allege: that the patent was duly issued under the seal of the Patent Office and signed by the Commissioner of Patents.[11] That the plaintiff had at the time of the infringement, a title to the patent, or such an interest therein, as made him legally aggrieved.[11a] Where he was not the original patentee, he must show how he acquired his title.[12] He must allege infringement by the defendant.[13] A simple averment that defendant has infringed the patent above described was held to be sufficient.[14]

The Revised Statutes provide: "In any action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who

6 Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349; *supra*, § 146.

7 Ibid.

8 Mass v. McConway Farley Co., 144 Fed. 128; *supra*, § 146.

9 U. S. R. S. § 4887, as amended 29 St. at L. 693, 32 St. at L. 1225, *supra*, § 146.

10 Am. Graphophone Co., *supra*, § 146.

11 § 4883; 25 St. at L. 40; 32 St. at L. 95; Comp. St. § 9427, *supra*, § 146.

11a Krick v. Jansen, 52 Fed. 823, *supra*, § 146.

12 Vant Woud Rubber Co. v. Sternau, 145 Fed. 197, *supra*, § 146.

13 Western El. Instrument Co. v. Valee Bros. El. Co., 145 Fed. 534; *supra*, § 146.

14 Am. Bell Tel. Co. v. So. Tel. Co., 34 Fed. 803; *supra*, § 146.

was using reasonable diligence in adapting and perfecting the same; or,

Third. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or,

Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect." [15]

The burden of proof rests upon the plaintiff to establish novelty and invention.[16] Disputed questions as to invention and infringement are, in general, questions of fact which should be submitted to the jury under proper instructions.[17] Where the facts are undisputed, as to the meaning of the claims, or as to the prior art, novelty and invention are questions of law to be decided by the court.[18]

Profits cannot be recovered in an action at law,[19] but where the complaint alleged that the damages to the plaintiff and the

15 U. S. R. S., § 4920.

16 *Supra*, § 188.

17 Prepayment Car Sales Co. v. Orange County Traction Co., C. C. A., No. 122, 221 Fed. 939; Trustees of Masonic Hall and Asylum Fund v. Fountain Electrical Floor Box Corporation, C. C. A., 218 Fed. 642.

18 Prepayment Car Sales Co. v. Orange County Traction Co., C. C. A., 221 Fed. 939, 941.

19 Brown v. Lanyon, C. C. A., 148, 838, 78 C. C. A. 728.

profits to the defendant were the same specified amount, the court took jurisdiction accordingly.[20] Where the proof is conflicting in an action at law for infringement, it is a question for the jury to decide whether the patented invention is of a primary character and the patent a pioneer.[21]

§ 454n. Pleading in actions at common law upon copyrights. The Revised Statutes provide that "in all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence."[1]

The Pennsylvania practice in replevin is not followed by the courts of the United States, there held, in actions to enforce a forfeiture under the Revised Statutes for breach of copyright.[2] In New York, a cause of action to recover penalties for infringement of copyright cannot be joined with one for damages for tort not connected with copyright, namely, the circulation of the piratical publication under the plaintiff's name.[3]

In other respects, the pleadings in actions at common law arising under the copyright Laws should in general follow the State practice.[4]

The plaintiff's initial plea must set forth every fact necessary under the statute to the existence of a valid copyright.[5] Where there are alternative methods of compliance with the statu-

20 Portland Gold Min. Co. v. Hermann, C. C. A., 160 Fed. 91.

21 Transit Development Co. v. Cheatham El. Switching Device Co., C. C. A., 194 Fed. 963.

§ 454n. 1 U. S. R. S., § 4969.

2 U. S. R. S., § 4965; Falk v. Curtis, 102 Fed. 967; s. c., C. C. A., 107 Fed. 126; Gustin v. Record Pub. Co., 127 Fed. 603. See § 150, *supra*.

3 Ohman v. City of New York, 168 Fed. 953.

4 Ohman v. New York, 168 Fed. 953; Johnston v. Klopsch, 88 Fed. 692. See Hale on Copyright and Literary Property, 13 Corpus Juris 1198-1203, *supra*, § 150.

5 Burk v. Relief, etc., Assoc., 3 Hawaii Fed. 388; Parkinson v. Laselle, 18 F. Cas. No. 10,762, 3 Sawy. 330; Boucicault v. Hart, 3 F. Cas. No. 1,692, 13 Blatchf. 47; Chicago Music Company v. J. W. Butler Paper Co., 19 Fed. 758; Stover v. Lathrop, 33 Fed. 348; Falk v. Howell, 34 Fed. 739; Trow City Directory Co. v. Curtin, 36 Fed. 829; Scribner v. Henry G. Allen Co., 43 Fed. 680; Scribner v. Henry G. Allen Co., 49 Fed. 854; Osgood v. A. S. Aloe Instrument Co., 69 Fed. 291; Burnell v. Chown, 69 Fed. 993; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642; Ohman v. New York, 168 Fed. 953; Bosselman v. Richardson, 174 Fed. 622, 98 C. C. A. 127; Gaument Co. v. Hatch, 208 Fed. 378; See Hale no Copyright and Literary Property.

tory conditions, they cannot be pleaded in the disjunctive,[6] although if not inconsistent they may be pleaded in the conjunctive.[7]

The plaintiff must allege: the citizenship or residence of the person who first acquired the copyright.[8] When such person is a non-resident alien, he must allege the existence of reciprocal copyright relations between his country and the United States entitling him to the benefit of the copyright laws.[9] He must in general terms allege authorship and originality to the extent necessary to support a copyright,[10] the insertion or use of the statutory notice of copyright,[11] except in the case of foreign editions,[12] compliance with the requirement of domestic manufacture when applicable to the work in which a copyright is claimed,[13] the facts which show that plaintiff is competent to maintain the suit and the right of action asserted is vested in him.[14] When the plaintiff claims as assignee it may not be necessary to set forth his chain of title.[15] It has been said that an averment that plaintiff was author [16] or proprietor [17] would be sufficient. It is the safer practice where the copyright was not obtained in plaintiff's name, or he was not the author, to show

6 Falk v. Howell, 34 Fed. 739.

7 Scribner v. Henry G. Allen Co., 43 Fed. 680.

8 Webb v. Powers, 29 F. Cas. No. 17,323, 2 Woodb. & M. 497.

9 Ohman v. New York, 168 Fed. 953.

10 Atwill v. Ferrett, 2 F. Cas. No. 640, 2 Blatchf. 39; Henderson v. Tompkins, 60 Fed. 758; Bosselman v. Richardson, 174 Fed. 622, 98 C. C. A. 127; Crown Feature Film Co. v. Levy, 202 Fed. 805.

11 Trow City Directory Co. v. Curtin, 36 Fed. 829; Falk v. Gast Lith., etc., Co., 40 Fed. 168; Haggard v. Waverly Pub. Co., 144 Fed. 490; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642.

12 Haggard v. Waverly Pub. Co., 144 Fed. 490; United Dictionary Co. v. G. & C. Merriam Co., 208 U. S. 260, 28 S. Ct. 290, 52 L. ed. 478.

13 Hale on Copyright and Literary Property, 13 Corpus Juris 1201, criticising Osgood v. A. S. Aloe Instrument Co., 69 Fed. 291.

14 Ferrett v. Atwill, 8 F. Cas. No. 4,747, 1 Blatchf. 151; Crown Feature Film Co. v. Levy, 202 Fed. 905.

15 Lillard v. Sun Printing & Pub. Ass'n, 87 Fed. 213. See Tams v. Witmark, 30 Misc. (N. Y.) 293; 63 N. Y. Supp. 721; aff'd 48 App. Div. (N. Y.) 632.

16 Falk v. Schumacher, 48 Fed. 222; Falk v. Seidenberg, 48 Fed. 224; Gaumont Co. v. Hatch, 208 Fed. 378.

17 Ibid. Lillard v. Sun Printing, etc., Assoc., 87 Fed. 213; Edward Thompson Co. v. American Law Book Co., 119 Fed. 217.

an assignment or rather transfer to him [18] or a license sufficient to entitle him to sue.[19] Where the copyright is in a work that has not been published, the registration and deposit of copies in accordance with the statute must also be pleaded.[20]

The facts which constitute the infringement must be set forth.[21] In England, it was held to be sufficient to charge the infringement in the language of the statute.[22] It has been there held to be sufficient to charge in general terms that the defendant has copied, published, and pirated the plaintiff's work [23] although the latter does not claim that the former's publication is in every part, a breach of his copyright.[24]

A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible.[25]

§ 454o. Pleadings in actions to recover penalties. Petitions by the United States against railway companies to recover penalties for violations of the Safety Appliance Act,[1] and of the act forbidding cattle to be kept in a car for a period longer than twenty-eight hours without unloading, are treated as actions

18 Chicago Music Co. v. J. W. Butler Paper Co., 19 Fed. 758; Crown Feature Film Co. v. Levy, 202 Fed. 805.

19 Roberts v. Myers, 20 Fed. Cas. No. 11,906; Hill v. Whalen, 220 Fed. 359; Photo Drama Motion Picture Co. v. Social Uplift Film Corp. C. C. A., 220 Fed. 448; Hale on Copyright and Literary Property, 13 Corpus Juris 1195, 1201.

20 Gaumont v. Hatch, 208 Fed. 378. See Hale on Copyright and Literary Property, 13 Corpus Juris 1201.

21 Lee v. Simpson, 3 C. B. 871, 54 E. C. L. 871, 136 Reprint 349; Stover v. Lathrop, 33 Fed. 348; Black v. Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Falk v. Curtis Pub. Co., 110 Fed. 77.

22 Lee v. Simpson, 3 C. B. 871.

23 Sweet v. Maughan, 11 Simons 51; Lidell v. Copp-Clark Co., 19 Ont. Pr. 332.

24 Ibid.

25 S. C. Copyright rule 2, Lesser v. Borgfeldt, 188 Fed. 864; Tully v. Triangle Film, 229 Fed. 297, 300 *supra*, § 150.

§ 454o. 1 Act of March 2, 1893, 27 St. at L. 531; U. S. v. Atlantic Coast Line R. Co., 153 Fed. 918.

of debt and the pleadings conform in general to the State practice.[2]

In an action to recover the penalty for a violation of the law requiring a carrier to unload cattle for rest, water and feeding, within each consecutive twenty-eight hours, the Government is not required to allege or prove the non-existence of the exceptional cases which relieve the defendant from such requirement.[3]

In an action to recover penalties for the importation of contract laborers an allegation that an offer of employment was made by the defendant corporation need not specify whether the offer was made by an officer of the company, or by some other person[4] nor the authority of the person who made the offer,[5] nor whether the offer was in writing or by word of mouth,[6] nor the terms of the offer.[7] An allegation that the defendant in a specified foreign country made to the alien named a "certain offer of employment," that if the alien would migrate from the foreign country to a specified place in the United States, the defendant would employ and pay him to perform for said defendant at such place certain specified manual labor is sufficient; although the offer was indefinite, as to the amount of the wages and the other terms and conditions of the employment.[8] An allegation that the alien migrated to the United States is sufficient although it does not aver that he went to the place specified in the offer of employment.[9] An allegation that an alien was not within the exempted class but was a contract laborer, is sufficient although it does not state the facts showing that he was not within such class.[10]

§ 454p. Pleadings in actions at common law by the United States to recover taxes. An action of debt will lie on behalf of the United States to recover taxes of internal revenue,[1] includ-

2 Act of June 29, 1906, c. 3594, 34 St. at L. 607, Comp. St. Supp. 1907, p. 918; N. Y. Cent. & H. R. R. Co. v. U. S., C. C. A., 165 Fed. 833.

3 N. Y. Cent. & H. R. R. Co. v. U. S., C. C. A., 165 Fed. 833.

4 U. S. v. Dwight Mfg. Co., 210 Fed. 74.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

§ 454p. 1 Dollar Sav. Bank v. U. S., 19 Wall. 227, 22 L. ed. 80; U. S. v. Washington Mills, 2 Cliff, 601, 607; U. S. v. Pacific Railroad, 4

ing stamp taxes,[2] and to recover duties upon imports.[3] The pleadings in them should conform in general with the requirements of the State practice.[4] In a suit brought against an importer to recover the amount of duty assessed under a reliquidation made more than a year after the original liquidation, the Government must conform to the general rule of pleading where recovery is sought on the ground of fraud.[5]

§ 455. Writs and process. In general. The Supreme Court has power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction [1] and power to issue writs of mandamus to any courts appointed under the authority of the United States and where a State, public minister, consul, or vice-consul is a party, to persons holding office under the authority of the United States.[2] In cases of which the Supreme Court has original jurisdiction, it may issue any writ used in practice at common law, although there is no statutory authority for the same.[3] The Supreme Court and the District Courts have the power to issue writs of *scire facias*.[4] The Supreme Court, the Circuit Court of Appeals and the District Courts have power to issue all writs, not specifically provided for by statute, which are necessary for exercise of their respective jurisdictions and agreeable to the usages and principles of law.[5] This does not authorize the

Dillon, 66; U. S. v. Tilden, 9 Benedict, 368.

2 U. S. v. Chamberlin, 219 U. S. 250, 55 L. ed. 204.

3 U. S. v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; Meredith v. U. S., 13 Peters, 486, 10 L. ed. 258.

4 U. S. v. Sherman & Sons Co., 237 U. S. 146. But see U. S. v. Rubin, 227 Fed. 938.

5 U. S. v. Sherman & Sons Co., 237 U. S. 146, 158.

§ 455. 1 Jud. Code, § 234, 36 Stat. at L. 1087 re-enacting U. S. R. S., § 688. See § 456, *infra*.

2 Ibid. See § 457, *infra*.

3 Kentucky v. Dennison, 24 How. 66.

4 Ibid., § 262, re-enacting U. S. R. S., § 716. See § 469, *infra*.

5 Ibid. In Stewart v. Justices of St. Clair Co. Court, 47 Fed. 482, 484, Judge Philips said "By this is meant the mode of process in the State where the United States Circuit Court sits." Admiralty Rule 12 of the Circuit Court of Appeals for the Second Circuit provides that "a writ of inhibition may be awarded by this court on motion of the appellant to stay proceedings in the court below, when circumstances require it."

issues of process such as a warrant of arrest for service or execution in another district.[6]

The Revised Statutes provide that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof."[7] This does not apply to a notice to a garnishee,[8] nor, it has been held, to a notice to a party which is the initiation of a suit,[9] or a proceeding,[10] such as a notice of a motion for judgment[11] under the Code of Virginia[12] or a notice of the commencement of a proceeding to condemn land.[13]

It has been held in the Second Circuit that a rule of State practice which permits an attorney to issue a summons, subpœna, or other process without the seal of the court or the signature of the clerk, will not be followed by the Federal court;[14] and that a summons issued without such seal and signature is void, and cannot be cured by amendment.[15]

Writs and process which issue from the Supreme Court and from the Circuit Courts of Appeals, must bear *teste* of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a District Court must bear *teste* of the judge of that court or, when that office is vacant, of the clerk thereof.[16] All process must bear *teste* from the day of its issue.[17] It has been held that a writ with the proper seal, but wrongly tested, may be amended.[18] Where the State practice requires a summons to run in the name of the State, the summons, if properly tested, need not run in the name of the United States.[19] In Porto

6 Mitchell v. Dexter, C. C. A., 244 Fed. 926.

7 U. S. R. S., § 911.

8 Wyle v. Cohn, 63 Fed. 759. See *supra*, § 453.

9 Leas & McVitty v. Merriman, 132 Fed. 510.

10 *Re* Condemnation Suits by United States, 234 Fed. 433. See *infra*, § 482.

11 Leas & McVitty v. Merriman, 132 Fed. 510.

12 Code of Virginia, § 3211.

13 *Re* Condemnation Suits by United States, 234 Fed. 443. See *infra*, § 482.

14 Dwight v. Merritt, 4 Fed. 614; Peaslee v. Haberstro, 15 Blatchf. 472. *Contra*, Chamberlain v. Mensing, 47 Fed. 435.

15 Dwight v. Merritt, 4 Fed. 614; Peaslee v. Haberstro, 15 Blatchf. 472. *Contra*, Chamberlain v. Mensing, 47 Fed. 435.

16 U. S. R. S., § 911.

17 U. S. R. S., § 912.

18 U. S. v. Turner, 50 Fed. 734.

19 Chamberlain v. Mensing, 47

Rico all judicial process shall run in the name of "United States of America, ss, the President of the United States," and all penal or criminal prosecutions in the local courts shall be conducted in the name and by the authority of "The People of Porto Rico."[20]

The District Courts have power to make rules and orders, not inconsistent with any law of the United States as to the return of writs and processes.[21] When a rule of the District Court fixes the return day at the time described by the State statute, then in force, a subsequent change in the State law will not affect the Federal practice in this respect.[22] This authorized those courts to direct that writs, issued from them, shall be returned within a different time than that prescribed by the State laws.[23]

The plaintiff is not entitled to the entry of a writ which is returnable upon a wrong return day.[24] An objection to a return day cannot be taken in the court of review unless it is the subject of an objection and exception below.[25]

Writs to seize articles that are an infringement of a copyright are regulated by the rules of the Supreme Court of the United

Fed. 435. It has been held that the power of the Federal Courts to issue the writ of *capias ad satisfaciendum* is derived from the Judiciary and Process Acts of 1789, and is not affected by the Illinois Statute of June 17, 1895. U. S. v. Arnold, C. C. A., 69 Fed. 987.

20 39 St. at L. 954, Comp. St., § 3803d.

21 U. S. R. S., § 918.

22 Boston & Maine R. R. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. ed. 1002; *Re* Kinney, C. C. A., 202 Fed. 137.

23 Gokey v. Boston & Maine R. Co., 130 Fed. 992; aff'd Boston & Maine Railroad v. Gokey, 210 U. S. 155, 52 L. ed. 1002. U. S. v. U. S. F. & G. Co., C. C. A., 186 Fed. 477. In Massachusetts, the return days of original writs are the same as they were under the State practice in 1793 and must be on the first day of some term fixed by statute with a test dated sufficiently in advance of such return days as to afford due opportunities for service. *Re* Kinney, C. C. A., 202 Fed. 137. See Elson v. Waterford, 135 Fed. 247. Where a summons, returnable on the first Tuesday of October next, was not served until subsequent to the return day, it was held to be sufficient to oblige the defendant to appear on or before the first Tuesday next succeeding the date of service, although the date of issuing the writ had not been changed. Speare v. Stone, C. C. A., 193 Fed. 375.

24 Kinney v. Plymouth Rock Squab Co., C. C. A., 214 Fed. 766.

25 Baker Contract Co. v. U. S., C. C. A., 204 Fed. 390.

States previously quoted.[26] Such a writ is not strictly a writ of replevin, although in the nature of the same, and it need not follow the technical provisions of any State practice.[27]

It has been said that United States Revised Statutes, Section 602, providing for the continuance of all process, pleadings and proceedings during a vacancy, is a remedial statute, to be liberally construed in aid of its general purpose.[28]

Otherwise, the practice concerning writs and process usually followed that in the State courts.[29] The Federal court followed a State statute [30] authorizing the issue of a summons at any time within a year after the complaint was filed.[31]

§ 455a. Service of process. The Supreme Court has said, speaking of the act requiring a conformity with the State practice in actions at common law: "There can be no doubt, we think, that the mode of service of process is within the categories named in the act." [1] But where the Federal court adopted a rule regulating the service of process in accordance with the then State practice, it was held that service thus made was good although the State practice had subsequently been amended.[2] It was so held when the long established practice of the Federal court, concerning service upon towns, differed from that required by the State statute.[3]

The Revised Statutes make it the marshal's duty to execute, throughout the district, all lawful precepts directed to him and issued under the authority of the United States,[4] and give him and all his deputies the same powers as the sheriff's in the same State and their deputies.[5]

26 214 U. S. 533, quoted § 150, *supra*. See Stern v. Jerome H. Remick & Co., 164 Fed. 781.

27 Stern v. Jerome H. Remick & Co., 164 Fed. 781.

28 U. S. v. Murphy, 82 Fed. 983.

29 Amy v. Watertown, 130 U. S. 301, 304, 32 L. ed. 946, 947; *supra*, § 453, *infra*, § 455a.

30 California Code of Civ. Proc., § 406.

31 Perris Irr. Dist. v. Turnbull, C. C. A., 215 Fed. 562.

§ 455a. 1 Amy v. Watertown, 130 U. S. 301, 304, 32 L. ed. 946, 947.

2 Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602.

3 Elson v. Waterford, 135 Fed. 247.

4 U. S. R. S., § 787.

5 U. S. R. S., § 788. Deputy United States Marshals in Alaska appointed under the act of May 17, 1884, may execute process issued by United States Commissioners exercising the powers of Justices'

The State practice is usually followed as to the manner of service of process at common law within the district.[6] Where the State practice does not require a writ to be served by a public officer it need not in an action be served by the marshal.[7] It has been held that, when the laws of the State give such power to a sheriff, the marshal may appoint a person to serve a particular writ or perform any other special service,[8] that the blank form of a writ, signed and sealed, may be given by the clerk to an attorney; that the attorney may fill in the writ, in his own handwriting, with the names of the parties, style of action, and date; that the marshal may give the attorney a blank form appointing a deputy in which the attorney may write the name of the process-server;[9] and that when the writ as served is indorsed by an attorney not admitted to practice in the Federal court but qualified for admission, the court may amend it without thereby invalidating the service, by substituting another attorney, or by admitting the attorney to practice in such court.[10]

The State practice is not followed so far as to permit a service of process in another district from that where the action is brought.[11]

Where the State statute is silent, the Federal court is not bound to follow the State practice concerning exemption from service[12] and the determination of the validity thereof.[13] The validity of the service of a summons is not affected because a copy of the complaint, thereto annexed, contains no allegations which show the jurisdiction of the court.[14]

Courts according to the statutes of Oregon. Holden v. Williams, 75 Fed. 798. See *supra*, § 340.

6 U. S. v. Mitchell, 223 Fed. 805; *supra*, §§ 163-164c.

7 U. S. v. Mitchell, 223 Fed. 805; *contra*. Schwabacker v. Reilly, 2 Dill. 127. See Amy v. Watertown, 130 U. S. 301, 304, 32 L. ed. 946, 947; Hyman v. Chales, 12 Fed. 855; U. S. v. Jailer of Fayette Co., 2 Abb. U. S. 265.

8 Hyman v. Chales, 12 Fed. 855.

9 Jewett v. Garrett, 47 Fed. 625.

10 Ibid.

11 Colosino v. Pittsburgh & L. E. R. Co., 210 Fed. 550; Sewchulis v. Lehigh Valley Coal Co., C. C. A., 233 Fed. 423, *supra*, §§ 64, 163, 164c, 164d, 166-166b.

12 Kaufman v. Garner, 173 Fed. 550.

13 Kaufman v. Garner, 173 Fed. 550; Higham v. Iowa State Travelers' Ass'n, 183 Fed. 845. See *supra*, §§ 163, 167a.

14 Goodman v. City of Ft. Collins, C. C. A., 164 Fed. 970.

§ 455b. Amendment of writs and process. The Revised Statutes provide that "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to wit, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion and by its rules, prescribe."[1] It has been held: that an amendment may add the date to a writ,[2] and the signature of the clerk,[3] when it issued from his office, and a description of the defendant in his official capacity;[4] that where the State statute permits a writ of attachment to be amended by the addition of a seal, such a writ may be so amended by the Federal Court after a removal;[5] that an omission in the papers upon which an attachment has been granted may be supplied by an amendment in a case where the State practice does not permit such an amendment;[6] that petitions and bonds on removal are process within the statute and may be amended in a proper case;[7] that amendments of pleadings will

§ 455b. [1] U. S. R. S., § 954. See Parks v. Turner, 12 How. 39, 46, 13 L. ed. 883, 887; Roach v. Hulings, 16 Pet. 319, 10 L. ed. 979; Tilton v. Cofield, 93 U. S. 163, 167, 23 L. ed. 858; Jacob v. U. S., Brock 520, 525; Rosenbach v. Dreyfuss, 1 Fed. 391; U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Warren v. Moody, 9 Fed. 673; Thomas v. U. S., 15 Ct. Cl. 242; Russell v. U. S., 15 Ct. Cl. 168, Gulf, C. & S. F. Ry. Co. v. James, 48 Fed. 148, 150; Am. Alkali Co. v. Campbell, 113 Fed. 398; Great Northern Ry. Co. v. Herron, C. C. A., 136 Fed. 49; U. S. R. S., §§ 636, 948, 914, 5595, 5596.

[2] Gilbert v. South Carolina I. & W. I. Exposition Co., 113 Fed. 523.

[3] Bryan v. Ker, 222 U. S. 107, 113, 56 L. ed. 114.

[4] Hastings v. Herold, 184 Fed. 759.

[5] Wolf v. Cook, 40 Fed. 432.

[6] Bowden v. Burnham, 59 Fed. 752, 754; Erstein v. Rothschild, 22 Fed. 61, 64; Booth v. Denike, 65 Fed. 43, *supra*, § 207, *infra*, § 470.

[7] Kinney v. Columbia Sav. & L. Ass'n, 191 U. S. 78, 48 L. ed. 103; *infra*, § 546.

be allowed in all cases authorized by the State statute.[8] Amendments are rarely allowed to the plaintiff in penal actions and actions to enforce forfeitures.[9]

§ 456. Writs of prohibition. A writ of prohibition is a writ issuing out of a court of superior jurisdiction, and directed to an inferior court for the purpose of preventing the inferior tribunal from usurping a jurisdiction to which it is not entitled.[1] A writ of prohibition is a civil proceeding even when designed to stop a criminal proceeding.[2]

The Supreme Court has power to issue writs of prohibition to the District Courts of the United States when proceeding as courts of admiralty.[3] In a similar case a writ of prohibition may issue to the District Court of the United States for the District of Alaska.[4] The writ has been issued to forbid the admission of new libellants without the service of process by them.[5] Where the court of admiralty has jurisdiction of the vessel sued and of the subject-matter, the Supreme Court will not interfere to correct an error in the decision,[6] even upon a question as to the validity of a statute.[7]

The Supreme Court has ordinarily no power to issue a writ of prohibition in any other case, except when necessary for the exercise of its jurisdiction in some matter before it;[8] or pos-

8 Leman v. Baltimore & O. R. Co, 128 Fed. 111.

9 U. S. v. Batchelder, 9 Int. Rev. Rec. 98.

§ 456. 1 High on Extraordinary Remedies, § 762.

The history of the writ of prohibition is well described in a letter by Professor Theodore W. Dwight to the *New York Tribune*, in reference to *Re* Cooper, 138 U. S. 44, 34 L. ed. 993, published Jan. 19, 1891, reprinted in the fourth edition of this treatise, § 362.

2 Farnsworth v. Montana, 129 U. S. 104, 113, 32 L. ed. 616, 618; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601.

3 U. S. R. S., § 688; *Ex parte* Phoenix Ins. Co., 118 U. S. 610, 30 L. ed. 274.

4 *Re* Cooper, 138 U. S. 404, 34 L. ed. 993.

5 *Ex parte* Indiana Construction Co., 244 U. S. 456.

6 *Ex parte* Gordon, 105 U. S. 515, 26 L. ed. 953; *Ex parte* Hagar, 104 U. S. 520, 26 L. ed. 816; *Ex parte* Pennsylvania, 109 U. S. 174, 27 L. ed. 894; *Re* Fassett, 142 U. S. 479, 484, 35 L. ed. 1087, 1088; *Re* Engles, 146 U. S. 357, 36 L. ed. 1004; *Re* Morrison, 147 U. S. 14, 37 L. ed. 60.

7 *Ex parte* Pennsylvania, 109 U. S. 174, 27 L. ed. 894.

8 *Ex parte* Gordon, 1 Black, 503, 17 L. ed. 134; *Re* Christy, 3 How.

sibly when an application is made by a State, public minister, or consul,[9] but the writ has been granted to prevent a single judge from settling a decree upon a mandate of the Supreme Court under "The Act to protect trade and commerce against unlawful restraints and monopolies."[10] When a State is the relator the writ issues only when the respondents are aliens or citizens of another State.[11]

The Circuit Courts of Appeals cannot issue writs of prohibition, except where that writ is necessary for the efficient administration of the particular jurisdiction for which they are invested;[12] and when an appeal or writ of error is pending, or an attempt to take such an appeal or sue out such a writ has been made.[13] They cannot issue the writ when a writ of error or appeal is merely contemplated[14] nor to prevent a judge from hearing a cause in which it is claimed that he is interested.[15]

A Circuit Court af Appeals cannot issue a writ of prohibition to prevent a District Court from acting where the latter has no jurisdiction over the subject matter;[16] since the former court would have no jurisdiction to review such a case.[17] The writ may issue from a Circuit Court of Appeals to prevent a District Judge from granting a new trial after his jurisdiction has expired,[18] and from requiring certain persons to become parties to a suit and interplead.[19] In both these cases the jurisdiction of the court which issued the writ had been invoked.

292, 11 L. ed. 603; *Ex parte* Warmouth, 17 Wall. 64, 21 L. ed. 543; *Ex parte* Graham, 10 Wall. 541, 19 L. ed. 981; *Re* Massachusetts, 197 U. S. 482, 49 L. ed. 845.

9 *Re* Baiz, 135 U. S. 403, 34 L. ed. 222.

10 *Ex parte* U. S., 226 U. S. 420, 57 L. ed. 281.

11 *Re* Massachusetts, 197 U. S. 482, 49 L. ed. 222.

12 U. S. v. Williams, C. C. A., 67 Fed. 384; *Re* Paquet, C. C. A., 114 Fed. 437; Zell v. Judges, C. C. A., 149 Fed. 86; Hammond Lumber Co. v. U. S. District Court, C. C. A., 240 Fed. 924.

13 U. S. v. Williams, C. C. A., 67 Fed. 384; *Re* Paquet, C. C. A., 114 Fed. 437; Zell v. Judges, C. C. A., 149 Fed. 86.

14 Zell v. Judges, C. C. A., 149 Fed. 86.

15 *Re* Paquet, C. C. A., 114 Fed. 437.

16 Hammond Lumber Co. v. U. S. District Court, C. C. A., 240 Fed. 924.

17 See *infra*, § 693.

18 U. S. v. Mayer, 235 U. S. 55.

19 *Ex Parte* Equitable Trust Co., C. C. A., 231 Fed. 571, 594.

No District Court of the United States has the power to issue a writ of prohibition except when necessary for the exercise of its jurisdiction in some matter previously before it.[20]

It seems that the Supreme Court of the District of Columbia has the power to issue writs of prohibition directed to inferior courts and to public boards and officers acting in a quasi judicial capacity within its territorial jurisdiction.[21] It is doubtful whether any court has the power to issue a writ of prohibition against a court-martial.[22]

Where the court against which the writ is sought has clearly no jurisdiction of the suit or prosecution originally issued before it or of some collateral matter arising therein, and the defendant has objected to its jurisdiction at the outset, and has no other remedy; the writ of prohibition should issue,[23] and a refusal to grant a writ, where all the proceedings appear of record, may be reviewed by a writ of error.[24]

Where the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the grant or refusal of the writ is discretionary;[25] and it is not obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings.[26]

20 U. S. R. S., § 716; *Re* Bininger, 7 Blatchf. 159.

21 See argument of Messrs. Jeff. Chandler and Eppa Houston, in Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602; Act of Feb. 27, 1827, ch. 69, § 2 (19 St. at L. 253); U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167; Price v. State, 8 Gill (Md.), 295, 310.

22 Smith v. Whitney, 116 U. S. 167, 175, 29 L. ed. 601, 603; U. S. v. Maney, 61 Fed. 140.

23 *Re* Rice, 155 U. S. 396, 39 L. ed. 198; *Re* N. Y. & Porto Rico S. S. Co., 155 U. S. 523, 39 L. ed. 246. Lehman v. Gumbel, 236 U. S. 448, affirming the issue by a State court of a writ of prohibition against an inferior court of the same State which relegated the parties to the court of bankruptcy.

24 Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602; U. S. v. Mayer, 235 U. S. 55.

25 *Re* Rice, 155 U. S. 396, 39 L. ed. 198; *Re* N. Y. & Porto Rico S. S. Co., 155 U. S. 523, 39 L. ed. 246. *Re* Cooper, 143 U. S. 472, 495, 36 L. ed. 232, 239; Am. Construction Co. v. Jacksonville, T. & K. Ry. Co., 148 U. S. 372, 379, 37 L. ed. 486. *Ex parte* Oklahoma, 220 U. S. 191, 55 L. ed. 431; Consolidated Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756.

26 Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602; *Re*

The writ will not issue when the relator has another adequate remedy by appeal or otherwise;[27] for example, to set aside an injunction[28] or to prevent a District Court from taking jurisdiction of a suit against a non-resident.[29] The requirement of a bond upon an appeal does not justify the issue of the writ.[30] The writ will not issue to control the decision of the court below upon questions which such court is competent to decide.[31] Nor to correct an erroneous taxation of costs.[32]

The usual practice is, upon an application, regularly called a suggestion, in the name of the United States on the relation of the party aggrieved, for the court to grant a rule to the judge sought to be prohibited, to show cause why the writ should not issue, and to accompany the rule with an order that he proceed no further in the case till the decision of the upper court in the premises.[33] It has been said that when the suit complained of is brought by a private person he may be joined as a defendant; but that when it is a suit or prosecution on behalf of the government the writ of prohibition can go to the court only.[34] The proceedings of a court-martial cannot be prohibited by such a writ addressed to an officer who ordered the court-martial to convene, but is not himself a member of it.[35] The application for the writ should be supported by an affidavit where the motion for the writ of prohibition is founded upon matter not appearing upon the face of the proceeding below.[36] It is the duty of the respondent to produce any evidence that exists to countervail the petitioner's proof of such new matter.[37]

The respondent to the application should be the judge and

Cooper, 143 U. S. 472, 495, 36 L. ed. 232, 239; *Re* Rice, 155 U. S. 396, 403, 39 L. ed. 198, 201.

27 *Re* Rice, 155 U. S. 396, 39 L. ed. 198. *Ex parte* Oklahoma, 220 U. S. 191, 55 L. ed. 431.

28 *Ex parte* Oklahoma, 220 U. S. 191, 55 L. ed. 431.

29 *Ex parte* Wisner, 203 U. S. 449, 461, 51 L. ed. 264, 268.

30 Alexander v. Crollot, 199 U. S. 580, 50 L. ed. 317.

31 *Ex parte* Southwestern Surety Ins. Co., 247 U. S. 20.

32 *Re* Peterson, 253 U. S. 300; Pope Mfg. Co. v. Arnold, Schwinn & Co., C. C. A., 208 Fed. 406.

33 U. S. v. Hoffman, 4 Wall. 158, 18 L. ed. 354.

34 Smith v. Whitney, 116 U. S. 167, 176, 29 L. ed. 601, 603, per Gray, J.

35 Ibid.

36 *Re* Baiz, 135 U. S. 403, 430, 34 L. ed. 222, 230, per Fuller, C. J.

37 Ibid.

not the parties interested in upholding the order.[38] The return should be made by him and not by them.[39]

After the time for the return as expired a return may be filed by permission of the court.[40]

The writ of prohibition cannot be used to correct errors of a court in deciding matters of law or fact within its jurisdiction,[41] nor to undo what has been done;[42] nor after a cause is finished below.[43] The denial of the writ is not an adjudication that the court below had jurisdiction of the suit or proceeding.[44]

"The only effect of the writ is to suspend all action, and to prevent any further proceeding in the prohibited direction."[45]

§ 457. The writ of mandamus. In general. The writ of mandamus is a command issued in the name of the United States, directed to a person, corporation, or court within its jurisdiction, requiring the respondent to do some particular thing therein specified which pertains to its office or duty.[1]

A mandamus will issue to compel a court to exercise its discretion in one way or another.[2] The writ will issue to compel a court to proceed in a case which it has dismissed for want of jurisdiction, when the record before the lower court shows its jurisdiction, and there is no review by appeal or writ of error;[3] but not when through mistake a paper showing the jurisdiction

38 *Ex parte* Indiana Transportation Co., 242 U. S. 281.

39 Ibid.

40 Ibid.

41 Smith v. Whitney, 116 U. S. 167, 176, 29 L. ed. 601, 603.

42 U. S. v. Hoffman, 4 Wall. 158, 18 L. ed. 354.

43 *Ex parte* Joins, 191 U. S. 93, 48 L. ed. 110.

44 Consolidated Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756.

45 U. S. v. Hoffman, 4 Wall. 158, 18 L. ed. 354.

§ 457. 1 *Ex parte* Crane, 5 Pet. 189, 190, 8 L. ed. 92, 93.

2 *Ex parte* Crane, 5 Pet. 189, 190, 8 L. ed. 92, 93; *Ex parte* Morgan, 114 U. S. 174, 29 L. ed. 135; *Ex parte* Parker, 120 U. S. 737, 30 L. ed. 818; *Re* Hohorst, 150 U. S. 653, 37 L. ed. 1211.

3 Insurance Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493; Railroad Co. v. Wiswall, 23 Wall. 507, 23 L. ed. 103; Hoadley v. San Francisco, 94 U. S. 4, 24 L. ed. 34; *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853; *Ex parte* Railway Co., 103 U. S. 794, 26 L. ed. 461; *Ex parte* Baltimore & O. R. Co., 108 U. S. 566, 27 L. ed. 812; Hollon Parker, Petitioner, 131 U. S. 221, 33 L. ed. 123. But see *Re* Burdett, 127 U. S. 711, 32 L. ed. 321. *Re* Pennsylvania Co., 137 U. S. 451, 453, 34 L. ed. 738, 739.

was not in the record and before the court.[4] After a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and judgment in favor of the plea and for a dismissal of the action; the plaintiff is confined to his remedy by writ of error, and cannot by mandamus compel the inferior court to take jurisdiction of his case.[5]

The writ may issue: to compel a Circuit Court of Appeals to take jurisdiction of a writ of error, which it has improperly dismissed;[6] but not to compel a District Court to remand a case because of a slip in practice,[7] such as a failure to serve notice of the filing of the petition,[8] nor because it has been removed to an improper district,[9] nor where jurisdiction is improperly claimed upon the ground of a separable controversy between citizens of different States,[10] nor where there is a controversy as to whether the suit is of a civil nature or for a penalty,[11] nor where a difference of citizenship appears, but the record does not show the residence of one or more of the parties[12] nor unless the application is by a State,[13] a public minister or a consul, except possibly under extraordinary circumstances, in any case where jurisdiction is claimed because of difference of citizenships[14] or because it arises under the Constitution and

4 *Re* Sherman, 124 U. S. 364, 31 L. ed. 423.

5 *Ex parte* Baltimore & O. R. Co., 108 U. S. 566, 27 L. ed. 812; *Ex parte* Railway Co., 103 U. S. 794, 26 L. ed. 461; *Re* Pennsylvania Co., 137 U. S. 451, 453, 34 L. ed. 738, 739.

6 Matter of Christensen Eng. Co., 194 U. S. 458, 48 L. ed. 1072; *Re* Merchants' Stock & Grain Co., 223 U. S. 639, 56 L. ed. 584.

7 U. S. v. Sessions, C. C. A., 205 Fed. 502.

8 Ibid.

9 *Ex parte* Park Square Automobile Station, 244 U. S. 412.

10 *Re* Pollitz, 206 U. S. 323, 51 L. ed. 1081, in which the writer was counsel; *Ex parte* Nebraska, 209 U. S. 436, 52 L. ed. 876; *Ex parte* Harding, 219 U. S. 363, 55 L. ed. 252.

11 *Ex parte* Gruetter, 217 U. S. 586, 54 L. ed. 892.

12 Ibid.

13 Virginia v. Rives, 100 U. S. 313, 323, 329, 25 L. ed. 667, 671, 673; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633.

14 *Ex parte* Hoard, 105 U. S. 578, 26 L. ed. 1176; *Ex parte* Harding, 219 U. S. 363, 55 L. ed. 252; overruling in this respect *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264; *Re* Moore, 209 U. S. 490, 52 L. ed. 904; and disapproving *Re* Winn, 213 U. S. 458, 53 L. ed. 873, which holds that the question whether the cause of action arises under the Constitution or laws of the United

laws of the United States[15] when the question may be reviewed upon appeal or writ of error.

The writ may issue to compel a District Judge of the United States to order the marshal to deliver to the county jailer certain prisoners convicted under indictments, or other criminal proceedings, illegally removed to the District Court of the United States;[16] to compel the allowance of an appeal,[17] provided the applicant was a party to the suit;[18] to compel a judge to settle a bill of exceptions and to sign the bill after he has settled it;[19] or after it has been presented in duly proper form;[20] but not to extend the time for the preparation and settlement of a bill of exceptions,[21] nor to re-instate a bill of exceptions which after a hearing upon the merits has been stricken out,[22] nor to sign a bill of exceptions which he considers not to state correctly the proceedings before him,[23] although, he may be thus compelled to settle such part thereof as correctly sets forth any of the proceedings;[24] to compel a court to proceed in a suit which it has improperly stayed;[25] to compel a judge to set aside an order

States may be reviewed by mandamus.

15 *Ex parte* Roe, 234 U. S. 70; but see *Re* Winn, 213 U. S. 458, 53 L. ed. 873.

16 Virginia v. Rives, 100 U. S. 313, 323, 329, 25 L. ed. 667, 671, 673; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633.

17 *Ex parte* Jordan, 94 U. S. 248, 24 L. ed. 123; *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355; Vigo's Case, 21 Wall. 648, 22 L. ed. 690. But it was said that the writ may be denied where the order appealed from was wholly discretionary, and where the discretion was properly exercised. Lewis v. Baltimore & L. R. Co., C. C. A., 62 Fed. 218.

18 *Ex parte* Cutting, 94 U. S. 14, 24 L. ed. 49.

19 Chateaugay O. & I. Co., Petitioner, 128 U. S. 544, 32 L. ed. 508. See *Ex parte* Crane, 5 Pet. 189, 190, 8 L. ed. 92, 93.

20 *Re* Federal Life Ins. Co., C. C. A., 248 Fed. 908.

21 Camden Iron Works Co. v. Sater, C. C. A., 223 Fed. 611.

22 *Ex parte* First Nat. Bank of Dexter, 228 U. S. 516.

23 *Ex parte* Bradstreet, 4 Pet. 102, 7 L. ed. 796; Black v. Youmans, C. C. A., 245 Fed. 460.

24 Black v. Youmans, C. C. A., 245 Fed. 460.

25 Livingston v. Dorgenois, 7 Cranch, 577, 3 L. ed. 444; Barber Asphalt Pav. Co. v. Morris, C. C. A., 67 L.R.A. 761, 132 Fed. 945; McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762; Postal Telegraph-Cable Co. v. Call, C. C. A., 255 Fed. 850; but see *Re* Lasserot, C. C. A., 240 Fed. 325.

denying an injunction and vacating a restraining order which he has previously granted forbidding action by an officer of a State;[26] to set aside an order beyond its jurisdiction made subsequent to a final decree,[27] to take jurisdiction of a writ of *scire facias* which it has improperly quashed;[28] to prescribe the method and direct the service of a writ of *scire facias*, and, after due service, to take jurisdiction of, and to decide, issues raised thereupon;[29] to compel a judge to restore a case to the jury calendar after he has improperly directed that it be transferred to the equity docket;[30] to allow papers filed in a court to be produced for evidence in another suit;[31] to compel a court to proceed to judgment,[32] and when the act of signing the judgment was purely ministerial to sign it;[33] to execute a judgment it has rendered;[34] to set aside the suspension of a sentence;[35] to execute a previous mandate of the Supreme Court,[36] or of a Circuit Court of Appeals;[37] and to compel the reinstatement in a court of the United States or of the District of Columbia

[26] *Ex parte* Metropolitan Water Co., 220 U. S. 539, 55 L. ed. 575.

[27] New Liverpool Salt Co. v. Wellborn, C. C. A., 160 Fed. 923; *Re* Dennett, C. C. A., 215 Fed. 673. But see *Ex parte* Bradstreet, 8 Pet. 588, 8 L. ed. 1054.

[28] *Re* Connaway, 178 U. S. 421, 44 L. ed. 1134.

[29] Collin County Nat. Bank of McKinney Tex. v. Hughes, C. C. A., 152 Fed. 414.

[30] *Ex parte* Simons, 247 U. S. 231; in which the author was counsel. *Contra Ex parte* Mason, C. C. A., 254 Fed. 154.

[31] *Ex parte* Uppercu, 239 U. S. 435.

[32] Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949; Life & Fire Ins. Co. v. Adams, 9 Pet. 571, 9 L. ed. 233; *Re* Watts, C. C. A., 214 Fed. 80.

[33] *Ex parte* Bradstreet, 6 Pet. 774, 8 L. ed. 577; Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949; *Ex parte* Many, 14 How. 24, 14 L. ed. 311. But see *Ex parte* Morgan, 114 U. S. 174, 29 L. ed. 135; *Re* Watts, C. C. A., 214 Fed. 80.

[34] U. S. v. Peters, 5 Cranch, 115, 3 L. ed. 53; Stafford v. Union Bank, 16 How. 135, 14 L. ed. 876.

[35] *Ex parte* U. S., 242 U. S. 27.

[36] White v. U. S., 1 Black, 501, 17 L. ed. 227; U. S. v. Fossatt, 21 How. 445, 16 L. ed. 186; *Ex parte* Dubuque & P. R. Co., 1 Wall. 69, 17 L. ed. 514; *Re* Washington & G. R. Co., 140 U. S. 91; *infra*, Chapter on Writs of Error and Appeals. But see *Ex parte* Railway Co., 101 U. S. 711, 25 L. ed. 872; *Re* Humes, 149 U. S. 192, 37 L .ed. 698; *supra*, §§ 457, 457a.

[37] *Ex parte* Chicago Title & Tr. Co., C. C. A., 146 Fed. 742; *Re* Beckwith, C. C. A., 203 Fed. 45, s. c., 201 Fed. 518, *supra*, § 457b.

of an attorney who had been disbarred, in a case of which the court had no jurisdiction or acted with flagrant impropriety.[38]

A mandamus will not be issued when there is any other appropriate relief,[39]—as, for example, by writ of error or appeal,[40] or certiorari,[41]—nor to control the exercise of discretion,[42] except, possibly, in case of a very flagrant abuse of discretion.[43] The writ of mandamus has been denied when asked to compel a court or judge to allow or refuse an amendment of a pleading,[44] to strike impertinent matter from a pleading;[45] to order a withdrawal of a plea;[46] to allow the filing of double pleas;[47] to allow an intervention;[48] to grant the applicant a revivor;[49] to set aside the designation of a judge to hear a proceeding in the place of

38 *Ex parte* Bradley, 7 Wall. 364, 19 L. ed. 214; *Ex parte* Robinson, 19 Wall. 506, 22 L. ed. 205. But see *Ex parte* Burr, 9 Wheat, 529, 6 L. ed. 152; *Ex parte* Secombe, 19 How. 9, 15 L. ed. 565; *Ex parte* Wall. 107 U. S. 265, 27 L. ed. 552; *Re* Green, 141 U. S. 325, 35 L. ed. 765. But see Barnes v. Lyons, C. C. A., 187 Fed. 881.

39 Bank of Columbia v. Sweeny, 1 Pet. 567, 7 L. ed. 265; U. S. v. Addison, 22 How. 174, 16 L. ed. 304; *Ex parte* Newman, 14 Wall. 152, 20 L. ed. 877; *Re* Morrison, 147 U. S. 14, 26, 37 L. ed. 60, 65.

40 *Ex parte* Newman, 14 Wall. 152, 20 L. ed. 877; *Ex parte* Baltimore & O. R. Co., 108 U. S. 566, 27 L. ed. 812; *Ex parte* Brown, 116 U. S. 401, 29 L. ed. 676; Connecticut Mut. L. Ins. Co., Petitioner, 131 U. S. App. clxxxi; *Re* Morrison, 147 U. S. 14, 26, 37 L. ed. 60, 65; Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 379, 37 L. ed. 486, 489; *Ex parte* Roe, 234 U. S. 70; *Ex parte* Park Square Automobile Station, 244 U. S. 412; *Re* L. S. Starrett Co., C. C. A., 204 Fed. 588; U. S. v. Sessions, C. C. A., 205 Fed. 502; *Re* Duncan, C. C. A., 249 Fed. 155. An appeal from an interlocutory injunction affords an adequate remedy. *Ex parte* Oklahoma, 220 U. S. 191, 55 L. ed. 431; Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524.

41 *Ex parte* Park Square Automobile Station, 244 U. S. 412.

42 *Ex parte* Railway Co., 101 U. S. 711, 25 L. ed. 872; *Ex parte* Roberts, 6 Pet. 216, 8 L. ed. 375; *Ex parte* Davenport, 6 Pet. 661, 8 L. ed. 537; *Ex parte* Bradstreet, 7 Pet. 634, 8 L. ed. 810; *Ex parte* Bradstreet, 4 Pet. 102, 7 L. ed. 796; *Ex parte* Bradstreet, 8 Pet. 588, 8 L. ed. 1054; *Ex parte* Milwaukee R. Co., 5 Wall. 188, 18 L. ed. 676; Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949.

43 *Ex parte* Bradley, 7 Wall. 364, 19 L. ed. 214.

44 *Ex parte* Bradstreet, 7 Pet. 634, 8 L. ed. 810.

45 Lovell-McConnell Mfg. Co. v. Brindrim, C. C. A., 219 Fed. 533.

46 *Ex parte* Sweeny, 1 Pet. 567, 7 L. ed. 265.

47 *Ex parte* Davenport, 6 Pet. 661, 8 L. ed. 537.

48 *Re* Engelhard, 231 U. S. 646.

49 *Ex parte* Slater, 246 U. S. 128.

one who had retired for reasons alleged to be insufficient;[50] upon the application of a private individual, to remand a civil case after a motion for a remand had been denied by the court below;[51] to retain jurisdiction of a case which had been remanded to the State court since the act of March 3, 1887;[52] to vacate interlocutory orders which did not terminate the suit;[53] to vacate a preliminary injunction;[54] to vacate an order setting aside a non-suit;[55] to punish a party for an alleged contempt;[56] to open a default;[57] to quash a writ of execution;[58] to admit a prisoner to bail;[59] to diminish the amount of bail required for a prisoner's discharge;[60] to approve a bond;[61] to compel the issue of a subpoena duces tecum;[62] to compel a witness to answer specified questions;[63] to grant a rehearing;[64] to receive further proofs on an appeal in admiralty;[65] to vacate an order directing a district attorney and a marshal to deliver the official books of

50 *Ex parte* Am. Steel Barrel Co., 230 U. S. 35.

51 *Ex parte* Hoard, 105 U. S. 578, 26 L. ed. 1178; *Re* Pollitz, 206 U. S. 323, 51 L. ed. 1081; *Ex parte* Nebraska, 209 U. S. 436, 52 L. ed. 876; *Ex parte* Harding, 219 U. S. 363, 55 L. ed. 252; *Ex parte* Roe, 234 U. S. 70; *Ex parte* Park Square Automobile Station, 244 U. S. 412. See *supra*.

52 *Re* Pennsylvania Co., 137 U. S. 451, 453, 34 L. ed. 738, 739.

53 *Ex parte* Hoyt, 13 Pet. 279, 10 L. ed. 161; *Ex parte* Whitney, 13 Pet. 404, 10 L. ed. 221; Gain v. Relf, 15 Pet. 9, 10 L. ed. 642; *Ex parte* Perry, 102 U. S. 183, 26 L. ed. 43; *Ex parte* Schwab, 98 U. S. 240, 25 L. ed. 105; Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 379, 37 L. ed. 486, 489.

54 *Ex parte* Schwab, 98 U. S. 240, 25 L. ed. 105.

55 *Ex parte* Loring, 94 U. S. 418, 24 L. ed. 165.

56 Minnesota Moline Plow Co. v. Dowagiac Mfg. Co., C. C. A., 126 Fed. 746.

57 *Ex parte* Roberts, 6 Pet. 216, 8 L. ed. 375.

58 U. S. ex rel. Harless v. Judges, C. C. A., 85 Fed. R. 178.

59 *Ex parte* Flippin, 94 U. S. 348, 24 L. ed. 194; U. S. ex rel. Harless v. Judges, C. C. A., 85 Fed. 177. But see Hudson v. Parker, 156 U. S. 277, 39 L. ed. 424.

60 *Ex parte* Taylor, 14 How. 3, 14 L. ed. 302.

61 *Ex parte* Milwaukee R. Co., 5 Wall. 188, 18 L. ed. 676.

62 Vacuum Cleaner Co. v. Platt, C. C. A., 196 Fed. 398. But see Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211.

63 *Re* Welsh Mfg. Co., C. C. A., 201 Fed. 519; but see Vacuum Cleaner Co. v. Platt, C. C. A., 196 Fed. 398. But see Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211.

64 U. S. v. Bullock, 6 Pet. 485, note, 8 L. ed. 473, note.

65 *Re* Hawkins, 147 U. S. 486, 37 L. ed. 251.

record to persons appointed by the President as their successors, whose title they disputed;[66] to transmit a specified paper with the transcript of the record.[67]

The writ will not issue except in an extraordinary case against a judge where there is no proof of a demand that he do as the writ would direct,[68] nor to compel the performance of an act by a person who is under no duty in respect thereto.[69]

Where the record shows apparent jurisdiction, the writ will not be issued to compel a dismissal of a cause for want thereof, unless evidence showing such a defect is before the court.[70] It is not the office of a mandamus to direct a court to decide in a particular way a matter before it within its jurisdiction,[71] even when there is no remedy by writ of error or appeal.[72]

The issue of the writ is within the discretion of the court.[73]

As a general rule a writ of mandamus will not issue when there is any other adequate remedy for the relator.[74] A mandamus will not issue in a case of doubtful right.[75] A mandamus will not issue in a case where the relator has another adequate remedy, and the grant of the writ may affect the rights of

66 *Re* Parsons, 150 U. S. 150, 37 L. ed. 1034.

67 Starcke v. Klein, C. C. A., 62 Fed. 502. The proper remedy seems to be a *certiorari* for a diminution of the record. See *infra*, § 460.

68 Edinburg Coal Co. v. Humphreys, C. C. A., 134 Fed. 839.

69 U. S. v. Lake Drummond Canal & Water Co., 228 Fed. 66; U. S. v. Basic Products Co., 260 Fed. 472.

70 *Re* Cleland, 218 U. S. 120, 54 L. ed. 962. Where the evidence was not before the court of review, it refused to issue the writ to compel the dismissal of proceedings in bankruptcy against the corporation, on the ground that the petition failed to show that such corporation belonged to the class specified in the statute. Matter of Riggs, 214 U. S. 9, 53 L. ed. 887.

71 *Re* Morrison, 147 U. S. 1, 26, 37 L. ed. 55, 65. Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524; *Ex parte* Park & Tilford, 244 U. S. 582; *Ex parte* Slater, 246 U. S. 128. A determination; Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454.

72 *Re* Rice, 155 U. S. 396, 39 L. ed. 198.

73 *Re* Cleland, 218 U. S. 120, 122, 54 L. ed. 962, 964, where it was said that the delay and inconsistent position of the petitioner to the writ might be a ground for denying the same. Dowagiac Mfg. Co. v. Lochren, C. C. A., 143 Fed. 211.

74 *Re* Pennsylvania Co., 137 U. S. 451, 453, 34 L. ed. 738, 739.

75 U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814, per Lamar, J., citing Life & Fire Ins. Co. v. Wilson's Heirs, 8 Pet. 291, 302, 8 L. ed. 949, 953.

persons who are not parties to the proceedings, or where it will be attended with manifest hardship and difficulties.[76] The want of any other remedy does not always authorize the issue of the writ.[77]

A State court cannot by injunction or otherwise interfere with the issue of a writ of mandamus by a Federal court.[78]

§ 457a. Jurisdiction of the Supreme Court to issue writs of mandamus. The Supreme Court has power to issue writs of mandamus, in cases warranted by the principles and usages of law,[1] to any courts appointed under the authority of the United States;[2] or where a State or an ambassador, or other public minister, or a consul or vice-consul is a party, to persons holding office under the authority of the United States,[3] but when a State is a party, only when such officer is a citizen of another State.[4] The Constitution prohibits the grant to that court of any further original jurisdiction to issue writs of mandamus to officers of the United States.[5]

The power of the Supreme Court to issue writs of mandamus directed to other courts of the United States is authorized by the Constitution, because such a writ is in the nature of appellate jurisdiction.[6] In a case ultimately within its power of review, the Supreme Court has jurisdiction thus to compel the filing of the record in a Circuit Court of Appeals.[7] After the mandate of the Circuit Court of Appeals has been filed in a District Court it is doubtful whether the Supreme Court of the United

76 U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814, per Lamar, J., citing People v. Forquer, Breese (1 Ill.), 68 (2d ed. 14); Van Rensselaer v. Sheriff of Albany, 1 Cowen (N. Y.), 501, 512; Oaks v. Hill, 8 Pick. (Mass.) 46. See U. S. v. Com'rs, 5 Wall. 563, 18 L. ed. 692.

77 Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610.

78 U. S. v. King, 74 Fed. 493; Clapp v. Otoe County, C. C. A., 104 Fed. 473.

§ 457a. 1 U. S. R. S., § 688.

2 *Re* Green, 141 U. S. 325, 35 L. ed. 765.

3 U. S. R. S., § 688. See Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Virginia v. Rives, 100 U. S. 313, 316, 25 L. ed. 667, 668, *Re* Baiz, 135 U. S. 403, 34 L. ed. 222; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386.

4 *Re* Massachusetts, 197 U. S. 482, 49 L. ed. 845.

5 Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.

6 *Ex parte* Crane, 5 Pet. 189, 190, 8 L. ed. 92, 93.

7 *Ex parte* Abdu, 247 U. S. 27.

States can issue the writ of mandamus directed to the former court except in aid of a proceeding instituted before the issue of such mandate.[8]

The cases in which the Supreme Court has granted and those in which it has denied, applications for the writ of mandamus, are previously discussed.[9]

§ 457b. Jurisdiction of the Circuit Courts of Appeals to issue writs of mandamus. The jurisdiction of the Circuit Court of Appeals to issue writs of mandamus exists only in cases where the relief is necessary to the complete exercise of their appellate jurisdiction.[1] The writ may issue from a Circuit Court of Appeals in a proper case to compel action by the Court below which is required for the exercise of its functions by the court of review after the issue of the writ of error or the allowance of an appeal,[2] or where the District Court is proceeding contrary to the mandate of the Circuit Court of Appeals,[3] or refuses to proceed in a suit pending below so that the appellate jurisdiction of the Circuit Court of Appeals may be defeated,[4] or has improperly set aside an appealable decree.[5]

A Circuit Court of Appeals has no power to issue such a writ to control proceedings in a case which could not be brought before it by appeal of writ of error after final decree of judgment.[6]

8 *Ex parte* Wagner, 249 U. S. 465.

9 See § 457 *supra*.

§ 457b. 1 Muir v. Chatfield, C. C. A., 255 Fed. 24. Before the Evarts Act of March 3, 1891, a Circuit Court could, as ancillary to a case of which it had appellate jurisdiction, issue a writ of mandamus to a District Court of the United States. Smith v. Jackson, 1 Paine, 455; The New England, 3 Sumner, 495; The Enterprise, 3 Wall. Jr. 58; *Ex parte* Jesse Hoyt, 13 Pet. 279, 10 L. ed. 161.

2 Ibid; *supra*, § 457.

3 *Ex parte* Chicago Title & Trust Co., C. C. A., 146 Fed. 742; *Re* Beckwith, C. C. A., 203 Fed. 45; A. D. Howe Mach. Co. v. Dayton, C. C. A., 210 Fed. 801, *supra*, § 457.

4 McKlennan v. Carland, 217 U. S. 268, 54 L. ed. 762; Barber Asphalt Pav. Co. v. Morris, C. C. A., 132 Fed. 945; *Re* Robert Gair Co., 196 Fed. 492; *Re* Watts, C. C. A., 214 Fed. 80; *Ex parte* Equitable Trust Co., C. C. A., 231 Fed. 577, 585, 594.

5 *Re* Dennit, C. C. A., 215 Fed. 673, *supra*, § 457.

6 U. S. ex rel. Mudsill Min. Co. v. Swan, C. C. A., 65 Fed. 647; U. S. v. Severens, C. C. A., 71 Fed. 768; Collin County Nat. Bank of McKinney, Tex. v. Hughes, C. C. A., 152 Fed. 414; Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524; U. S. v. Sessions, C. C. A., 205 Fed. 502; Muir v. Chatfield, C. C. A., 255 Fed. 24.

Such a court has no power to compel a District Court to take original jurisdiction of a cause,[7] or to set aside an order remanding a case removed from a State court,[8] or to refuse to discharge a vessel seized in admiralty unless the owner gives a bond,[9] or to dismiss a case for want of jurisdiction as a Federal court,[10] when the jurisdictional question is Federal in its nature; but it has been said that it may do so when the jurisdiction is disputed upon other grounds;[11] and it may compel a District Court to proceed in a case which the latter has stayed under the belief that it has no jurisdiction thereof.[12]

§ 457c. Jurisdiction of the District Courts to issue writs of mandamus. Except when specifically authorized by statute a District Court of the United States has no power to issue a writ of mandamus which is not necessary for, or ancillary to, the exercise of its jurisdiction in another matter;[1] even when the relief sought concerns a right secured by the Constitution of the United States.[2]

7 U. S. ex rel. Mudsill Min. Co. v. Swan, C. C. A., 65 Fed. 647; Collin County Nat. Bank of McKinney, Tex. v. Hughes, C. C. A., 152 Fed. 414; Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524.

8 U. S. v. Sessions, C. C. A., 205 Fed. 502.

9 Muir v. Chatfield, C. C. A., 255 Fed. 24.

10 U. S. v. Severens, C. C. A., 71 Fed. 768. See New Liverpool Salt Co. v. Wellborn, C. C. A., 160 Fed. 923; Hammond Lumber Co. v. U. S. District Court, C. C. A., 240 Fed. 924.

11 Dowagiac Mfg. Co. v. McSherry Mfg. Co., C. C. A., 155 Fed. 524.

12 McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762.

§ 457c. 1 U. S. R. S., § 716; McIntire v. Wood, 7 Cranch, 504, 3 L. ed. 420; McClung v. Silliman, 6 Wheat. 598, 5 L. ed. 340; Graham v. Norton, 15 Wall. 427, 21 L. ed. 177; Bath County v. Amy, 13 Wall. 244, 20 L. ed. 539; County of Greene v. Daniel, 102 U. S. 187, 26 L. ed. 99; Davenport v. County of Dodge, 105 U. S. 237, 26 L. ed. 1018; Louisiana v. Jumel, 107 U. S. 711, 727, 27 L. ed. 448, 453; Gares v. N. W. Nat. Bldg., L. & I. Ass'n, 55 Fed. 209; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536, 49 L. ed. 870; Covington & C. Br. Co. v. Hager, 203 U. S. 109, 51 L. ed. 111. But see Frank v. Butler County, C. C. A., 139 Fed. 119; U. S., Butterworth & Lowe v. Sessions, C. C. A., 205 Fed. 502; Evans v. Yost, C. C. A., 255 Fed. 726; U. S. v. Nashville, C. & St. L. Ry., 217 Fed. 254.

2 Covington & C. Br. Co. v. Hager, 203 U. S. 109, 51 L. ed. 111. But it has been held that the writ may issue to compel a State Board of Equalization, with the exception

A District Court cannot by removal acquire jurisdiction to grant a mandamus in a case where it could not do so upon an application originally addressed to it;[3] but where the relief sought was a direction that a street railway company operate its cars in accordance with the conditions of its franchise, a removal was permitted.[4] The fact that a District Court of the United States has no jurisdiction of an original proceeding by mandamus to compel municipal officers to levy a tax to pay bonds does not affect its jurisdiction of an action at law by a citizen of another State to recover judgment on such bonds, although any judgment recovered can be enforced only by mandamus.[5] An application to a District Court by a receiver appointed in supplementary proceedings by a State court, seeking a writ of mandamus to require the clerk of the District Court to pay a fund in the registry of that court to the receiver, is an original proceeding, and the court has no power to grant the writ.[6] The writ will not issue to compel a United States marshal to restore to office a deputy marshal whom he has removed;[7] but it has been said that it may compel a post-master to forward to the first assistant postmaster general a letter carrier's application for re-instatement.[8]

The District Courts of the United States have power to issue a mandamus, upon motion of the Attorney-General or any District Attorney of the United States, to compel any officer of the United States to file the bonds, make returns, and perform any other duties required by chapter 95 of laws passed at the Second Session of the Forty-third Congress, relating to costs and fees;[9] and to compel the Union Pacific Railroad Company to operate its road as required by law.[10]

of the Governor, to equalize taxes. Huidekoper v. Hadley, C. C. A., 177 Fed. 1.

3 Indiana ex rel. Munice v. L. E. & W. R. Co., 85 Fed. 1. *Contra*, State ex rel. Postal Tel. Cable Co. v. Del. & A. Tel. & T. Co., 47 Fed. 633; People v. Colorado C. R. Co., 42 Fed. 638, 640.

4 State v. Tacoma Ry. & Power Co., 244 Fed. 989.

5 Waite v. City of Santa Cruz, 89 Fed. 619.

6 *Re* Forsyth, 78 Fed. 296.

7 U. S. v. Lapp, C. C. A., 244 Fed. 377.

8 U. S. v. Postmaster of City of Buffalo, 221 Fed. 689.

9 18 St. at L. 333.

10 17 St. at L. 509, § 4; U. S. v. U. P. R. Co., 2 Dill. 527; U. P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428. It seems that the corporation may be thus compelled to operate its telegraph lines by itself alone through its own corporate officers.

The District Courts of the United States have jurisdiction to compel the compliance, by railway companies and other common carriers, with the provision of the Interstate Commerce Laws;[11] but not unless the matter in question has first been submitted to the Interstate Commerce Commission.[12] Such a court has not jurisdiction to compel the Interstate Commerce Commission to entertain a complaint which the Commission has dismissed under the belief that it is beyond its jurisdiction.[13] Such a writ may be issued by the Supreme Court of the District of Columbia.[14] It was held that the Circuit Court of the United States for the Southern District of New York had the power to grant the writ to compel the Board of General Appraisers to examine and decide a case, of which it had jurisdiction under the Customs Administrative Act.[15]

The District Courts have jurisdiction upon the application of the Attorney General to issue writs of mandamus commanding any persons or corporations to comply with the provisions of the act creating the Federal Trade Commission.[16]

The writ was denied when access was sought to the books and papers of a corporation not engaged in interstate or foreign commerce nor charged with unfair competition; when the purpose was to obtain information for the Navy Department of the cost of manufacturing of a patented article under a secret process.[17]

The most frequent instances in which writs of mandamus are issued by the District Courts of the United States are to compel

Union Pac. Ry. Co. v. U. S., 59 Fed. 813, 833.

11 Jud. Code, § 207, 36 St. at L. 1087. See §§ 75, 151, *supra*, 25 St. at L. 862, §§ 6, 10, 23, as amended by Act of June 29, 1906, ch. 3591, 34 St. at L. 585. See *supra*, § 77d, *infra*, § 457d.

12 Baltimore & Ohio R. R. Co. v. U. S. ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. ed. 292; U. S. v. Louisville & N. R. R. Co., 236 U. S. 318, 337.

13 Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Co., 224 U. S. 474, 56 L. ed. 849.

14 Ibid, *infra*, § 458.

15 26 St. at L. 137. Thomas Prosser & Son v. United States, C. C. A., 158 Fed. 971.

16 Act of Sept. 26, 1914, ch. 311, § 9, 38 St. at L. 721, Comp. St., § 883, *supra*, § 77h.

17 U. S. v. Basic Products Co., 260 Fed. 472.

the levy of taxes by officers of municipal or other public corporations to satisfy judgments previously obtained in the courts which issue the writs.[18] When so employed, the writ is considered not to be a suit, but simply process in aid of execution.[19] Where judgments rendered on certain railroad aid bonds issued by a township contained orders making it the duty of the county commissioners of the county in which the township was located to levy annually a necessary tax to collect the interest on the bonds, but such judgments did not direct the clerk to issue writs of mandamus thereafter if defaults should occur in the levy of the tax; it was held that they did not contain process within themselves for their own enforcement, so that, on the board's default, it was necessary for the owner of the judgments to obtain orders of the court to compel performance.[20] It has been held that an action will lie to obtain a special judgment which will not warrant the issue of an execution and can only be enforced by a mandamus, although in the State court the only remedy could be an original mandamus.[21] A mandamus was granted to compel the transfer of stock in a corporation to the buyer of the same at a sale under an execution issued by the same court.[22] When the statute authorized a city council to levy a tax to pay a funded debt "if it believe that the public good and the best interests of the city require," a mandamus was issued

18 Riggs v. Johnson County, 6 Wall. 166, 18 L. ed. 768; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627; Commissioners v. Aspinwall, 24 How. 376, 16 L. ed. 735; Supervisors v. U. S., 4 Wall. 435, 18 L. ed. 419; Weber v. Lee County, 6 Wall. 210, 18 L. ed. 781; U. S. v. New Orleans, 98 U. S. 381, 25 L. ed. 225; Tucker v. Hubbert, C. C. A., 196 Fed. 849. But see Board of Com'rs of Grand County v. King, C. C. A., 54 Fed. 202. For a case where the county justices were imprisoned for contempt because of their disobedience to such a writ see *Re* Copenhaver, 54 Fed. 660.

19 Thompson v. Perris Irr. Dist., 116 Fed. 769.

20 Board of Com'rs of Hertford County, N. C. v. Tome, C. C. A., 153 Fed. 81.

21 Aylesworth v. Gratiot County, 43 Fed. 350, 352. "Where the plaintiff is otherwise entitled to relief in this court, he will not be debarred therefrom by reason of the fact that his remedy in the State court upon the same cause of action would be of a character which we were not entitled to administer here." Ibid. See Jordan v. Cass County, 3 Dillon, 185; Davenport v. County of Dodge, 105 U. S. 237, 26 L. ed. 1018.

22 Hair v. Burnell, 106 Fed. 280.

after judgment to compel the levy of the tax.[23] The writ issues to compel the proper county officers to assess at its true value the property subject to taxation in order that sufficient taxes may be levied to pay the amount due a judgment creditor.[24]

A State statute forbidding the issue of a mandamus, in certain cases, will not impair the jurisdiction of the Federal courts in that respect.[25]

A repeal of the State statute authorizing the officer to levy the tax does not divest the power of the Federal court to compel him to do so by mandamus, after a judgment upon a contract before the repeal.[26] Otherwise the writ will not issue to compel an officer to perform a duty not imposed upon him by the law of the State under which he was appointed.[27] A Federal court cannot appoint commissioners to levy and collect the tax, although a State court has commanded the county officers to make such levy and collection in payment of a judgment and these have failed to do so.[28] Where the original State statute made it the duty of the county court, when the office of sheriff was vacant, to appoint a single collector under a single bond, to collect all county taxes including those levied to pay the county debts, and an amendment, subsequent to the issues of the county bonds, authorized such a court to appoint several collectors giving separate security each charged with the duty of collecting a designated part of the taxes; it was held that this was unconstitutional and a writ was issued directing the county judge in case of such vacancy to appoint a special collector to collect levies to satisfy the judgment and other county taxes and to continue such appointment and direction until a collector should

23 Galena v. Amy, 5 Wall. 705, 18 L. ed. 560.

24 U. S. Fall City Const. Co. v. Jimmerson, C. C. A., 222 Fed. 489.

25 U. S. ex rel. Kilpatrick v. Capdevielle, C. C. A., 118 Fed. 809.

26 Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403.

27 U. S. v. Macon County, 99 U. S. 582, 25 L. ed. 331; U. S. v. Labette County, 7 Fed. 318; U. S. v. County of Clark, 95 U. S. 769, 24 L. ed. 545; Memphis v. U. S., 97 U. S. 293, 24 L. ed. 920; Brownsville v. Loague, 129 U. S. 493, 32 L. ed. 780. *Cf.* Hicks v. Cleveland, C. C. A., 106 Fed. 459; Padgett v. Post, C. C. A., 106 Fed. 600; Little Rock v. U. S. ex rel. Howard, C. C. A., 103 Fed. 418.

28 Yost v. Dallas County, 236 U. S. 50.

accept the appointment and qualify.[29] When a municipal corporation had refused to comply with its obligation to levy a special assessment to pay bonds, and a judgment was entered directing that a bond holder recover from it the amount for which the assessment should have been levied to be enforceable only by a writ of mandamus; a bill in equity to collect the amount from the persons against whom the assessment was directed was sustained.[30] Where the charter of the municipal corporation has been repealed and its corporate existence extinguished, no such mandamus can be granted.[31] It has been held that the court will not thus control the discretion of the municipal authorities, to make appropriations to pay current expenses out of the fund in the city treasury.[32] When such a writ is issued by a District Court of the United States to enforce its own judgment, the jurisdiction cannot be enlarged so as to include a judgment of another court.[33] A mandamus to compel the levy of a tax cannot be issued until after a judgment has been obtained.[34] It has been said that after a claim against a school district has been duly established and liquidated, mandamus is the proper remedy to compel payment thereof.[35]

§ 457d. Mandamus under the interstate commerce laws. The District Courts of the United States "have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them." [1]

29 Hendrickson v. Apperson, 245 U. S. 105.

30 Cushman v. Warren-Scharf Asphalt Paving Co., C. C. A., 220 Fed. 857.

31 Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. ed. 893. But see U. S. v. Port of Mobile, 12 Fed. 768. For the power of the court to appoint a receiver in such a case, see *supra*, § 306.

32 Cleveland v. U. S., C. C. A., 111 Fed. 341, 347.

33 U. S. ex rel. Kerr v. New Orleans, C. C. A., 117 Fed. 610, 612.

34 Rosenbaum v. Bauer, 120 U. S. 450, 30 L. ed. 743, and cases cited.

35 Whitaker & Ray Co. v. Roberts, County Superintendent of Schools, 155 Fed. 882.

§ 457d. 1 Act of Feb. 4, 1887, ch. 104, § 20, 24 St. at L. 386, as amended June 29, 1906, ch. 3591, § 7, 34

The District Courts of the United States "have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of the question of fact; Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."[2]

The Act of March 1, 1913, providing for the physical valuation of property of carriers provides, "that the district courts of the United States shall have jurisdiction upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section."[3]

The writ has been issued to compel the Interstate Commerce Commission to receive proof as to the present cost of condemna-

St. at L. 593, Feb. 25, 1909, 35 St. at L. 649, June 18, 1910, ch. 309, § 14, 36 St. at L. 555, March 4, 1915, ch. 176 § 1, 38 St. at L. 1196, Aug. 9, 1916, ch. 301, 39 St. at L. 441, Feb. 28, 1920, §§ 434, 436, Comp. St., § 8592, *supra*, § 77d.

[2] Act of March 2, 1889, ch. 382, § 10, 25 St. at L. 862, Comp. St., § 8593.

[3] Act of Feb. 4, 1887, ch. 104, § 19a, added March 1, 1913, ch. 92, 37 St. at L. 701, Feb. 28, 1920, § 433, Comp. St., § 8591.

tion and damages, or purchase, of the land, or rights of way and terminals owned by a railroad and to report thereupon in accordance with the statute last quoted.[4] To compel a carrier to carry the petitioners' coal in such reasonable quantities as could be handled.[5] To compel a carrier to furnish the relator its equitable proportion of cars to carry coal, when the basis of distribution between neighboring shippers has been fixed by contract.[6] To compel an express company to transport intoxicating liquor into a State where prohibition was established.[7] To compel a common carrier to file annual reports.[8] The writ will not be issued unless the matter has first been submitted to the Interstate Commerce Commission.[9]

The writ was denied when sought to compel the production of books and papers which did not relate to Interstate Commerce although they might show a violation of the anti-trust law,[10] and when the allegations in the petition as to the papers of which production was requested were so vague that the court could not see whether any of these were privileged communications between an attorney and client and what parts thereof were relevant to an investigation of Interstate Commerce.[11]

The provision that the writ may issue notwithstanding a question of fact raised by the pleading is undetermined does not justify its issue when no case of unjust discrimination is shown to exist, although it does authorize the amount of compensation to be determined after the writ has been issued upon proper terms.[12]

§ 457e. Mandamus against the executive and administrative officers of the United States. In general. The only courts which have original jurisdiction to issue the writ of mandamus against an officer of the United States in the absence of special statute,

4 U. S. ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission, 252 U. S. 178.

5 U. S. ex rel. Stoney Coal Co. v. Louisville & N. R. Co., 195 Fed. 88.

6 U. S. ex rel. Green Briar Coal & Coke Co. v. Norfolk & Western Ry. Co., C. C. A., 143 Fed. 266 reversing 138 Fed. 849.

7 U. S. ex rel. Friedman v. U. S. Express Co., 180 Fed. 1006.

8 U. S. v. Union Stockyard & Transit Co., 192 Fed. 330.

9 Baltimore & Ohio R. R. Co. v. U. S. ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. ed. 292.

10 U. S. v. Louisville & N. Ry. Co., 212 Fed. 486.

11 Ibid.

12 U. S. ex rel. Morris v. Delaware L. & W. R. Co., 40 Fed. 101.

when the writ is not ancillary to other jurisdictional powers, and where neither a State nor an ambassador or other public minister, nor a consul or a vice-consul is a party, are the Supreme Court of the District of Columbia,[1] and the Territorial and insular Courts.[2]

The District Court of the Canal Zone has power to issue the writ in a proper case.[3] It may compel the auditor to issue a warrant in payment of a salary fixed by Congress for which there has been an appropriation.[4] The District Court of Alaska may issue a mandamus to compel a commissioner of that Territory to proceed in a cause.[5]

A District Court has no jurisdiction to compel a postmaster by mandamus to transmit mail matter at a lower rate of postage than that charged,[6] nor to compel a collector to examine into the facts as to the validity of a claim to a trade-mark affecting importations.[7] It has been said that, although a District Court may have the power to grant the writ of mandamus at the application of a receiver in bankruptcy, it will not do so to compel a postmaster to transport the receiver's publications, when there is doubt as to their being mailable.[8]

A State court cannot issue a mandamus against an officer of the United States to compel the performance of a duty of his Federal office.[9]

The writ was denied when sought to compel a commission with quasi-judicial functions to enroll an applicant as a member of an Indian tribe.[10]

In a case where the application is not made by a person claim-

§ 457e. 1 Kendall v. U. S., 12 Pet. 524, 9 L. ed. 1181; U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167. See U. S. v. Guthrie, 17 How. 284, 15 L. ed. 102; *infra*, § 458.

2 Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945. Specific power to issue the writ is granted to the District Courts of Porto Rico. Act of March 2, 1917, ch. 145, § 48, Comp. St., § 3803u.

3 Smith v. Jackson, C. C. A., 241 Fed. 747.

4 Smith v. Jackson, C. C. A., 241 Fed. 747.

5 Finn v. Hoyt, 52 Fed. 83.

6 U. S. v. Pearson, 24 Blatchf. 453.

7 *Re* Vintschger, 50 Fed. 459.

8 *Re* Coleman, 131 Fed. 151.

9 McClung v. Silliman, 6 Wheat. 598, 5 L. ed. 340.

10 Kimberlin v. Commission to Five Indian Tribes, C. C. A., 104 Fed. 653.

ing a beneficial interest in sustaining or defeating a bill, no court should interfere by mandamus to correct the record of a legislative body.[11] The Governor of a State cannot be compelled by mandamus to return a fugitive from labor or justice.[12]

The writ of mandamus issues to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act.[13] There are cases in which the writ of mandamus will not be issued to compel the performance of even a purely ministerial act. "In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake." [14]

§ 458. Jurisdiction of the Supreme Court of the District of Columbia to issue a writ of mandamus to an officer of the United States. The Supreme Court of the District of Columbia has the power to issue the writ of mandamus, to an officer of the United States or other person within its territorial jurisdiction in cases in which the relator is by common law entitled to seek relief.[1] The writ will not issue in a case where its effect would be to direct or control the head of an executive department in the exercise of judgment or discretion, even when in the exercise of his discretion the officer has been called upon to interpret several statutes of doubtful meaning and he has made an erroneous interpretation of these;[2] but when the officer refuses to act

11 Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945.

12 Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

13 U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 319, 35 L. ed. 183, 187; Brownsville v. Loague, 129 U. S. 493, 501, 32 L. ed. 780, 783.

14 U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814, per Lamar, J., citing U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167.

§ 458. 1 9 St. at L. 253; U. S. v Schurz, 102 U. S. 378, 394, 26 L. ed. 167, 171; Kendall v. U. S., 12 Pet. 524, 9 L. ed. 1181; Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559; Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Com'r of Patents v. Whiteley, 4 Wall. 522, 18 L. ed. 335; U. S. ex rel. Miller v. Black, 128 U. S. 40, 50, 32 L. ed. 354, 358; U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811; U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 35 L. ed. 183; Roberts v. U. S., 176 U. S. 221, 44 L. ed. 443; U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074.

2 Congress on March 3, 1837, passed an act giving a pension to the widow of any officer who had died in the naval service. On the same day Congress passed a resolution granting a pension to the widow

of Stephen Decatur for a certain period of time. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the special pension granted by that as well. The Secretary of the Navy, acting under the opinion of the Attorney General, decided that she could not have both. Upon her application for a mandamus to compel the Secretary to grant her a special pension, the writ was denied. Decatur v. Paulding, 14 Pet. 497, 515, 516, 10 L. ed. 559, 568, 569, per Taney, C. J. An application for a mandamus against the Secretary of the Navy, by a commander in the navy of the Republic of Texas, for pay alleged to be due him from the United States since the annexation of Texas under the joint resolutions for annexation of Texas, was denied. Brashear v. Mason, 6 How. 92, 12 L. ed. 357. So was an application for the writ to compel the Secretary of the Navy to accept the highest bid for a condemned vessel. U. S. ex rel. Goldberg v. Daniels, 231 U. S. 218.

An application for a mandamus to the Secretary of the Treasury to compel the payment of a salary to a Territorial judge for the unexpired term of his office, from which he claimed that he had been improperly removed by the President, was denied. U. S. ex rel. Goodrich v. Guthrie, 17 How. 284, 303, 305, 15 L. ed. 102, 105, 106.

The writ of mandamus to the Secretary of the Treasury is not a legal remedy to try the title of the relator to an office claimed by him. U. S. ex rel. Goodrich v. Guthrie, 17 How. 284, 305, 15 L. ed. 102, 106. But upon a writ of error to the Supreme Court of the Territory of New Mexico it was held that in case of a disputed election to a municipal office, mandamus may issue to compel the recognition by another municipal officer of the *de facto* officer, whose title is disputed, until the rights of the parties can be determined on *quo warranto*. Re Delgado, 140 U. S. 586, 590, 35 L. ed. 578, 580. Mitchell furnished material and performed labor for the United States under a contract; and when the work was done and the materials furnished he presented his account to the proper office for adjustment and settlement. The balance was found to be correct so far as the labor and material were concerned, but it was also found that through penalties and forfeitures that balance was liable to be materially reduced. It also appeared that Mitchell was indebted to contractors and others in a large amount for work done and materials furnished under the contract. The Treasury officials agreed with Mitchell that this account should be adjusted, if he would consent that his said indebtedness should be paid out of the sums allowed, and that the control of the money should not be given up until those claims were satisfied. He assented, and a draft was prepared accordingly. Mitchell failed to satisfy the claims, and the assignee of his claim to the draft applied for a mandamus to compel the Secretary of the Treasury to deliver the draft to him before he had made the agreed pay-

ments; but the application was denied. U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811.

The writ was denied when prayed to compel the Secretary of the Treasury to collect a different rate of duty upon a certain import from that which he had determined to be lawful. Louisiana v. McAdoo, 234 U. S. 627.

An application for a mandamus to compel the Commissioner of Patents to refer an application for a reissue, which he had decided did not come within the statute, to "the proper, examiner, or otherwise examine or cause the same to be examined according to law," was denied. Com'r of Patents v. Whiteley, 4 Wall. 522, 18 L. ed. 335. The writ was denied when asked to compel the Commissioner of Patents to declare an interference at the request of the junior applicant for a patent. Ewing v. U. S., 244 U. S. 1.

Neither an injunction will issue to prevent, nor a mandamus issue to compel, the cancellation of an entry in the Land Office under which a claim is made to lands. Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62. See also Sioux City & St. P. R. Co. v. U. S., 36 Fed. 610, 612.

Where the Commissioner of the Land Office or the Secretary of the Interior has decided that a patent should not issue, in a case where numerous questions of law and fact arose, some of them depending upon circumstances which rested upon parol proof, and where the exercise of judicial functions, some of them of a high character, was required, an application for a writ of mandamus will be refused. U. S. v. Commissioner, 5 Wall. 563, 565, 18 L. ed. 692, 693; U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316; U. S. ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U. S. 549. There the writ was sought to require the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent which had been denied because the Secretary had decided that work done was for prospecting purposes and not for the purpose of opening a mine.

The writ will not issue to review the decision of the Secretary of the Interior as to the practice to be pursued in making applications for land patents. U. S. ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610. Nor to require the Secretary of the Interior to approve the selection of land allotted to such tribe, by one who claimed to be an adopted member of the same, in a case where the Secretary was of the opinion that the applicant had not been duly adopted. U. S. ex rel. West v. Hitchcock, 205 U. S. 80, 51 L. ed. 718. Nor to review his decision reopening because of newly discovered evidence or fraud a previous administrative order concerning the succession to an Indian allotment while the property was still under his administrative control. Lane v. U. S., 241 U. S. 201.

Where the Secretary of the Interior had granted a land patent in pursuance of an act of Congress, it was held that the courts could not review his proceedings by manda-

at all in a case where he is bound to act,[3] or when by special statute or otherwise a purely ministerial duty, which he is bound to perform without question, is imposed upon a public officer, even the head of an Executive Department, a mandamus may be issued to compel him to do such duty, if there is no other adequate remedy.[4] A mandamus may issue to compel the Treas-

mus upon the application of a claimant to the land who contended that the statute was unconstitutional. *Ex* Emblen, 161 U. S. 52, 40 L. ed. 613. Where the Commissioner of Pensions had decided upon an application for an increase of a pension, that the applicant was not entitled to the same, and this decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate given to the pensioner, it was held that no mandamus would issue to compel an increase of the pension. U. S. ex rel. Dunlap v. Black, 128 U. S. 40, 48, 32 L. ed. 354, 357. An application for a mandamus to compel the Secretary of State to pay a certain award under the Mexican Claims Commission, under the act of June 18, 1878, was denied. U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 35 L. ed. 183. See also U. S. ex rel. Angarica v. Bayard, 127 U. S. 251, 259, 32 L. ed. 159, 162; Frelinghuysen v. Key, 110 U. S. 63, 28 L. ed. 71. See also U. S. ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160; U. S. ex rel. Mutual Messenger Co. v. Wright, 15 App. D. C. 463.

[3] U. S. ex rel. Dunlap v. Black, 128 U. S. 40, 48, 32 L. ed. 354, 357; U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814; U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 319, 35 L. ed. 183, 187; U. S. v. Lamar, 116 U. S. 423, 29 L. ed. 677; *infra*, note 4.

[4] Stockton & Stokes, mail contractors, had certain claims against the government for extra services, which they insisted should be granted in their accounts, and a controversy arose as to this between them and the Post-office Department. Congress passed an act for their relief; by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon full examination of all the evidence might seem to be equitable and right; and the Postmaster-General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after investigation, made his report, and stated the sums due to Stockton & Stokes on the claims made by them, but the Postmaster-General refused to give them credit as directed by the law. This, the court held he could be compelled to do by a mandamus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. Kendall v. U. S. ex rel. Stokes, 12 Pet. 524, 613, 614, 9 L. ed. 1181, 1216, 1217.

McBride claimed a patent for land under a right of pre-emption. The regular proceedings had taken

place in the Department of the Interior; the right of the applicant had been affirmed; the patent had been made out in the Land Office, signed by the President, sealed with the Land Office seal, counter-signed by the Recorder of the Land Office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery had been refused, because instructions had been received from the Commissioner to return the patent. Upon an application for a mandamus, the defense was that it had been discovered that the land belonged to a town site. The court held that this defense was insufficient; that the title had passed to the applicant; that he was entitled to the patent subject to any equity which other parties might have to the land, or subject to a proceeding to set the patent aside; and that the duty of the Commissioner and of the Secretary of the Interior had become a mere ministerial duty to deliver the instrument. A mandamus was granted accordingly. U. S. v. Schurz, 102 U. S. 407, 26 L. ed. 175.

Upon an application for a patent in the case of interference, the Commissioner of patents had decided in favor of Gill, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the Secretary of the Interior, and he reversed the decision of the Commissioner. The latter for that reason refused to issue a patent. Upon an application for a mandamus, the Supreme Court held that no appeal lay from the decision of the Commissioner to the Secretary of the Interior; that "the latter officer had no jurisdiction in the matter;" that the patent ought to be issued to Gill's assigns in accordance with the decision of the Commissioner. A mandamus to compel the issue of such a patent was granted accordingly. Butterworth v. Hoe, 112 U. S. 50, 28 L. ed. 656. The Commissioner of Pensions had refused to grant an application for an increase of a pension. The applicant appealed to the Secretary of the Interior, who overruled the decision of the Commissioner, and held that the applicant was entitled to an increase of his pension. The Commissioner refused to carry out the Secretary's decision and to grant the increase requested. It was held that the Commissioner could be compelled by a mandamus to grant the increase of the pension for which the application had been made, in accordance with the decision of the Secretary of the Interior. U. S. ex rel. Dunlap v. Black, 128 U. S. 40, 50, 52, 32 L. ed. 354, 358, 359, per Bradley, J. See also U. S. ex rel. Hufty v. Trimble, 14 App. D. C. 414. The writ of mandamus was granted to compel the Secretary of the Interior to erase the marks and notations, made by his predecessor, striking the name of the relator from the enrollment of an Indian nation. Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249, 53 L. ed. 168. The writ has been issued to compel the Secretary of the Interior to cause a patent to be issued upon a homestead entry, when no contest or protest proceeding had been initiated and no departmental order made for the pur-

urer to pay a judgment of the Court of Claims.[5] No mandamus will issue to enforce specific performance of a contract with the United States which has been repudiated by an act of Congress.[6] It has been held that a writ of mandamus, addressed to the Commissioner of Patents, is the proper remedy to compel the transmission to the Board of Examiners in Chief of an appeal, which the primary examiner has refused to allow; and that, in such a case, a writ should not issue to the Court of Appeals for the District of Columbia, which has dismissed, for want of jurisdiction, an appeal.[7]

pose of challenging the validity of the entry within two years from the issue of the final receiver's receipt, although an adverse report by a deputy supervisor of a National Forest challenging such entry for insufficiency of residence and cultivation had been filed in the General Land Office within the two years but not acted upon until after the time had expired. Lane v. Hoglund, 244 U. S. 174. The writ will issue to compel the Interstate Commerce Commission to entertain a complaint which it has dismissed under the belief that it is beyond its jurisdiction. Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Co., 224 U. S. 474, 56 L. ed. 849; U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638. To compel the Interstate Commerce Commission to receive proof as to the present cost of condemnation and damages, or purchase, of the land, rights of way and terminals owned by a railroad and to report thereupon in accordance with the Act of March 1, 1913, ch. 92 (37 St. at L. 701). U. S. ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission, 252 U. S. 178.

5 Roberts v. U. S., 176 U. S. 221, 44 L. ed. 443. There is a dictum by Mr. Justice Daniel to the effect that no mandamus will issue "to command the withdrawal of a sum or sums of money from the Treasury of the United States to be applied in satisfaction of disputed or controverted claims against the United States." U. S. ex rel. Goodrich v. Guthrie, 17 How. 284, 303, 15 L. ed. 102, 105. In an English case, Lord Chief Justice Denman said: "If, as has been suggested, it should on any occasion be unsafe with reference to the public service to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the Lords Commissioners would be bound to apply the money to particular purposes of a more pressing nature." The King v. The Lord Com'rs of the Treasury, 4 Ad. & El. 286, 295; cited by Lamar, J., in U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 644, 34 L. ed. 811, 814.

6 U. S. ex rel. Levey v. Stockslager, 129 U. S. 470, 478, 32 L. ed. 785, 787.

7 *Ex parte* Frasch, 192 U. S. 566, 48 L. ed. 564.

§ 459. Practice on application for mandamus. In the Supreme Court of the United States, the usual practice on an application for a mandamus is to issue a rule addressed to the judge or judges of the lower court calling on him or them to show cause why the writ should not issue against him.[1] The rule may also be addressed to the lower court itself.[2] The rule is only issued upon a petition verified by affidavit, showing an apparent right to the writ.[3] The party at whose relation the writ is issued must show an interest in the relief sought;[4] and should allege his citizenship.[5] He is not obliged to obtain the intervention of the Attorney-General or a district attorney.[6] It is the safer practice to move *ex parte* for leave to file the petition.[7] The return cannot be amended on the motion of a person to whom the writ is not addressed.[8]

An application for a mandamus to enforce payment of a judgment of a court of the United States is ancillary to the original action and within the jurisdiction of the Federal court, irrespective of the citizenship of the parties.[9]

It has been held that, upon an application based upon a statute of the United States, the State practice should not be followed; but that the practice remains substantially as at common law.[10] It has been said that the practice should conform to that upon an application for a *scire facias*.[11]

§ 459. 1 Postmaster-General v. Trigg, 11 Pet. 173, 9 L. ed. 676; *Ex parte* Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853.

2 Hollon Parker Petitioner, 131 U. S. 221, 33 L. ed. 123.

3 Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; *Ex parte* Taylor, 14 How. 3, 14 L. ed. 302; Postmaster-General v. Trigg, 11 Pet. 173, 9 L. ed. 676.

4 *Ex parte* Fleming, 2 Wall. 759, 17 L. ed. 924; Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945; People v. Colorado Cent. R. Co., 42 Fed. 638.

5 People v. Colorado Cent. R. Co., 42 Fed. 638, 641.

6 U. P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; s. c. as Hall v. Union P. R. Co., 3 Dill. 515; U. S. v. U. P. R. Co., 91 U. S. 72, 23 L. ed. 224.

7 Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Farmers' L. & Tr. Co., Petitioner, 129 U. S. 206, 32 L. ed. 656.

8 *Ex parte* Harmon, 131 U. S. Appendix, lxvii.

9 Tucker v. Hubbert, C. C. A., 196 Fed. 849.

10 U. S. v. U. P. R. Co., 2 Dill. 527; Evans v. Yost, C. C. A., 255 Fed. 726.

11 Evans v. Yost, C. C. A., 255 Fed. 726, *infra*, § 469.

It is, however, safer to comply also with the regulations of the State practice.[12] The rule in the State of Washington, that, in case of the refusal of the treasurer of a municipal corporation to pay a warrant, the holder cannot sue the municipality, but his sole remedy is a mandamus to compel the levy of a tax, does not bind the Federal courts there held, and the holder of the warrant may recover a judgment at law as preliminary to an application for a mandamus.[13]

A State statute forbidding a mandamus to enforce a judgment against a municipal corporation has been held not to deprive the Federal court of jurisdiction.[14] Where mandamus is sought to compel the payment of a judgment against a municipal corporation, performance should be first made of all conditions precedent required by State statutes, such as the issue of an execution and its return unsatisfied,[15] and service of the judgment upon such officers as the State statute requires.[16] It seems that a formal demand for payment of the judgment is, except when the statutes of the State require it, not a condition precedent to the issue of the writ.[17] A demand for payment of a judgment is equivalent to a demand for the levy of a tax to pay it.[18] The filing of a certificate of the judgment with a city clerk in Montana was held to be a sufficient demand.[19]

The remedy is a common law writ.[20] A bill in equity praying for its issue to correct certain tax assessments cannot be sus-

12 Wisdom v. Memphis, 2 Flip. 285; Stewart v. Justices of St. Clair Co. Court, 47 Fed. 482, 484, quoted *supra*, § 455.

13 First Nat. Bank of Central City v. City of Port Townsend, Wash., C. C. A., 184 Fed. 574.

14 Hart v. New Orleans, 12 Fed. 292; New Orleans v. Morris, 3 Woods, 103, 115. "A mandamus to collect a tax for the payment of a judgment is process in execution, and nobody heretofore has ever questioned the power of a court to control its own process." Memphis v. Brown, 97 U. S. 300, 24 L. ed. 924, per Story, J.

15 Riggs v. Johnson County, 6 Wall. 166, 18 L. ed. 768; Weber v. Lee County, 6 Wall. 210, 18 L. ed. 781; Lansing v. County Treasurer, 1 Dill. 522; Laird v. Mayor of De Soto, 25 Fed. 76.

16 Moran v. Elizabeth, 9 Fed. 72.

17 U. S. v. Elizabeth, 9 Rep. 232; U. S. v. Auditors of Brooklyn, 8 Fed. 473; U. S. v. New Orleans, 17 Fed. 483.

18 U. S. ex rel. Masslich v. Saunders, C. C. A., 124 Fed. 124.

19 Mayor, etc., of Helena v. U. S. ex rel. Helena Waterworks, C. C. A., 104 Fed. 113.

20 Assessor of Vernon Parish v. Gould, C. C. A., 210 Fed. 894.

tained upon the equity side of the court.[21] The application should be by a verified petition, which may be also termed an information or complaint.[22] Such petition should state the citizenship of the petitioner[23] and contain a correct, uncolored statement of the matter concerning which it seeks relief.[24]

The writ of mandamus is either peremptory or alternative.[25] The peremptory writ requires the defendant absolutely to obey its commands. The alternative writ directs him either to obey or to show cause to the contrary upon the day fixed for its return.[26]

Except under extraordinary circumstances, when no defense is possible[27] a peremptory writ cannot issue without notice to the respondent.[28]

The alternative writ should state the averments of title or right which form the inducement of the writ, and should be in conformity with the legal obligation of the respondent.[29] A peremptory writ has, however, been granted from the return of a citation to show cause to the contrary without any alternative writ.[30]

The writ and other proceedings upon an application for a mandamus to compel the levy of a tax under a judgment against a public corporation should ordinarily be addressed by name to the officers whose duty it is to act, and also describe them in their official capacity.[31] A mandamus is sufficient when merely addressed to a public officer by his official title without naming him,[32] although the corporation has another title under

21 Ibid.

22 Poultney v. La Fayette, 12 Pet. 472, 9 L. ed. 1161; U. S. v. Union P. R. Co., 2 Dill. 527. See High on Extr. Rem., Part I, ch. viii.

23 People v. Colorado Cent. R. Co. 42 Fed. 638, 641.

24 *Ex parte* Slater, 246 U. S. 128.

25 U. S. ex rel. Fisher v. Board of Directors of Public Schools, C. C. A., 229 Fed. 1.

26 Ibid.

27 Commissioners of Santa Fe County v. Territory of New Mexico ex rel. Coler, 215 U. S. 296.

28 Fairbanks v. Amoskeag Nat. Bank, 3 Fed. 602.

29 People v. Colorado Cent. R. Co., 42 Fed. 638, 644.

30 Clearwater County v. Pfeffer, C. C. A., 236 Fed. 183.

31 Thompson v. U. S., 103 U. S. 480, 484, 26 L. ed. 521, 523; The Mayor v. Lord, 9 Wall. 409, 19 L. ed. 704. For a form of the mandatory part of the writ see Cleveland v. U. S., C. C. A., 111 Fed. 341, 349; Bunch v. U. S., C. C. A., 252 Fed. 673.

32 Thompson v. U. S., 103 U. S.

which its charter gives it power to be suit.[33] The writ may also be addressed to the corporation itself, as in the case of a county.[34] When the clerk has acted in obedience to an erroneous order of his court, it is irregular to make the clerk and not the court and judge a party to the application.[35] When the action sought to be corrected is that of a single judge he should be the respondent.[36] It is proper to unite as respondents to the proceedings for the writ, all the officers whose action is necessary to the levy of the tax, although some of them have not refused to act.[37] Where parts of a county have been detached by a statute providing that they bear their respective proportions of its indebtedness, the counties to which those portions are annexed are not necessary parties to an application for a mandamus to compel the commissioners of the original county to levy a tax to pay the same.[38] When a State statute provides that service of process against a public board may be made upon its clerk, service of the writ upon that clerk will be sufficient to justify the punishment of the individual members of the board for contempt if they disobey.[39] An alternative writ of mandamus commanding certain designated officials and "such persons as may be elected to fill vacancies in the board of revision and assessment" to do certain acts was held bad on demurrer, as showing that some against whom it was directed had no notice and were not ascertained.[40]

The respondent, if he is unwilling to do the thing directed, under the former practice at least, may raise objections apparent on the face of the application by a motion to quash the alter-

480, 26 L. ed. 521; The Mayor v. Lord, 9 Wall. 409, 19 L. ed. 704. As to the form of the writ, see State v. Sullivan, 50 Fed. 593.

33 The Mayor v. Lord, 9 Wall. 409, 19 L. ed. 704.

34 Commissioners v. Sellew, 99 U. S. 624, 25 L. ed. 333.

35 *Ex parte* Abdu, 247 U. S. 27, 29, where the irregularity was disregarded. *Ex parte* U. S., 242 U. S. 27.

36 *Ex parte* U. S., 242 U. S. 27.

37 McKie v. Rose, 140 Fed. 145, affirmed C. C. A., 145 Fed. 584.

38 Commissioners of Santa Fe County v. Territory of New Mexico ex rel. Coler, 215 U. S. 296, 54 L. ed. 202.

39 Commissioners v. Sellew, 99 U. S. 624, 25 L. ed. 333. But see U. S. v. Labette County, 7 Fed. 318.

40 U. S. v. City of Elizabeth, 42 Fed. 45.

native writ,[41] to dismiss the proceeding,[42] or a demurrer.[43] Objections depending upon new matter can only be raised by a return.[44] It has been said that since the new equity rules the decision to quash or a demurrer should be postponed until the hearing on the merits.[45]

A demurrer may be filed to the return.[46] A motion for the writ founded on the record may be treated as such a demurrer.[47] Amendments of the proceedings including the return may be allowed, but not such an amendment as would make an entirely new case.[48] It has been held that an amendment cannot be allowed after the reversal by the Supreme Court of an order granting the writ, when pending the writ of error the judgment has become dormant by the lapse of time under the State statute.[49] It is error to refuse the relator permission to discontinue his application at any time before the final order, even after the return to an alternative writ.[50]

By the common law the return was not traversable.[51] By the statute 9 Anne, ch. 20, a traverse was allowed to the return to a writ of mandamus in proceedings against persons claiming to hold public offices instituted by any person to obtain admission

41 High on Extraordinary Remedies § 459; U. S. v. Postmaster of Buffalo, 221 Fed. 687.

42 *Re* Garrosi, C. C. A., 229 Fed. 363.

43 High on Extraordinary Remedies § 459; U. S. v. Postmaster of Buffalo, 221 Fed. 687.

44 Ibid.

45 U. S. v. Postmaster of Buffalo.

46 U. S. ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165. There, the relators set forth insufficient notice of a motion to strike their names from an enrollment of members of an Indian tribe and the return set forth, upon information and belief, that the relators were not entitled to be placed upon the enrollment. A general demurrer to this answer was overruled, since, if the return was true, the grant of the writ would have been properly followed by a second order of the secretary, on due notice, striking the names of the relators from the roll. U. S. v. Nashville, C. & St. L. Ry., 217 Fed. 254.

47 Supervisors v. Durant, 9 Wall. 736, 19 L. ed. 813; U. S. v. Union Pac. R. Co., 4 Dill. 479; s. c. as Union Pac. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428.

48 People v. Colorado Cent. R. Co., 42 Fed. 638, 644.

49 Brockway v. Oswego, 40 Fed. 612.

50 U. S. ex rel. Coffman v. Norfolk & W. Ry. Co., C. C. A., 118 Fed. 554.

51 Enfield v. Hills, 2 Lev. 236, 238; Lunt v. Davison, 104 Mass. 498; High on Extr. Rem., § 457.

or restoration to office or to the franchise of being burgess or freeman.

The issues must be tried by a jury,[52] and the proceedings must be in accordance with the practice at common law.[53] A reference to a master of the issues, or of the return, and the exceptions thereto, is error.[54]

Where the duty sought to be enforced is one neglected by a public corporation or a court,[55] and not the purely personal default of a public officer, the death, resignation, or expiration of the term of office of the officer against whom the proceedings are directed will not abate them, and the writ may be issued or enforced against his successor.[56] When the writ or application is based upon the personal default of a public officer, according to the former rule, the proceeding would abate upon his death or his retirement from office.[57] In such a case, if the application is granted, costs will be awarded to the relator, although the public officer acted in good faith under an erroneous view of the law.[58]

By statute it is provided: "That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain

52 Cleveland v. U. S. ex rel. Cunningham, C. C. A., 127 Fed. 667.

53 Ibid.

54 Ibid.

55 Commissioners v. Sellew, 99 U. S. 624, 25 L. ed. 333; Thompson v. U. S., 103 U. S. 480, 485, 26 L. ed. 521, 523; Hollon Parker, Petitioner, 131 U. S. 221, 33 L. ed. 123.

56 Secretary v. McGarrahan, 9 Wall. 298, 19 L. ed. 579; U. S. v. Boutwell, 17 Wall. 604, 21 L. ed. 721; Thompson v. U. S., 103 U. S. 480, 484, 485, 26 L. ed. 521, 523. *Contra*, People ex rel. La Chicotte v. Best, 187 N. Y. 1, 116 Am. St. Rep. 586. The writ may be addressed to the officers and to their successors in office whom it will bind. Hicks v. Cleveland, C. C. A., 106 Fed. 459.

57 Secretary v. McGarrahan, 9 Wall. 298, 19 L. ed. 579; U. S. v. Boutwell, 17 Wall. 604, 21 L. ed. 721; Thompson v. U. S., 103 U. S. 480, 484, 26 L. ed. 521, 523.

58 U. S. v. Schurz, 102 U. S. 407, 26 L. ed. 175.

a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs.''[59] It has been held that this authorizes the continuance of a proceeding, upon an application for a mandamus, against the successor in office of the original respondent.[60] The pendency of a previous application for the same relief, in the same jurisdiction and between the same parties, may be pleaded in abatement.[61]

The issue of a mandamus to compel a railway company to comply with the Interstate Commerce Law does not bar an independent application to the court or Interstate Commerce Commission, by a person similarly situated with the relator, to secure similar relief, although he contributed to the expense of the former application.[62]

The application may be denied for laches.[63] It has been held that a mandamus will not issue to enforce a judgment after the judgment has become dormant according to the State law through the lapse of time, and no execution can issue thereunder.[64]

Delay will not bar the application when in the meantime the applicant has obtained, in accordance with the State practice, judgments renewing the original judgment.[65]

Upon an application for a writ of mandamus to enforce a judgment no question adjudicated by the judgment can be

59 Act of February 8, 1899, c. 121; 30 St. at L. 822.

60 Caledonian Coal Co. v. Baker, 196 U. S. 432, 442, 49 L. ed. 540, 544; *supra*, § 216.

61 U. S. ex rel. Coffman v. Norfolk & W. Ry. Co., 114 Fed. 682.

62 Merchants' Coal Co. v. Fairmont Coal Co., C. C. A., 160 Fed. 769.

63 Matter of Eastern Cherokees, 220 U. S. 83, 55 L. ed. 379, where an application to require the Court of Claims to modify its decree was denied because delayed until after the fund had been distributed. U. S. ex rel. Arant v. Lane, 249 U. S. 361; a delay of twenty months before an application for re-instatement to office.

64 U. S. v. Oswego, 28 Fed. 55; Brockway v. Oswego, 40 Fed. 612; McAleer v. Clay County, 42 Fed. 665; Stewart v. Justices of St. Clair Co. Court, 47 Fed. 482; City of Harper v. Daniels, C. C. A., 211 Fed. 57. But see Amy v. Galena, 7 Fed. 163.

65 Bunch v. U. S., C. C. A., 252 Fed. 163.

questioned;[66] but it is competent to show that the judgment is void.[67] Where the application was made to collect judgments, by process not contained in themselves and requiring, to be sustained, reference to the alleged cause of action upon which they were founded, the aid of the court was denied when the record showed that the judgment rested on no cause of action.[68] A lack of diversity of citizenship between the parties to the original judgment is no defense;[69] not even when the representations concerning the citizenships were false and fraudulent.[70] It is no defense to an application for the writ to compel the issue of a warrant for payment of a judgment in accordance with a State statute that the municipality has no funds to pay it;[71] nor, is it a defense to an application for a writ to compel the levy of a tax which has been unlawfully refused for a period of years that the tax will exceed the statutory limitations.[72] Nor to a proceeding for payment of a judgment out of a particular fund that there are outstanding municipal warrants when it is not shown that they are payable out of such funds or entitled to a preference.[73]

It is no defense to an application for a mandamus to compel the levy of a tax that, since the suit in which was entered the judgment sought to be enforced, a State court has enjoined the levy.[74] Evidence that a special tax has been levied to pay the relator's claim, and that all claims except those of the same

66 Harshman v. Knox County, 122 U. S. 306, 30 L. ed. 1152; Kaill v. Board of Directors of St. Landry Parish, La., C. C. A., 194 Fed. 73; Tucker v. Hubbert, C. C. A., 196 Fed. 849; Estill County, Ky. v. Embry, C. C. A., 144 Fed. 913. It was held to be no defense to an application for a mandamus to compel the payment of a judgment by a parish, that the funds to be collected by it were dedicated by law to educational purposes and were insufficient to maintain the schools. Kaill v. Board of Directors of St. Landry Parish, La., C. C. A., 194 Fed. 73.

67 Moore v. Edgefield, 32 Fed. 498. *Re* Griggs, C. C. A., 233 Fed. 243.

68 Brownsville v. Loague, 129 U. S. 493, 505, 32 L. ed. 780, 784, 505.

69 Bunch v. U. S., C. C. A., 252 Fed. 673.

70 Ibid.

71 Symons v. U. S. ex rel. Masters, C. C. A., 252 Fed. 109.

72 Evans v. Yost, C. C. A., 255 Fed. 726.

73 U. S. v Board of Directors of Public Schools, C. C. A., 229 Fed. 1; Clearwater County v. Pfeffer, C. C. A., 236 Fed. 183.

74 Riggs v. Johnson County, 6 Wall. 166, 18 L. ed. 768.

class have been granted, is irrelevant to an application for a mandamus to compel the issue of bonds to liquidate his judgment.[75] It is no defense to the application that the duties sought to be commanded do not include all the acts requisite to a full satisfaction of the judgment.[76] It seems that *certiorari* and mandamus cannot be joined in one writ.[77] But the petition may pray for these writs in the alternative.[78] An order awarding the writ, which declares that it is for the collection of the amount specified in a judgment, is not fatally defective for failure to specify the amount to be collected.[79]

The writ of mandamus may direct the performance of a series of acts by different persons.[80] A writ of mandamus to compel the levy of a tax may direct the distribution of the tax over a number of years, in order to relieve the taxpayers from hardship.[81] Under the prayer for general relief the writ may be issued to compel the levy of a tax for a different year from that specifically requested.[82]

When relief is granted against a judge it is the usual practice to withhold the issue of the writ until he has had an opportunity to obey the decision after notice thereof.[83] The issue of the writ may also be suspended in a case affecting the rights of a party convicted of a crime in order to afford time for executive clemency.[84] Ordinarily, upon a petition for a mandamus against a judge, costs will not be taxed against him if the writ is granted, although they may be against such other adverse parties as appear and resist the application on the merits.[85]

75 U. S. ex rel. Fisher v. Board of Liquidation, etc., of New Orleans, 60 Fed. 387.

76 Rose v. McKie, C. C. A., 145 Fed. 584, affirming 140 Fed. 145.

77 Fairbanks v. Amoskeag Nat. Bank, 30 Fed. 602.

78 Am. Const. Co. v. Jacksonville T. & K. W. R. Co., 148 U. S. 372; 37 L. ed. 486, *infra*, § 460.

79 Estill County, Ky. v. Embry, C. C. A., 141 Fed. 913.

80 Labette County Com'rs v. U. S., 112 U. S. 217, 28 L. ed. 698; Hicks v. Cleveland, C. C. A., 106 Fed. 459; Bunch v. U. S., C. C. A., 252 Fed. 673.

81 City of Cleveland, Tenn. v. U. S., 166 Fed. 677; City of Harper v. Daniels, C. C. A., 211 Fed. 57.

82 U. S. v. Board of Directors of Public Schools, C. C. A., 229 Fed. 1.

83 *Ex parte* Simons 247 U. S. 231, in which the author was counsel, *Ex parte* Equitable Trust Co., C. C. A., 231 Fed. 574.

84 *Ex parte* U. S., 242 U. S. 27, 52.

85 *Re* Haight & Freese Co., C. C.

Disobedience to the writ is punished by attachment for contempt.[86] Directions in the writ for the performance of acts not authorized by law are void,[87] and disobedience thereto is consequently not punishable.[88] But an error in granting the writ cannot be reviewed in contempt proceedings.[89]

The decision should be reviewed by writ of error, not by appeal.[90] Where the petition was dismissed without prejudice because more relief was requested than the law permitted, the order was affirmed by the Supreme Court which refused to issue a mandate of reversal granting the relief to which the applicant was entitled.[91]

§ 460. Writs of Certiorari. The writ of *certiorari* is a writ issued from a superior to an inferior court, ordering the latter to certify to the former certain proceedings before it.[1] At common law, the writ was issued for two purposes: as an appellate proceeding for the re-examination of some action of an inferior tribunal; and as auxiliary process to enable a court to obtain further information in respect to some matter already before it for adjudication.[2]

It seems that the writ can be issued from a Federal court other than the Supreme Court and the Circuit Court of Appeals, only for the latter purpose.[3]

The Supreme Court may grant the writ of *certiorari*, when

A., 164 Fed. 688. In which the author was counsel, where the adverse parties were relieved from costs because they merely appeared and moved to dismiss upon the ground that the order complained of had been vacated subsequent to the application and the writ had become unnecessary.

86 Commissioners v. Sellew, 99 U. S. 624, 25 L. ed. 333; U. S. v. Lee County, 2 Biss. 77.

87 U. S. v. Sup'rs of Labette County, 7 Fed. 318; President v. Mayor, etc. of Elizabeth, 40 Fed. 799; People v. Colorado Cent. R. Co., 42 Fed. 638, 644.

88 U. S. v. Sup'rs of Labette County, 7 Fed. 318; President v. Mayor, etc., of Elizabeth, 40 Fed. 799; People v. Colorado Cent. R. Co., 42 Fed. 638, 644.

89 Evans v. Yost, C. C. A., 255 Fed. 726.

90 Muhlenberg County v. Dyer, C. C. A., 65 Fed. 634; Evans v. Yost, C. C. A., 255 Fed. 726.

91 U. S. v. Louisville & N. R. R., 236 U. S. 318.

§ 460. 1 U. S. v. Young, 94 U. S. 258, 259, 24 L. ed. 153. See Harris v. Barber, 129 U. S. 366, 369, 32 L. ed. 697, 699.

2 U. S. v. Young, 94 U. S. 258, 259, 24 L. ed. 153.

3 U. S. R. S., § 716; U. S. v. Young, 94 U. S. 258, 260, 24 L. ed. 153; *Ex parte* Van Orden, 3 Blatchf.

the circumstances imperatively demand that form of interposition at common law to correct excesses of jurisdiction and in furtherance of justice.[4] The power of the Supreme Court to issue writs of *certiorari* addressed to the Circuit Courts of Appeals is not limited to the provisions of the Evarts Act as subsequently re-enacted in the Judicial Code.[5]

The Supreme Court may order by *certiorari* or otherwise any case in which the decision of the Circuit Court of Appeals is made final "to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."[6] Such a *certiorari* has been granted after the decision of the Circuit Court of Appeals.[7] In an extraordinary case, it may issue to review the decision of the lower court upon an appeal from an interlocutory order.[8] This was done where one of the judges below was disqualified from sitting in the case.[9] "This branch of our jurisdiction should be exercised sparingly, and with great caution."[10] The inquiry upon such an application is "whether the matter is of sufficient importance in itself and sufficiently open to controversy" to justify the writ.[11] The Supreme Court has the same power to review decisions of the Court of Customs Appeals,[12] Court of Appeals of the District of Columbia,[13] the Supreme Court of

166; *Re* Martin, 5 Blatchf. 303; Fowler v. Lindsey, 3 Dall. 411, 1 L. ed. 658.

4 Am. Construction Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 380, 37 L. ed. 486, 489; *Re* Chetwood, 165 U. S. 443, 461, 462, 41 L. ed. 782, 788; *Re* Tampa Suburban R. R. Co., 168 U. S. 583, 42 L. ed. 589; Whitney v. Dick, 202 U. S. 132, 140, 50 L. ed. 963, 966; McClellan v. Carland, 217 U. S. 268; U. S. v. Beatty, 232 U. S. 463.

5 Ibid, see U. S. R. S., § 716, Jud. Code, § 262, 36 St. at L. 1087.

6 Jud. Code, § 240, 36 St. at L. 1087, re-enacting 26 St. at L., § 6, p. 828. See *infra*, Chapter on Error and Appeals, § 689.

7 Lau Ow Bew, Petitioner, 141 U. S. 583, 35 L. ed. 868, per Fuller, C. J.

8 Amer. Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 387, 388, 37 L. ed. 486, 492. But see *Re* Tampa Suburban R. Co., 168 U. S. 583, 42 L. ed. 589.

9 Amer. Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 37 L. ed. 486.

10 Lau Ow Bew, Petitioner, 141 U. S. 583, 589, 35 L. ed. 868, 870, per Fuller, C. J.

11 Lau Ow Bew, Petitioner, 141 U. S. 583, 587, 35 L. ed. 868, 869, per Fuller, C. J.

12 36 St. at L. 115-9.

13 Code Dec. 234; 29 St. at L.

Porto Rico,[14] the Supreme Court of Hawaii,[15] and the Supreme Court of the Philippines.[16]

"It shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause where in a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."[17]

If the record sent up on appeal or writ of error is incomplete, it may be corrected by *certiorari*.[18] It has been said that proceedings that have taken place since the appeal or writ of error cannot be thus removed;[19] but the Supreme Court has thus reviewed proceedings to punish a person for contempt in suing out a writ of error and also an order forbidding the further prosecution of the writ of error.[20] Perhaps, other contempt proceedings may be thus reviewed.[21] An omission to make a

692; Winston v. U. S., 171 U. S. 690; s. c., 172 U. S. 303, 43 L. ed. 456; Sinclair v. District of Columbia, 192 U. S. 16, 21, 48 L. ed. 322, 325, *infra*, § 691.

14 38 St. at L. 804, *infra*, § 691.

15 Ibid.

16 39 St. at L. 727, Comp. St., § 1225b, *supra*, § 72, *infra*, § 691.

17 Act of Sept. 6, 1916, ch. 448, § 2, 39 St. at L. 726; Comp. St., § 1214; See *infra*, § 692.

18 U. S. v. Gomez, 1 Wall. 690, 17 L. ed. 677; The Rio Grande, 19 Wall. 178, 22 L. ed. 60; Field v. Milton, 3 Cranch, 514, 2 L. ed. 516.

19 U. S. v. Young, 94 U. S. 258, 24 L. ed. 153; U. S. v. Adams, 9 Wall. 661, 19 L. ed. 808.

20 *Re* Chetwood, 165 U. S. 443, 453, 462, 41 L. ed. 782, 785, 788.

21 Ibid.

finding cannot be thus corrected.[22] The Supreme Court may by order require the Court of Claims to find a specific fact.[23] An error in a bill of exceptions cannot be thus corrected;[24] although the judge who settled the same may himself do so.[25]

The Supreme Court has no original jurisdiction to issue a writ of *certiorari* to examine the proceedings of a military commission.[26] It has been said that the Supreme Court has no power to review by *certiorari* the proceedings of an inferior tribunal which has been abolished.[27]

The Circuit Courts of Appeals may grant the writ of *certiorari* when necessary for the exercise of their appellate jurisdiction.[28]

A Circuit Court of Appeals cannot issue the writ to review an order of the Circuit Court of Appeals which is not appealable;[29] nor, except in an extraordinary case where the order sought to be reviewed was ultimately reviewable by repeal.[30] The writ was denied when requested to compel the amendment of a bill of exceptions after the statutory time had expired.[31]

Any court of the United States may issue a writ of *certiorari* as ancillary to a writ of *habeas corpus*,[32] but its refusal so to do is not the subject of review.[33]

22 U. S. v. Adams, 9 Wall. 661, 19 L. ed. 808.

23 U. S. v. Adams, 9 Wall. 661, 19 L. ed. 808.

24 Stimpson v. Westchester R. Co., 3 How. 553, 11 L. ed. 722. But see Morgan v. Curtenius, 19 How. 8, 15 L. ed. 576.

25 Stimpson v. Westchester R. Co., 3 How. 553, 11 L. ed. 722, *infra*, § 479.

26 *Ex parte* Vallandigham, 1 Wall. 243, 17 L. ed. 589; *Re* Videl, 179 U. S. 126, 45 L. ed. 118. In a proper case the writ might possibly issue for that purpose by the Supreme Court of the District of Columbia. See Garling v. Van Allen, 55 N. Y. 31; People ex rel. Smith v. Hoffman, 166 N. Y. 462; People ex rel. Higgins v. Stotesbury, 182 App. Div. N. Y. 691.

27 *Re* Vidal, 179 U. S. 126, 45 L. ed. 118.

28 Jud. Code, § 262.

29 U. S. ex rel. Montana O. P. Co. v. Circuit Court, C. C. A., 126 Fed. 169.

30 Lovell-McConnell Mfg. Co. v. Bindrim, C. C. A., 219 Fed. 533; *Re* Garrosi, C. C. A., 229 Fed. 363. See *Re* Cogan, C. C. A., 228 Fed. 192.

31 Kerrch v. U. S., C. C. A., 171 Fed. 365.

32 *Ex parte* Burford, 3 Cranch, 448, 2 L. ed. 495; *Ex parte* Bollman, 4 Cranch, 75, 2 L. ed. 554; *Re* Martin, 5 Blatchf. 303; *Ex parte* Stupp, 12 Blatchf. 501. See *infra*, § 466.

33 Hyde v. Shine, 199 U. S. 62, 80, 50 L. ed. 90, 97.

A District Court of the United States has statutory power to issue the writ to a State court requiring the latter to make return of the record in a suit which has been removed.[34] In case of the removal of a civil suit or criminal prosecution against an officer of the United States the clerk of the District Court [35] or in his absence a deputy [36] must issue the writ for the same purpose. It has been said that a District Court may review by *certiorari* proceedings pending before a United States commissioner without the writ of *habeas corpus*.[37] Such a court cannot thus review the findings of steamboat inspectors; [38] nor the classification by a local board of a registrant under the Selective Service Act; [39] nor the findings of a commissioner which it has no power to correct.[40] The power of a District Court to issue the writ when it is not used in aid of its jurisdiction is doubtful.[41]

It may be that the Supreme Court of the District of Columbia has power to review by *certiorari* in a proper case, a decision of a *quasi* judicial nature made by an officer of the United States at Washington,[42] such as the assessment of an income tax.[43] The decision of the Postmaster General that an order should issue excluding matter from the mails for fraud cannot be thus reviewed.[44]

It seems that *certiorari* and mandamus cannot be joined in one writ,[45] but the petition may pray for these writs in the

34 18 St. at L. 470; 25 St. at L. 433; *infra*, § 551.

35 State v. Sullivan, 50 Fed. 593.

36 It has been held that its address to the United States marshal directing him to make known to the clerk of the State court the removal of the cause, and that such court is required to send a transcript of its record to the Circuit Court, does not invalidate the writ. Ibid.

37 U. S. v. Berry, 4 Fed. 779.

38 Fredenberg v. Whitney et al., 240 Fed. 819.

39 Angelus v. Sullivan, C. C. A., 246 Fed. 54. *Re* Kitzerow, 252 Fed. 865; *Ex parte* Platt, 253 Fed. 413. U. S. ex rel. Roman v. Rauch, 253 Fed. 814; Brown v. Spelman, 255 Fed. 863.

40 *Ex parte* Van Orden, 3 Blatchf. 166. See Patterson v. U. S., 2 Wheat. 221, 4 L. ed. 224.

41 U. S. ex rel. Roman v. Rauch, 253 Fed. 814.

42 Alexandria C. R. & Br. Co. v. District of Columbia, 5 Mackey (D. C.), 376; Wood v. District of Columbia, 6 Mackey (D. C.), 142.

43 Degge v. Hitchcock, Postmaster General, 229 U. S. 162. See *supra*, § 101. See *supra*, §§ 68, 103 Foster's Income Tax, § 118.

44 Fairbanks v. Amoskeag Nat. Bank, 30 Fed. 602.

45 Amer. Const. Co. v. Jackson-

alternative.[46] Upon a petition for a writ of *certiorari* or mandamus, and a motion thereon argued on a notice, where the right to a writ of *certiorari* was doubtful, the Supreme Court directed the entry of a rule to show cause why the writ should not issue for a single purpose only.[47]

The grant of the writ depends on the discretion of the court.[48] A preliminary inquiry into a jurisdictional fact may be directed by the court before passing on the application for the writ.[49] The issue of the writ operates as a supersedeas from the time of its service or formal notice of its issue until the court of review has finally disposed of the proceeding.[50]

The return of the writ of *certiorari* should be by the clerk under his hand and the seal of the court.[51] The return need not be signed by the judge.[52]

Where an appeal and a petition for a writ of *certiorari* were both pending before the court, and the appeal was dismissed, but the writ allowed; the record on appeal was treated as a return to the *certiorari*.[53] "A writ of *certiorari*, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up, after judgment, the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error. Although the granting of the writ of *certiorari* rests in the discretion of the court, yet after the writ has been granted and the record certified in obedience thereto, the questions

ville, T. & K. W. R. Co., 148 U. S. 372, 37 L. ed. 486; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 235 U. S. 383.

46 Am. Const. Co. v. Jacksonville T. & K. W. R. Co., 148 U. S. 372, 37 L. ed. 486.

47 *Ex parte* Hitz, 111 U. S. 766, 28 L. ed. 592.

48 *Re* Baiz, 135 U. S. 403, 531, 34 L. ed. 222, 231, per Fuller, C. J., citing *Ex parte* Hitz, 111 U. S. 766, 28 L. ed. 592.

49 Waskey v. Hammer, C. C. A., 179 Fed. 273.

50 Fennemore v. U. S., 3 Dall. 357, 360, all note, 1 L. ed. 634, 635.

51 Stewart v. Ingle, 9 Wheat. 526, 6 L. ed. 151.

52 Farrell v. O'Brien, 199 U. S. 89, 50 L. ed. 101. See Lovell-McConnell Mfg. Co. v. Automobile Supply Co., 235 U. S. 383.

53 Gray, J., in Harris v. Barber, 129 U. S. 360, 369, 32 L. ed. 697, 699; Amer. Const. Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 387, 37 L. ed. 486, 492.

arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error.''[54] The court confines its consideration to the matter relied upon in procuring the writ.[55] It has been said that the writ furnishes the court no wider range of determination upon the sufficiency of the facts shown to warrant an extradition than does the writ of *habeas corpus*.[56]

§ 461. Writs of habeas corpus. In general. The writ of *habeas corpus* is a high prerogative writ known to the common law, directing the production of a prisoner before a court or magistrate, the great object of which is the liberation of those who may be imprisoned without sufficient cause.[1] It is then termed a writ of *habeas corpus ad subjiciendum*.[2] There were also by the common law four other writs of *habeas corpus:* the *habeas corpus ad respondendum; ad satisfaciendum;* and *ad faciendum et recipiendum*, which removed a prisoner for debt from an inferior to a superior court for further proceedings in the same or a subsequent action;[3] and the *habeas corpus ad prosequendum, testificandum, deliberandum*, which removed a prisoner for debt or crime in order to prosecute or testify in another court.[4] The *habeas corpus cum causa* is used in the removal of criminal proceedings from the State courts to a District Court of the United States.[5]

The Supreme Court, and the District Courts of the United States have power to issue the writ of *habeas corpus*.[6]

''The Supreme and District Courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the

54 Alice State Bank v. Houston Pasture Co., 247 U. S. 240.

55 *Re* Lincoln, 202 U. S. 178, 50 L. ed. 984.

56 Ibid.

§ 461. 1 *Ex parte* Watkins, 3 Pet. 193, 202, 7 L. ed. 650, 653.

2 3 Bl. Com. 131.

3 3 Bl. Com. 129, 130; *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cranch, 75, 97, 2 L. ed. 554, 562.

4 Bl. Com. 130; *Ex parte* Bollman and *Ex parte* Swartout, 4 Cranch, 75 97, 2 L. ed. 554, 562; *Re* Leo Hem Bow, 47 Fed. 302; *Ex parte* Peck, 3 Blatchf. 123; U. S. v. Tilden, 10 Ben. 566; *supra*, § 343.

5 U. S. R. S., §§ 642, 643; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386; *infra*, §§ 551, 552. In certain cases the clerk, and even, it has been held, his deputy can issue such a writ without an order of the court. State v. Sullivan, 50 Fed. 593.

6 U. S. R. S., § 751.

District Courts of the United States, and the District Courts may grant writs of mandamus in all proper cases."[7]

A Circuit Court of Appeals has no such power, except, perhaps, as an incident to some case otherwise before it.[8] It has been held that a Circuit Court of Appeals has no jurisdiction to issue a writ of *habeas corpus* for service outside of the Circuit in which it sits, although its jurisdiction is invoked thus to review the decision of the District Court of a territory within its circuit.[9]

Except in cases affecting ambassadors, other public ministers, or consuls, or possibly upon the application of a State, the Supreme Court can only issue the writ of *habeas corpus* for a review of the judicial decision of some inferior officer or court.[10] Consequently, the Supreme Court cannot issue the writ to inquire into the legality of an arrest by a municipal police officer under a warrant issued by a State or municipal police judge.[11] Any Justice or judge of any of those courts has power to issue a writ of *habeas corpus* for the purpose of an inquiry into the cause of a restraint of liberty within its jurisdiction.[12] A Justice of the Supreme Court may grant the writ and hear argument on the return in any part of the United States.[13]

No Federal court or judge has power to discharge by a writ of *habeas corpus* a prisoner in jail, unless such prisoner is in custody under or by color of the authority of the United States; or is committed for trial before some court of the United States; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or a law or treaty of the United States; or, being a revenue officer of the United States, is in custody on account of any act done or omitted under color of his office or under color of any revenue law; or, being a subject or citizen

7 Act of March 2, 1917, ch. 145, § 48, Comp. St. § 3803u.

8 Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963.

9 *Re* Boles, 48 Fed. 75.

10 *Ex parte* Hung Hang, 101 U. S. 552, 27 L. ed. 811; *Ex parte* Barry, 2 How. 65, 11 L. ed. 181.

11 *Ex parte* Hung Hang, 108 U. S. 552, 27 L. ed. 811.

12 U. S. R. S., § 752.

13 *Ex parte* Clarke, 100 U. S. 399, 401, 25 L. ed. 715, 716.

of a foreign State and domiciled therein, is in custody for an act done or omitted under an alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign State or under color thereof, the validity and effect of which depends upon the law of nations; or unless the writ is necessary to bring the prisoner into court to testify.[14]

It is doubtful whether a District Court has any authority to release by *habeas corpus* a prisoner held under the judgment of another court of the United States.[15]

An Indian may obtain the writ in a proper case.[16] A proceeding upon an application for the writ of *habeas corpus* cannot be removed from a State to a Federal court.[17]

§ 461a. Jurisdiction to grant the writ of habeas corpus because of difference of citizenship. The District Courts of the United States may take jurisdiction by *habeas corpus* when there is no controversy arising under the Constitution or laws of the United States, but there is a difference of citizenship between the parties,[1] provided that the value of the method in dispute exceeds the jurisdictional amount but not otherwise.[2] It has been held that they can then inquire into the legality of the imprisonment, but cannot exercise any discretion in the capacity of *parens patriæ* as to the place or character of the confinement.[3] That the right to the custody of a child may be thus determined when the necessary difference of citizenship exists,[4]

14 U. S. R. S., §§ 753, 641, 643. See also 18 St. at L. 157.

For the history of this legislation, see *Re* Burrus, 136 U. S. 586, 589, L. ed. 500, 501, per Miller, J.; and a note by Ex-Judge S. D. Thompson, 18 Fed. 70.

15 *Re* Eaton, 51 Fed. 804, 806; Cooley v. Morgan, C. C. A., 221 Fed. 252.

16 U. S. v. Cook, 5 Dillon 453.

17 Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458.

§ 461a. 1 Bennett v. Bennett, Deady 299; U. S. v. Savage, 91 Fed. 490; King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 26 L. R. A. 784, 64 Fed. 331. But see *Re* Burrus, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514; Matters v. Ryan, 249 U. S. 375.

2 Matters v. Ryan, 249 U. S. 375.

3 King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 26 L. R. A. 784, 64 Fed. 331. See *supra*, § 81.

4 Bennett v. Bennett, Deady, 299; U. S. v. Savage, 91 Fed. 490. See also U. S. v. Green, 3 Mason, 482; U. S. ex rel. Wheeler v. Williamson, 4 Am. L. Reg. 5; *Re* Burrus, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514; Matters v. Ryan, 249 U. S. 375. *Contra, Ex parte* Evert, 1 Bond.

but not where a proceeding previously instituted is pending to determine the same question in a State court of competent jurisdiction.[5]

§ 461b. Writs of habeas corpus issued by State courts. A State court has not the power to grant a writ of *habeas corpus* to a person held under color of authority from the United States.[1] When such a writ is issued by a State court, the person to whom it is directed should make a return stating that he holds the prisoner under the authority of the United States, but otherwise disregard the writ.[2] A State court may by a writ of *habeas corpus* examine the legality of the detention of a prisoner by a person appointed by the governor of a State in extradition proceedings.[3]

§ 461c. The writ of habeas corpus ad subjiciendum. The writ of *habeas corpus ad subjiciendum* cannot be issued in favor of a person unless he is actually restrained of his liberty, or is threatened with such restraint by a person with the present means of enforcing it.[1] Mere moral duress is insufficient.[2] The validity of his conviction of crime cannot be thus tested by a person who has been pardoned and is not restrained of his liberty, although he has refused to accept such pardon.[3] The writ will be denied, where the relator is at large on bail,[4] where it appears that the applicant was surrendered by his bail, who

197; *Re* Barry, 42 Fed. 113; s. c., How. 65, 11 L. ed. 181; cited in argument of counsel in Barry v. Mercein, 5 How. 103, 104, 12 L. ed. 70, 71; Clifford v. Williams, 131 Fed. 100.

5 Hoadley v. Chase, 126 Fed. 818.

§ 461b. 1 Ableman v. Booth, 21 How. 506, 16 L. ed. 169; Tarble's Case, 13 Wall. 397, 20 L. ed. 597.

2 Ableman v. Booth, 21 How. 506, 16 L. ed. 169.

3 Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542; Roberts v. Reilly, 116 U. S. 80, 94, 29 L. ed. 544, 548.

§ 461c. 1 Wales v. Whitney, 114 U. S. 564, 572, 29 L. ed. 277.

2 Thus, when the party seeking the writ was a naval officer in Washington, and the basis of his application was a letter from the Secretary of the Navy inclosing charges against him, together with a notice of the session of a court-martial to consider them, and concluding, "You are hereby placed under arrest, and you will confine yourself to the limits of Washington;" it was held that the petitioner was not under such restraint as to warrant the issue of the writ. Wales v. Whitney, 114 U. S. 564, 29 L. ed. 277.

3 *Re* Callicot, 8 Blatchf. 89.

4 Sibray v. U. S. ex rel. Kupples, C. C. A., 185 Fed. 401. See Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497.

acted in collusion with him, merely for the purpose of suing out the writ, his restraint being merely nominal;[5] when he has given an undertaking and is on the jail limits, which comprise an entire county;[6] and where it appears to the satisfaction of the court that the arrest was made by collusion with him, for the purpose of summarily testing a question of jurisdiction.[7] It has been held, however, that an appeal from an order denying the writ will not be dismissed because the petitioner, pending the appeal, was admitted to bail.[8]

§ 461d. The writ of habeas corpus ad testificandum. The writ of *habeas corpus ad testificandum* is issued to remove a prisoner in order that he may testify in court.[1] This writ is not the high prerogative writ for deliverance from unlawful imprisonment but merely the ancient precept of the common law to bring a prisoner into court to testify.[2] It is a process of the court with an object analogous to that sought to be obtained by a subpœna to a *duces tecum*.[3]

When this writ does not direct the production of the prisoner before the judge who grants it, may be quashed by any other judge of the court.[4] This should be done when the witness is insane and incompetent to testify,[5] and is usually done when the law permits his testimony to be taken by deposition.[6]

§ 461e. Habeas corpus to protect officers of the United States. The Supreme Court and the District Court of the United States have power to issue the writ of *habeas corpus* "where a prisoner is in custody, under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or a judge thereof."[1] This provision of the Revised Statutes

5 *Re* Gow, 139 Cal. 242, 73 Pac. 145. *Contra, Re* Grice, 79 Fed. 627.

6 People ex rel. Smith v. Biggart, 25 App. Div. 20.

7 *Ex parte* Simon, 208 U. S. 144, 52 L. ed. 429, in which the author was counsel.

8 MacKenzie v. Barrett, C. C. A., 141 Fed. 964.

§ 461d. 1 Blackstone's Comm. III, 130.

2 *Re* Thaw, C. C. A., 166 Fed. 71, 74.

3 Ibid.

4 Ibid.

5 Ibid. 166 Fed. 71, 75.

6 *Re* Thaw, 172 Fed. 288, Oct. 1906.

§ 461e. 1 U. S. R. S., § 753, Comp. St. § 1281.

is a re-enactment of the Act of March 2, 1833, which was occasioned by the controversy growing out of the nullification laws of South Carolina when Federal customs officers were arrested for the performance of their duties in collecting the revenue of the United States there.[2] "In case of a suit or prosecution in a State court against a revenue officer of the United States, or a person acting under or by authority of any such officer on account of any right, title, or authority claimed by such officer or other person under a revenue law of the United States or against any person holding property or estate by title derived from any such officer and the validity of any such revenue law is thereby affected; or against any officers of the courts of the United States for or on account of any act done under color of his officer or in the performance of his official duties or when any suit or prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such house; when commenced by *capias* or by any similar form of proceeding by which a personal arrest is ordered and a proper petition for the removal of the cause is filed: the clerk of the District Court of the United States must issue a writ of *habeas corpus cum causa* under which it is the duty of the marshal to take the body of the defendant into his custody to be dealt with in the cause according to the law and the order of the District Court, or in vacation of any judge thereof."[3]

An act by an officer of the United States in the discharge of his official duty is done in pursuance of a law of the United States, although there is no express statutory authority for it.[4] Therefore an officer of the United States may be released by the writ of *habeas corpus* when he has been indicted[5] or convicted in a State court for a violation, in the discharge of his official functions, of a State statute which, so far as it applied to

[2] Ch. 57, § 7, 4 St. at L. 634, *Re* Neagle, 135 U. S. 1, 70.

[3] Jud. Code, § 33, 36 S. at L. 1097, as amended 39 St. at L. 532; Comp. St. § 1022. See *infra*, § 551.

[4] *Re* Neagle, 135 U. S. 1, 34 L. ed. 55. See U. S. ex rel. Drury v. Lewis, 129 Fed. 823; *Re* Leaken, 137 Fed. 680.

[5] Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699; *Re* Fair, 100 Fed. 149.

him, the State had no power to enact.[6] Where a Federal court had enjoined the enforcement of a State statute regulating railroad rates, and in its order prescribed conditions for the sale of tickets at prices in excess of those fixed by the act; it was held that a ticket agent imprisoned for the sale of tickets at such prices in the manner prescribed by the order was in custody for an act done in obedience to an order of a court of the United States.[7]

A person imprisoned pursuant to a Territorial law is not in custody under, or by virtue of, the authority of the United States; and upon a writ of *habeas corpus* from a Federal court he is in no better position in this respect than a prisoner convicted by a State court for the violation of a State law.[8]

The Federal court upon the return of the writ has jurisdiction summarily to hear the evidence and if it appears that the acts of which complaint is made were committed under or by color of the authority of the United States finally to dispose of the charges.[9] This has been done when the charge was murder or manslaughter alleged to have been committed by a soldier,[10] or a deputy marshal.[11] When the acts were not committed under or by color of the authority of the United States the writ will be dismissed without any inquiry into the truth of the charges.[12] When there is grave doubt as to whether the act was committed in discharge of official duty, the Federal court may in its discretion dismiss the writ and leave the prisoner to his remedy by writ of error or *certiorari* from the Supreme Court of the United States to the highest State court of review.[13]

6 *Re* Waite, 81 Fed. 359.

7 Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747, affirming 155 Fed. 190.

8 Connella v. Haskill, C. C. A., 158 Fed. 285; Low Wah Suey v. Backus, 225 U. S. 460, 472, 56 L. ed. 1165, 1169.

9 *Re* Neagle, 135 U. S. 1, 34 L. ed. 55, a deputy marshal; Kelly v. Georgia, 68 Fed. 652, a deputy marshal; *Re* Waite, 81 Fed. 359; s. c., C. C. A., 88 Fed. 102, a pension examiner; *Re* Lewis, 83 Fed. 159 (special employees of the Treasury Department); *Re* Fair, 100 Fed. 149, a soldier; *Re* Laing, 127 Fed. 213, a deputy marshal; Lewis v. Lipsett, 156 Fed. 65, a soldier; *Re* Wulzen, 235 Fed. 362, a soldier.

10 *Re* Fair, 100 Fed. 149; Lewis v. Lipsett, 156 Fed. 65; *Re* Wulzen, 235 Fed. 362.

11 *Re* Neagle, 135 U. S. 1, 34 L. ed. 55; Kelly v. Georgia, 68 Fed. 652; *Re* Laing, 127 Fed. 213.

12 *Re* Marsh, 51 Fed. 277.

13 Drury v. Lewis, 200 U. S. 1, 8;

When an officer or soldier of the United States is arrested by State process because of violence used by him in the course of an arrest or an attempt to make an arrest, in order to obtain his discharge before trial he must ordinarily show that he had authority from the United States to make such arrest of a person guilty of an offense against the laws of the United States; that he honestly believed and had reasonable cause to believe that the person he sought to arrest was guilty of such an offense; that he acted without the scope of his authority and used no more force than he honestly and reasonably believed to be necessary in order to make the arrest, and that the case is one of urgency in which the delay by trial in the State court will interfere with the enforcement of the laws of the United States or the operation of the national government.[14]

§ 461f. Habeas corpus to protect those acting under authority of foreign states. The statutory provision extending the privilege of the writ of *habeas corpus* to one who "being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations;"[1] was enacted to prevent criminal prosecutions in the State courts which might interfere with harmony between the United States and foreign relations. Its necessity was shown by the case of Alexander McLeod.[2] This subject of Great Britain was imprisoned and indicted for murder by the Supreme

Castle v. Lewis, C. C. A., 254 Fed. 917.

[14] Castle v. Lewis, C. C. A., 254 Fed. 917, 921.

§ 461f. [1] U. S. R. S., § 753, Comp. St. § 128.

[2] People v. McLeod, 25 Wendell, N. Y., 483; Trial of Alexander McLeod, for the Murder of Amos Durfee; and as an Accomplice in the Burning of the Steamer Caroline, in the Niagara River, during the Canadian Rebellion in 1837-38. Published at the Sun Office, 1841; the Trial of Alexander McLeod for the Murder of Amos Durfee at the Burning and Destruction of the Steamboat Caroline by the Canadians, December 29, 1837. Reported by Marcus T. C. Gould, Stenographer, assisted by H. Fowler, Esq., Stenographer of Canada. Published by Gould, Banks & Co., New York, and William A. Gould, Albany, Nov. 1, 1841. Gould Stenographic Reporter, Vol. II. American State Trials, Vol. II. 61.

Court of the State of New York because in his cups he had bragged that he had taken part in the fire of the steamboat Caroline by a band of Canadians while this boat was employed in carrying ammunition and supplies to a company of insurgents against the Canadian government who were defending themselves upon a navy island on the Canadian side of the Niagara River. In the course of the destruction an American citizen had been killed. The British Foreign Office assumed responsibility for the acts of violence of which complaint was made, and demanded McLeod's return.[3] A report by the Committee on Foreign Relations of the House which severely criticized the language of the British Minister inflamed the situation. This was endorsed by a majority of the house which was Democratic and consequently opposed to the new administration which was about to enter office.[4] At that time the Federal courts had no jurisdiction to interfere. Consequently, McLeod at the suggestion of Daniel Webster, who was then the Secretary of State, applied for the writ to the Supreme Court of the State of New York, where he was represented by the District Attorney of the United States acting in his private capacity. Judge Esek Cowen of that court denied the discharge and held the prisoner for trial.[5] The British Government ordered the mobilization of part of its troops and ships.[6] At the trial, the State of New York was represented by its Attorney-General and the accused again by the District Attorney of the United States. McLeod denied that he had boasted of the act and offered proof of an alibi. This was accepted by the jury, who acquitted him. Judge Cowen's decision was severely criticized by several eminent jurists.[7] It resulted in the passage of the Act of August

3 The official correspondence with a few unimportant omissions may be found in 25 Wendell, N. Y., 487-513.

4 McMaster's History, Vol. II, pp. 612-614.

5 People v. McLeod, 25 Wendell, N. Y., 483.

6 McMaster's History, Vol. II, p. 618.

7 Review of the Opinion of Judge Cowen, of the Supreme Court of the State of New York in the case of Alexander McLeod by Judge Talmadge, and letters by Chancellor Kent and Chief Justice Spencer of New York, Judge Rogers of Pennsylvania, Simon Greenleaf of Massachusetts, author of "Greenleaf on Evidence," Judge Berrien of Georgia, Chief Justice Clayton of Delaware, Judge Huntington of Connecticut, John J. Crittenden of Kentucky, and Rufus Choate of

29, 1842,[8] which has been re-enacted in the Revised Statutes.

The object of the law was stated by its introducer into the Senate, Senator Berrien of Georgia, in the following language which has been approved by the Supreme Court of the United States: "The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief."[9]

The Revised Statutes further provide that "when a writ of habeas corpus is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court, or justice, or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing."[10]

§ 461g. Errors which may be corrected by the writ of habeas corpus. The writ of *habeas corpus* cannot be used to correct

Massachusetts, Appendix to 26 Wendell 699.

[8] 5 St. at L., ch. 257, p. 539.

[9] *Re* Neagle, 135 U. S. 1, 71.

[10] U. S. R. S., § 762, Comp. St. § 1290.

errors and irregularities, however flagrant, committed within the sphere of the authority of the court.[1] But a party imprisoned

§ 461g. [1] *Ex parte* Terry, 128 U. S. 289, 304, 32 L. ed. 405, 408; *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte* Parks, 93 U. S. 18, 23 L. ed. 787; *Ex parte* Curtis, 106 U. S. 371, 27 L. ed. 232; *Ex parte* Bigelow, 113 U. S. 328, 28 L. ed. 1005; Carter v. McClaughry, 183 U. S. 365, 46 L. ed. 236; U. S. v. Lair, C. C. A., 195 Fed. 47; Henry v. Henkel, 235 U. S. 219; Cooley v. Morgan, C. C. A., 221 Fed. 252; Morgan v. Sylvester, C. C. A., 231 Fed. 886; Harrison v. Mayer, 224 Fed. 224. After judgment of conviction, a prisoner cannot be released by a writ of *habeas corpus* upon the ground that the facts charged in the indictment do not constitute a crime within the meaning of the statute, *Ex parte* Parks, 93 U. S. 18, 23 L. ed. 787; *Ex parte* Watkins, 3 Pet. 193, 203, 7 L. ed. 650, 653; *Ex parte* Yarbrough, 110 U. S. 651, 654. Hopkins v. McClaughry, C. C. A., 209 Fed. 821; Collins v. Morgan, C. C. A., 243 Fed. 495. But see *Re* Mayfield, 141 U. S. 107, 116, 35 L. ed. 635, 638. Nor because of a slight lack of certainty in the indictment, U. S. v. Pridgeon, 153 U. S. 48, 38 L. ed. 631. Nor because of its duplicity, although in violation of a Territorial statute, Connella v. Haskell, C. C. A., 158 Fed. 285. See Collins v. Morgan, C. C. A., 243 Fed. 495. Nor because an improper person sat on the grand jury which indicted him, *Ex parte* Harding, 120 U. S. 782, 30 L. ed. 824; Kaizo v. Henry, 211 U. S. 146, 53 L. ed. 125. See *Re* Wilson, 140 U. S. 575, 35 L. ed. 513. Nor because of an error in sustaining or overruling a challenge to a juror, *Re* Schneider, No. 2, 148 U. S. 162, 37 L. ed. 406; *Ex parte* Murray, 66 Fed. 297. Nor because the court improperly consolidated indictments. De Bara v. U. S., C. C. A., 99 Fed. 942; Howard v. U. S., C. C. A., 34 L.R.A. 509, 75 Fed. 986. Nor because the court refused to assign him counsel and forced him to trial without sufficient time to prepare his defense, *Re* McKnight, 52 Fed. 799. Nor because of an error as to the time allowed him, within which to plead. McMicking v. Schields, 238 U. S. 99. Nor because he was convicted upon insufficient evidence, *Re* Harkell, 52 Fed. 195; Harlan v. McGourin, 218 U. S. 442, 54 L. ed. 1101. Nor for errors committed in the course of his trial, even, it has been held, if these errors were infractions of the Constitution, such as a refusal to sustain a plea of a former conviction for the same cause, *Ex parte* Bigelow, 113 U. S. 328, 28 L. d. 1005; *Ex parte* Ulrich, 43 Fed. 661, or former jeopardy. Collins v. Morgan, C. C. A., 243 Fed. 495; or even an erroneous ruling as to the validity of the statute under which the proceeding was brought, Henry v. Henkel, 235 U. S. 219; provided the infringement of the Constitution does not clearly appear upon the record, Nielsen, Petitioner, 131 U. S. 176, 33 L. ed. 118. Nor because he was deaf and the testimony was not read to him through his ear trumpet. Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689. Nor because he was refused compulsory process for the attendance of witnesses on his behalf, *Ex*

under an order made by a court of the United States, where it does not possess jurisdiction of either the person or the subject-matter, can review that order by such a writ.[2]

parte Harding, 120 U. S. 782, 30 L. ed. 824. See *Re* Wilson, 140 U. S. 575, 35 L. ed. 513. Nor because he was tried by a *de facto* State judge who had no legal title to the office, *Ex parte* Ward, 173 U. S. 452, 43 L. ed. 765. Nor because he was convicted upon an information filed by a *de facto* State prosecutor who was not an officer *de jure*, *Re* Humason, 46 Fed. 388. Nor because he was denied bail pending a writ of error in a State court, Ibid. Nor because his petition for a removal was denied. *Ex parte* Murray, 66 Fed. 297. Nor, in bankruptcy, when committed for contempt before a referee, who has not certified to the District Court the disobedience of the relator. U. S. v. Henkel, 185 Fed. 553. Nor, it has been held, because the judge insisted on proceeding in the case after an affidavit of prejudice had been filed by the relator. *Ex parte* Glasgow, 195 Fed. 780.

[2] *Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872; *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte* Rowland, 104 U. S. 604, 26 L. ed. 861; *Re* Ayers, 123 U. S. 443, 485, 31 L. ed. 216, 223; *Re* Sawyer, 124 U. S. 200, 221, 31 L. ed. 402, 409; *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89. This may be done when he is imprisoned after conviction by a court martial composed of officers in the regular army, which had no jurisdiction over him, a volunteer officer, although the objection was not raised at the trial. McClaughry v. Deming, 186 U. S. 49, 46 L. ed. 1049; affirming C. C. A., 113 Fed. 639, 650. The employee of a contractor working in a training camp was discharged from arrest for trial before a court martial for manslaughter of a soldier within the limits of the camp, through the negligent operation of an automobile. *Ex parte* Weitz, 256 Fed. 58.

A court will not, however, thus interfere with the judgment of a court martial which had jurisdiction of the person and the subject matter although there was error in the proceedings, except possibly under extraordinary circumstances. *Ex parte* Tucker, 212 Fed. 569. A prisoner was discharged by writ of *habeas corpus*, when he had been convicted in a court of the United States of an infamous crime upon an information without an indictment. *Ex parte* Wilson, 114 U. S. 417, 29 L. ed. 89. A crime is considered infamous when punishable by imprisonment in a State prison or penitentiary with or without hard labor. *Ex parte* Wilson, 114 U. S. 417, 29 L. ed. 89; Mackin v. U. S., 117 U. S. 348, 29 L. ed. 909. A prisoner may be discharged by *habeas corpus* when his conviction was in a court of the United States, under an indictment, the body of which was amended by the court. *Ex parte* Bain, 121 U. S. 1, 30 L. ed. 849. Or under an indictment found by a grand jury unauthorized by law, but see *Re* Wilson, 140 U. S. 575, 35 L. ed. 513; *Ex parte* Harding, 120 U. S. 782, 30 L. ed. 824, or he has been sentenced in his absence,

The rule that, unless the contrary appears on the record, a cause is deemed to be without the jurisdiction of a District

Anderson v. Denver, C. C. A., 265 Fed. 3. But *not* because he was tried while he was insane. Myers v. Halligan, C. C. A., 244 Fed. 420½. A prisoner may be discharged when he is confined under a statute, State or Federal, Medley, Petitioner, 134 U. S. 160, 33 L. ed. 835; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699; *Re* Waite, 81 Fed. 359; *Re* Fair, 100 Fed. 149; which is repugnant to the Federal Constitution, *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex parte* Curtis, 106 U. S. 371, 27 L. ed. 232. But see Henry v. Henkel, 235 U. S. 219. Or when he is held by any court, State or Federal, under process based upon a city ordinance, Stockton Laundry Case, 26 Fed. 611; or a statute State or Federal; *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex parte* Curtis, 106 U. S. 371, 27 L. ed. 232; Medley, Petitioner, 134 U. S. 160, 33 L. ed. 835; but see *Ex parte* Crowder, 171 Fed. 250; which is repugnant to the Federal Constitution. "Though the law itself be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U. S. 356, 368. Such was held to be the refusal of the State court to pass upon the illegality of a commitment for lunacy when the person committed had no notice of the proceeding nor opportunity to be heard. Walters v. McKinnis, 221 Fed. 746; (as to effect of intimidation of the jury by a mob, see Frank v. Mangum, 237 U. S. 309, 335). Or when held by a State court under a charge of a crime exclusively within the jurisdiction of the Federal courts, *Re* Loney, 134 U. S. 372, 33 L. ed. 949; *Re* Neagle, 135 U. S. 1, 34 L. ed. 55. *Cf. Ex parte* Thompson, 1 Flippin, 507; U. S. v. McClay, 4 Cent. L. J. 255; *Ex parte* Larsen, 233 Fed. 708, where the State statute had been repealed; of a consul of a foreign country, *Ex parte* Anderson, 184 Fed. 114.

A prisoner who is held in custody under a conviction of a Federal court may, after his pardon by the President of the United States, be released by *habeas corpus*, Greathouse's Case, 2 Abb. U. S. 382. But the decision of a Board of Parole denying a release on parole cannot ordinarily be thus reviewed. Redman v. Duchay, C. C. A., 246 Fed. 283. Or, it seems, if in custody under sentence by a State or Federal court without a trial upon a plea of not guilty, *Re* Converse, 42 Fed. 217, 219. Or it seems if, when indicted for one crime, he has pleaded guilty of another, and is held in custody under sentence for either. *Re* Converse, 42 Fed. 217, 219. But see *Re* Maldonado, 63 Fed. 825. Or under a judgment imposing a second penalty or different penalty from that previously imposed upon the same party for the same offense, although

Court of the United States, has no application where the judgment of such a court is attacked collaterally by *habeas*

the former judgment was entered at the same term as the latter. *Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872; Nielsen, Petitioner, 131 U. S. 176, 33 L. ed. 118. Or under a judgment entered upon a conviction under several indictments, and imposing more than one punishment for a continuous offense. *Re* Snow, 120 U. S. 274, 30 L. ed. 658; Munson v. McClaughry, C. C. A., 198 Fed. 72. Stevens v. McClaughry, C. C. A., 207 Fed. 18.; O'Brien v. McClaughry, C. C. A., 209 Fed. 816. But see Moyer v. Anderson, C. C. A., 203 Fed. 881; Blake v. Moyer, C. C. A., 208 Fed. 678; Hopkins v. McClaughry, C. C. A., 209 Fed. 821. And when for any reason the sentence is beyond the jurisdiction of the court; Stoneberg v. Morgan, C. C. A., 246 Fed. 98; Collins v. C. C. A., 243 Fed. 495. Where part of the sentence is unlawful, the petitioner will not be discharged until he has performed such part thereof as was legally imposed. *Re* Swan, 150 U. S. 637, 37 L. ed. 1207; U. S. v. Pridgeon, 153 U. S. 48, 63, 38 L. ed. 631, 637; *Ex parte* Davis, 112 Fed. 139; Collins v. Morgan, C. C. A., 243 Fed. 495.

A prisoner will be thus discharged when confined under a judgment sentencing him to a penitentiary for a crime punishable by imprisonment in a jail only, *Re* Bonner, 151 U. S. 242, 38 L. ed. 149. *Cf. Re* Burns, 113 Fed. 987. But see *Re* Terrill, C. C. A., 144 Fed. 616. Or even, it has been held, when sentenced to imprisonment without hard labor in a house of correction for a crime punishable by imprisonment with hard labor in the same place of confinement. *Re* Christian, 82 Fed. 199.

Or for contempt of a court of the United States by disobedience to an order beyond the power of such court. *Ex parte* Rowland, 104 U. S. 604, 26 L. ed. 861; *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117; *Re* Ayres, 123 U. S. 443, 31 L. ed. 216; *Re* Sawyer, 124 U. S. 200, 31 L. ed. 402; Cuddy, Petitioner, 131 U. S. 280, 33 L. ed. 154. Or for contempt of a court of the United States for an act not committed in the presence of the court, when the prisoner has been given no hearing. *Ex parte* Terry, 128 U. S. 289, 32 L. ed. 405. Or for disobedience to an order when the prisoner was not a party to the suit, nor named in the order, nor bound by the same. *Re* Reese, C. C. A., 107 Fed. 942. But see *supra*, § 435.

Or for contempt of a Federal court because of his refusal to answer a question that might tend to criminate him. *Ex parte* Irvine, 74 Fed. 954. See *Re* Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, Butler v. Fayerweather, C. C. A., 91 Fed. 458. But not, unless he objected to the question upon this ground, although he subsequently contends that the statute under which he is punished is unconstitutional. *Ex parte* Blair, 253 Fed. 800.

Or, before conviction, when held under a warrant issued by a United States judge or commissioner, under a complaint which does not state an offense under a statute of the United States; *Ex parte* Bollman

corpus.[3] A person imprisoned for contempt of an order of a Federal court, where the record shows no Federal jurisdiction in the suit where such order was made, is not for that reason entitled to discharge.[4] It has been said that "if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on *habeas corpus.*"[5] A prisoner will not be discharged by a court of the United States where he has been committed for contempt of a State court in refusing to answer a question, his sole objection being that an answer will tend to criminate him;[6] nor when in a State prison under State process the only ground urged for his release being a dispute as to his identity with an escaped convict;[7] nor when under arrest

and *Ex parte* Swartwout, 4 Cranch, 75, 2 L. ed. 554; *Ex parte* Watkins, 3 Pet. 201, 7 L. ed. 652; *Ex parte* Jenkins, 2 Wall. C. C. 521, 528; *Re* Martin, 5 Blatchf. 303. See *Ex parte* Carll, 106 U. S. 521, 27 L. ed. 288; but see Price v. McCarty, 89 Fed. 84. Nor an offense of which such judge or commissioner has jurisdiction, *Re* Ferez, 7 Blatchf. 34; *Re* Cross, 20 Fed. 824; U. S. v. Rogers, 23 Fed. 658; *Re* Kelley, 25 Fed. 268; even after indictment in another district, to remove the prisoner to which the warrant is issued, *Re* Terrell, 51 Fed. 213; *Re* Greene, 52 Fed. 104.

3 Cuddy, Petitioner, 131 U. S. 280, 285, 33 L. ed. 154, 156; or otherwise, Kempe's Lessee v. Kennedy, 5 Cranch, 173, 185, 3 L. ed. 70, 73; McCormick v. Sullivant, 10 Wheat. 192, 199, 6 L. ed. 300, 302; Galpin v. Page, 18 Wall 350, 365, 21 L. ed. 959, 962.

4 *Re* Eaton, 51 Fed. 804; *Re* Lennon, 166 U. S. 548, 41 L. ed. 1110. *Cf. Re* Swan, 150 U. S. 637, 37 L. ed. 1207; *Re* Debs, 158 U. S. 564, 39 L. ed. 1092; *Re* Tyler, 149 U. S. 164, 37 L. ed. 689; Toy Toy v. Hopkins, 212 U. S. 542, 53 L. ed. 644, where the relator was an allottee Indian, who objected to the jurisdiction of the Federal Court in a criminal case for that reason. Where the District Court erroneously decided that the offense was committed within its territorial jurisdiction, the convict cannot be discharged by *habeas corpus*, but is confined to a remedy by writ of error. U. S. v. Lair, C. C. A., 195 Fed. 47.

5 Mr. Justice Bradley in U. S. v. Patterson, 29 Fed. 775, 778. For a case holding a penal statute void for uncertainty, see Louisville & Nashville R. R. Co. v. Commonwealth, 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457.

6 *Ex parte* Munn, 140 Fed. 782.

7 *Ex parte* Moebus, 148 Fed. 39.

for a contempt of a house of a State legislature which it is contended acted beyond its jurisdiction.[8] In one case a Federal court granted a writ of *habeas corpus* because a State judge had exercised powers not given him by the State statute.[9]

§ 462. Habeas corpus to review proceedings for extradition. The writ of *habeas corpus* will issue to review proceedings for extradition to another State,[1] or to another Federal district,[2] or to a foreign country [3] where the prisoner is held under a complaint or an indictment which does not charge an extraditable offense,[4] or which is founded upon a State statute that is unconstitutional,[5] or, in the case of interstate extradition, where it appears that the prisoner is not a fugitive from justice.[6] Insanity, which arose subsequent to the commission of the offense, is no ground for the discharge;[7] nor, it has been held, is a previous dismissal of criminal proceedings,[8] or of extradition proceedings,[9] because of inability to procure the evidence, which was subsequently secured.

In the case of extradition to a foreign country, in the absence of a special provision in the treaty to the contrary, the prisoner will be discharged where it appears that, at the time of the commission of the offense, he was not within the territorial jurisdic-

8 *Re* Lawrence, 80 Fed. 99; Carfer v. Caldwell, 200 U. S. 293, 50 L. ed. 488; reversing 138 Fed. 487.

9 *Re* Monroe, 46 Fed. 52. But see *Re* Duncan, 139 U. S. 449, 35 L. ed. 219; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225; *Ex parte* Brown, 140 Fed. 460; MacKenzie v. Barrett, C. C. A., 144 Fed. 954.

§ 462. 1 *Ex parte* Birdseye, 244 Fed. 972; *infra* §'491.

2 Henry v. Henkel, 235 U. S. 219; *infra*, § 489. In the case of an extradition to another Federal district, the writ will be dismissed when the indictment charges any offense within the jurisdiction of the court in which it was returned. *Ex parte* Hyde, 194 Fed. 207.

3 Cortes v. Jacobus, 136 U. S. 330, 34 L. ed. 464, in which the author was counsel. *Re* Geissler, 196 Fed. 168, where the writer was counsel; *infra*, § 490.

4 Henry v. Henkel, 235 U. S. 219; *Re* Ferez, 7 Blatchf. 34; *Re* Kelley, 25 Fed. 268; *Ex parte* Lane, 6 Fed. 34; *Re* Fitton, 45 Fed. 471; but see *Ex parte* Whitten, 67 Fed. 230; *Re* Geissler, 196 Fed. 168, in which the writer was counsel.

5 *Re* Murphy, 87 Fed. 549; but see Pearce v. Texas, 155 U. S. 311, 39 L. ed. 164.

6 People of Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 52 L. ed. 121.

7 *Ex parte* Charlton, 185 Fed. 880.

8 Tiberg v. Warren, C. C. A., 192 Fed. 458.

9 *Ex parte* Schorer, 195 Fed. 334.

tion of the country to which it is sought to extradite him.[10] This same rule applies to extradition from one State of the Union to another,[11] except upon a charge of conspiracy.[12] The presumption that he is a fugitive which arises from the fact that the prisoner is found in the State where he was arrested may be overcome by proof of his absence from the demanding State at the time of the commission of the offense.[13] Where there is nothing in the record to show that the prisoner was a fugitive, he will not be discharged because the rendition order or warrant is silent in that respect.[14] The prisoner will also be discharged where upon an application for his removal from one Federal District to another, where, upon the hearing before the commissioner, he was denied the right to offer evidence to rebut the facts charged in the indictment;[15] or because he was denied some other right under the Constitution of the United States.[16] It has been held that the identity of the prisoner is open to review upon the writ of *habeas corpus*.[17] After extradition into the United States from a foreign country, he is held in violation of a treaty, under a different charge from that upon which the extradition was based.[18] The court will not presume that the demanding Government will try the person surrendered for any offense not the subject of extradition,[19] although the complaint charges both an extraditable and a non-extraditable offense.[20] A prisoner was discharged, after the expiration of his sentence, by a Federal court, when, before such expiration, he had been delivered by the marshal to the marshal of another district and there tried, convicted and sentenced for another crime.[21] A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error.[22]

10 *Re* Taylor, 118 Fed. 196.

11 Innes v. Tobin, 240 Fed. 127; Reed v. U. S., C. C. A., 224 Fed. 378.

12 *Ex parte* Montgomery, 244 Fed. 967.

13 Reed v. U. S., C. C. A., 224 Fed. 378.

14 Innes v. Tobin, 240 Fed. 127.

15 Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689. See *infra*, § 489.

16 Ibid.

17 *Ex parte* Chung Kin Tow, 218 Fed. 185.

18 Cosgrove v. Winney, 174 U. S. 64, 43 L. ed. 897; U. S. v. Rauscher, 119 U. S. 407, 30 L. ed. 425. *Cf. Re* Rowe, C. C. A., 77 Fed. 161; *Re* Miller, 23 Fed. 32.

19 Bingham v. Bradley, 241 U. S. 511.

20 Kelly v. Griffen, 241 U. S. 6.

21 *Re* Jennings, 118 Fed. 479.

22 Cortes v. Jacobus, 136 U. S. 330, 334, 34 L. ed. 464, 466 in which the author was counsel; *Ex parte* Rickelt, 61 Fed. 203.

If the commissioner has jurisdiction of the subject-matter and of the person, and the offense charged is within the terms of a treaty, and in arriving at a decision to hold the accused, the commissioner has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused; for the purposes of extradition such decision cannot be reviewed by any court, on *habeas corpus*, either originally or upon appeal.[23] In case of an order for removal to another Federal district, the commissioner's certificate of probable cause is presumed to be correct, unless there was no substantial evidence to sustain it.[24]

The issue of the warrant is *prima facie* evidence that the petitioner is a fugitive from justice.[25] By a *certiorari*, accompanying the writ of *habeas corpus*, the evidence can be brought before the court in such a case;[26] but the court will not review the decision of a disputed question of fact;[27] nor discharge a prisoner for errors in the admission or exclusion of evidence;[28] nor for irregularities or errors not affecting the jurisdiction;[29] nor because the complaint does not state the offense with the certainty and definiteness requisite for an indictment,[30] unless it is so

23 Ibid.

24 Witte v. Shelton, C. C. A., 240 Fed. 265.

25 Tiberg v. Warren, C. C. A., 192 Fed. 458. *Ex parte* Montgomery, 244 Fed. 967; Reed v. U. S., C. C. A., 224 Fed. 378. There is a strong presumption that the papers are sufficient when the Governor of the demanding State has certified to their sufficiency according to the practice there prevailing. Ibid.

26 U. S. v. Peckham, 143 Fed. 625, 627.

27 Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234; *Re* Fowler, 4 Fed. 303; *Re* Byron, 18 Fed. 722; *Re* Roberts, 24 Fed. 132; *Re* Morriss, 40 Fed. 824; Cortes v. Jacobus, 136 U. S. 330, 34 L. ed. 464, in which the author was counsel; *Ex parte* Bryant, 167 U. S. 104, 42 L. ed. 94; Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787; *Ex parte* Reggel, 114 U. S. 642, 29 L. ed. 250; Sternaman v. Peck, C. C. A., 80 Fed. 883; McNamara v. Henkel, 226 U. S. 520, 57 L. ed. 330; *Re* Lincoln, 228 Fed. 70.

28 Benson v. McMahon, 127 U. S. 457, 461, 32 L. ed. 223, 236; Cortes v. Jacobus, 136 U. S. 330, 34 L. ed. 464, in which the author was counsel; such as a defect in the certification of depositions, McNamara v. Henkel, 226 U. S. 520, 57 L. ed. 330; see *Re* Lincoln, 228 Fed. 70.

29 Savin, Petitioner, 131 U. S. 267, 279, 33 L. ed. 150, 154; Stevens v. Fuller, 136 U. S. 468, 478, 34 L. ed. 461, 463; *Re* Tyler, 149 U. S. 164, 37 L. ed. 689.

30 Charlton v. Kelly, 229 U. S. 447; *Re* Adutt, 55 Fed. 376.

vague and indefinite in its terms as not sufficiently to apprise the person arrested of the charge, with respect upon which he is to be extradited.[31]

If a single count of the indictment or charge in the petition is sufficient the extradition will not be set aside,[32] nor because the fugitive was denied a hearing before the Governor;[33] nor, in a proceeding for extradition to a foreign country confronted with the witnesses against him.[34] Nor because there is evidence of malice or an ulterior purpose on the part of the prosecuting witness.[35] Nor because it is charged that he will not have a fair trial.[36] Nor because the prisoner was illegally brought within the United States and there regularly arrested.[37] The omission by the State authorities of a formal act of release from an illegal arrest did not authorize a discharge of the fugitive from a subsequent arrest by a United States marshal under an extradition warrant.[38] The fugitive will not be discharged because by fraud and connivance between the Executive authorities of two States he was deprived of any opportunity to apply before his surrender to the courts of the State where he was arrested.[39] Nor, it seems, because the extradition was obtained through the use of false affidavits.[40] Nor, upon extradition from one State to another State in the Union because the offense is barred by the statute of limitation;[41] nor, it has been said because of any other defense except that the accused was not in the demanding State at the time the crime was alleged to have committed.[42]

31 *Re* Herskovitz, 136 Fed. 713; Reed v. U. S., C. C. A., 224 Fed. 378; *Ex parte* Birdseye, 244 Fed. 972.

32 Price v. Henkel, 216 U. S. 488, 54 L. ed. 581; *Ex parte* Birdseye, 244 Fed. 972.

33 Reed v. U. S., C. C. A., 224 Fed. 378.

34 Bingham v. Bradley, 241 U. S. 511.

35 *Re* Herskovitz, 136 Fed. 713.

36 U. S. ex rel. Brown v. Cooke, C. C. A., 209 Fed. 637.

37 *Ex parte* Ker, 18 Fed. 167; Ker v. Illinois, 119 U. S. 437, 30 L. ed. 421; Mahon v. Justices, 127 U. S. 700, 32 L. ed. 283; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934.

38 Kelly v. Griffen, 241 U. S. 6.

39 Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148.

40 *Re* Moore, 75 Fed. 821. *Contra*, Tennessee v. Jackson, 1 L.R.A. 370, 36 Fed. 258.

41 Reed v. U. S., C. C. A., 224 Fed. 378; Biddinger v. Commissioner of Police, 245 U. S. 128. Opinion of the Court.

42 Biddinger v. Commissioner of Police, 245 U. S. 128.

Where, after the decision of the commissioner, the accused gave bail to appear before the court in the other district and there answer the charge against him, it was held that, upon his surrender, he could not question the validity of the decision: that a crime had been committed; that the defendant was the person charged with the commission thereof; and that there was reasonable cause and ground to believe him guilty.[43] When the prisoner is discharged an appeal should be taken by the marshal from whose custody he was released; not by the consul who applied for the extradition.[44]

§ 462a. Habeas corpus to protect alien enemies. By the Revised Statutes, "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who became so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."[1]

"When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the

[43] U. S. v. Peckham, 143 Fed. 625, 628.

[44] Collins v. Miller, 252 U. S. 364.

§ 462a. [1] U. S. R. S., § 4067, amended April 16, 1918, ch. 55, 40 St. at L. Comp. St., § 7615.

United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."[2]

"After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established to cause such alien to be duly apprehended and conveyed before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed."[3]

"When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor, and to execute such order in person, or by his deputy, or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be."[4]

It has been held that the action of the President in pursuance of these statutes cannot be reviewed by *habeas corpus*.[5]

2 U. S. R. S., § 4068, Comp. St., § 7616.

3 U. S. R. S., § 4069, Comp. St. § 7617.

4 U. S. R. S., § 4070, Comp. St., § 7618.

5 *Ex parte* Graber, 247 Fed. 882. *Contra* Banning v. Penrose, 255 Fed. 159.

§ 463. Habeas corpus for immigrants and to review orders for deportation. By the Act of February 5, 1917, "SEC. 17. Boards of special inquiry shall be appointed by the commissioner of immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards. When in the opinion of the Secretary of Labor the maintenance of a permanent board of special inquiry for service at any sea or land border port is not warranted, regularly constituted boards may be detailed from other stations for temporary service at such port, or, if that be impracticable, the Secretary of Labor shall authorize the creation of boards of special inquiry by the immigration officials in charge at such ports, and shall determine what Government officials or other persons shall be eligible for service on such boards. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal

to the Secretary of Labor: *Provided*, That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this act.[1]

§ 463. [1] Ch. 29, § 17, 39 St. at L. 875, Comp. St., § 4289¼b. Where there were only three immigration inspectors at the port it was held that the one who made the preliminary examination of the alien was incompetent to sit upon the board. U. S. ex rel. Paros v. Redfern, 180 Fed. 500. *Contra—Ex parte* Joyce, 212 Fed. 282. It was held to be permissible for an immigration inspector to hear a deportation proceeding against an alien charged with being found in a house of prostitution, although the inspector had participated in the raid of such a house in which the partitioner was found. *Ex parte* Kwan So, 211 Fed. 772.

"Rule 15. Special Inquiry.

"Subdivision 1. *Oath.*—Every person appointed to serve on a board of special inquiry shall first subscribe to an oath of office.

"Subdivision 2. *Hearings.*—Boards of special inquiry shall determine all cases as promptly as in the estimation of the immigration officer in charge the circumstances permit, due regard being had to the necessity of giving the alien a fair hearing. Hearings before the boards "shall be separate and apart from the public"; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed: *Provided*, First, that such friend or relative is not and will not be employed by him as counsel or attorney; second, that, if a witness, he has already completed the giving of his testimony; third, that he is not an agent or a representative at an immigration station of an immigrant aid or other similar society or organization; and, fourth, that he is either actually related to or an acquaintance of the alien."

Ex parte Lalime, 244 Fed. 279, per Morton, J.: "(1) In so-called "warrant" cases, i. e. those where the alien has been admitted to this country and the question is as to his right to remain, the practice differs in some respects from that on applications for admission to the country, as was fully pointed out in *Ex parte* Chin Loy You (D. C.), 223 Fed. 833, 834. In cases like the present the board of special inquiry performs two functions: (a) It takes evidence, much like a commissioner in equity, and makes up a record which is sent to the Secretary of Labor for his decision thereon; and (b) it makes findings on the evidence and recommendations as to the proper disposition of the case, which also go to the Secretary, and are an important factor in his decision."

A previous statute, applicable to Chinese cases, which made

By the same statute (§ 3): "the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living."

It has been held: that a similar provision in a former act as to diseased aliens did not apply to aliens domiciled in the United States, and that they might be discharged by the writ of *habeas corpus* in case of their detention under the statute; that such a resident alien had the right to appeal to the Secretary of Commerce from the decision of the board of special inquiry; and that, where the right of appeal was denied, he could procure the discharge of his children by the writ of *habeas corpus*. Rodgers v. U. S. ex rel. Cachigan, C. C. A., 157 Fed. 381. See U. S. v. Nakashima, C. C. A., 160 Fed. 842. The board has no right to base its decision solely upon the medical certificate without exercising its own judgment after also considering whatever other evidence upon the subject may be offered or contained in the record. Billings v. Sitner, C. C. A., 228 Fed. 315, affirming *ex parte* Sitner, 212 Fed. 572. But upon *habeas corpus* affidavits contradicting the certificate cannot be considered; U. S. ex rel. Aronowiez v. Williams, 204 Fed. 844; U. S. ex rel. La Fata v. Williams, 204 Fed. 848. When the alien cannot speak the English language the inability of the members of the medical board to talk with her does not justify the court in setting aside the decision of the board of special inquiry. *Ex parte* Joyce, 212 Fed. 282. Where the alien was not shown a letter by a surgeon which was important evidence against him, he was discharged upon *habeas corpus*. *Ex parte* Keisuki Sata, 215 Fed. 173.

"Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."

A criminal libel charging a King with bigamy does not involve moral turpitude, U. S. ex rel. Mylius v. Uhl, C. C. A., 210 Fed. 860. Nor a second marriage while a former husband is alive when the latter has not been heard of for many years. Greenwood v. Frick, C. C. A., 233 Fed. 629. Nor, an intention to desert from a foreign army existing at the time of the entry when the desertion did not take place till afterwards. *Ex parte* Hill, 245 Fed. 687. Nor, a political crime (see *infra*).

Where there has been no conviction or admission testimony of the commission of such a crime is inadmissible. U. S. ex rel. Castro v.

the decision of the Secretary of Commerce and Labor final, was

Williams, 203 Fed. 151. Where there has been no conviction "the act contemplates an explicit and voluntary admission." Ibid. Such was held to be a telegram proved to have been sent by the alien ordering the commission of a crime. Ibid. Perjury, evasive testimony and a refusal to answer questions upon the subject are not equivalent to an admission. Ibid.

Evidence at the trial which resulted in the conviction cannot be considered. U. S. ex rel. Mylrus v. Uhl, C. C. A., 210 Fed. 860. Nor evidence that he is depraved. Ibid.

"Polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all forms of law, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property; persons who are members of or affiliated with any organization entertaining and teaching disbelief in or opposition to organized government, or who advocate or teach the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who advocate or teach the unlawful destruction of property; U. S. ex rel. Turner v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. ed. 979; *Ex parte* Callow, 240 Fed. 212; U. S. ex rel. Rakico v. Uhl, C. C. A., 266 Fed. 646; prostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who directly or indirectly procure or attempt to procure or import prostitutes or persons for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons hereinafter called contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; persons who have come in consequence of advertisements for laborers printed, published, or distributed in a foreign country; persons likely to become a public charge."

"This clause excluding aliens on the ground likely to become a public charge has been shifted from its position in section 2 of the immigration act of 1907 to its present position in section 3 of this act in order to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons and with a view to overcoming the decision of the Supreme Court in Gegiow v. Uhl, 239 U. S. 3 (Senate Rept. 352, 64th Cong., 1st sess.). See Rule 17 regarding landing under bond."

See U. S. ex rel. Pazos v. Red-

fern, 180 Fed. 500; Greenwood v. Frick, C. C. A., 233 Fed. 629; U. S. ex rel. Cavanaugh v. Howe, 235 Fed. 990; *Ex parte* Callow, 240 Fed. 212; U. S. ex rel. Goldberg v. Williams, 204 Fed. 828.

An alien cannot be excluded solely because of the labor conditions in the place to which he is going. Gegiow v. Uhl, 239 U. S. 3.

The offer of a bond conditioned that the alien shall not become a public charge does not justify the court in setting aside such a decision. U. S. ex rel. Kutas v. Williams, 204 Fed. 847.

"Persons who have been deported under any of the provisions of this act, and who may again seek admission within one year from the date of such deportatiou, unless prior to their reembarkation at a foreign port or their attempt to be admitted from foreign contiguous territory the Secretary of Labor shall have consented to their reapplying for admission; persons whose tickets or passage is paid for with the money of another, or who are assisted by others to come, unless it is affirmatively and satisfactorily shown that such persons do not belong to one of the foregoing excluded classes; persons whose ticket or passage is paid for by any corporation, association, society, municipality, or foreign Government, either directly or indirectly; stowaways, except that any such stowaway, if otherwise admissible, may be admitted in the discretion of the Secretary of Labor; all children under sixteen years of age, unaccompanied by or not coming to one or both of their parents, except that any such children may, in the discretion of the Secretary of Labor, be admitted if in his opinion they are not likely to become a public charge and are otherwise eligible; unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and that twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering the United States shall be admitted to the United States. The provision next foregoing, however, shall not apply to persons of the following status or occupations: Government officers, ministers, or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure, nor to their legal wives or their children under sixteen years of age who shall accompany them or who subsequently may apply for admis-

sion to the United States, but such persons or their legal wives or foreign born children who fail to maintain in the United States a status or occupation placing them within the excepted classes shall be deemed to be in the United States contrary to law, and shall be subject to deportation as provided in section nineteen of this Act.

"That after three months from the passage of this Act, in addition to the aliens who are by law now excluded from admission into the United States, the following persons shall also be excluded from admission thereto, to-wit:

"All aliens over sixteen years of age, physically capable of reading, who can not read the English language or some other language or dialect, including Hebrew or Yiddish: Provided, That any admissible alien or any alien heretofore or hereafter legally admitted, or any citizen of the United States, may bring in or send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not; and such relative shall be permitted to enter. That for the purpose of ascertaining whether aliens can read the immigrant inspectors shall be furnished with slips of uniform size, prepared under the direction of the Secretary of Labor, each containing not less than thirty words in ordinary use, printed in plainly legible type in some one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made, and shall be required to read the words printed on the slip in such language or dialect. That the following classes of persons shall be exempt from the operation of the illiteracy test, to-wit: All aliens who shall prove to the satisfaction of the proper immigration officer or to the Secretary of Labor that they are seeking admission to the United States to avoid religious persecution in the country of their last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his religious faith; all aliens who have been lawfully admitted to the United States and who have resided therein continuously for five years and who return to the United States within six months from the date of their departure therefrom; all aliens in transit through the United States; all aliens who have been lawfully admitted to the United States and who later shall go intransit from one part of the United States to another through foreign contiguous territory: *Provided,* That nothing in this act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offense purely political: *Provided further,* That the provisions of this act, relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign Government shall not apply to the tickets or

passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: *Provided further,* That skilled labor, if otherwise admissible, may be imported if labor of like kind unemployed can not be found in this country, and the question of the necessity of importing such skilled labor in any particular instance may be determined by the Secretary of Labor upon the application of any person interested, such application to be made before such importation, and such determination by the Secretary of Labor to be reached after a full hearing and an investigation into the facts of the case: *Provided further,* That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed as domestic servants."

See Zakonaite v. Wolf, 226 U. S. 272. For the sufficiency of a return that the petitioner was held under a decree of deportation as an alien prostitute, see Stretton v. Rudy, C. C. A., 176 Fed. 727.

"*Provided further,* That whenever the President shall be satisfied that passports issued by any foreign Government to its citizens or subjects to go to any country other than the United States, or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holder to come to the continental territory of the United States to the detriment of labor conditions therein, the President shall refuse to permit such citizens or subjects of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possession or from the Canal Zone: *Provided further,* That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe: *Provided further,* That nothing in the contract-labor or reading-test provisions of this act shall be construed to prevent, hinder, or restrict any alien exhibitor, or holder of concession or privilege for any fair or exposition authorized by act of Congress, from bringing into the United States, under contract, such otherwise admissible alien mechanics, artisans, agents, or other employees, natives of his country as may be necessary for installing or conducting his exhibit or for preparing for installing or conducting any business authorized or permitted under any concession or privilege which may have been or may be granted by any such fair or exposition in connection therewith, under such rules and regulations as the Commissioner General of Immigration, with the approval of the Secretary of Labor, may prescribe both, as to the admission and return of such persons. *Provided further,* That the Commissioner General of Immigration with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exaction of

held to be constitutional.[2] Such act deprived the court of the power to determine by the writ of *habeas corpus*, whether the Chinese immigrants belonged to one of the excluded classes.[3] It was held by a divided court that the courts had then no power to determine, by the writ of *habeas corpus*, whether the Chinese excluded from admission was a citizen of the United States, and that the decision of administrative authorities upon the subject, when affirmed upon an appeal to the Secretary, was conclusive.[4]

The immigrant has a right to have his appeal decided by the

such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission: *Provided further*, That nothing in this act shall be construed to apply to accredited officials of foreign Governments, nor to their suites, families, or guests."

2 U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040; criticised Harv. L. Rev. xix, 61; Fok Yung Yo v. U. S., 185 U. S. 296, 46 L. ed. 917; *Cf.* Lee Gon Yung v. U. S., 185 U. S. 306, 46 L. ed. 921; Lee Lung v. Patterson, 186 U. S. 168, 46 L. ed. 1108; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218; § 12 of the Act of Sept. 13, 1888, 25 St. at L. 476, provided: "The collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise." This, if it ever became effective, seems to be no longer in force. See Act of April 27, 1904, ch. 1630, § 5, 33 St. at L. 428, Comp. St. § 4337, note, and note to § 4306. The removal of Chinamen, who are not within the classes subsequently described as subject to deportation by the order of the Secretary of Labor is after arrest upon a warrant issued by a United States Judge or Commissioner under a judgment subject to an appeal to a District Court of the United States. Act of Sept. 13, 1888, 25 St. at L. 476, § 13, Comp. St. § 4313. Act of April 27, 1904, ch. 1630, § 5, 33 St. at. L. 428, Comp. St. § 4337. The practice thereunder and upon such appeal is described *infra* § 694.

3 U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040; U. S. v. Wong Chow, C. C. A., 108 Fed. 376. *Cf.* Li Sing v. U. S., 180 U. S. 486, 45 L. ed. 634; Lem Moon Sing v. U. S., 158 U. S. 538, 39 L. ed. 1082; *Re* Way Tai, 96 Fed. 484; *Re* Ota, 96 Fed. 487; *Re* Lea, 126 Fed. 234; U. S. *ex rel.* Turner v. Williams, 126 Fed. 253; U. S. v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917. For the former rule see Ekiu v. U. S., 142 U. S. 651, 35 L. ed. 1146; Fong Yue Ting v. U. S., 149 U. S. 698, 37 L. ed. 905.

4 U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040; criticised Harv. L. Rev., XIX, 61; Wong Sang v. U. S., C. C. A., 144 Fed. 968; affirming 143 Fed. 147.

Secretary of Labor,[5] and not by an Assistant Secretary, unless

[5] *Ex parte* Tsuie Shee, 218 Fed. 256.

Rule 17. Appeals.

"Subdivision 1. *Informing alien as to right of appeal.*—Where an appeal lies the alien shall be informed of his right thereto, and the fact that he has been so informed shall be entered in the minutes.

"Subd. 2. *Appeals, how filed.*—An alien desiring to appeal may do so individually or through any society admitted to an immigration station or through any relative or friend or through any person, including attorneys, permitted to practice before the immigration authorities. Where such an appeal has been taken any further appeal shall be disregarded. Appeals purporting to be filed on behalf of an alien, but without his knowledge or consent previously obtained, may be ignored. A board member who dissents from a majority vote to admit also may take an appeal. In such a case the alien shall be allowed the same opportunity for representation as though the appeal were his, but his brief or argument must be submitted at the same time that the board member's appeal is forwarded to the bureau." See Mah Shee v. White, C. C. A., 242 Fed. 868, 872.

"Subd. 3. *Time for filing appeals.*—Appeals must be filed promptly. The immigration officer in charge may refuse to accept an appeal filed after the alien has been removed from an immigration station for deportation, provided the alien had a reasonable opportunity to appeal before such removal. Any appeal filed more than 48 hours after the time of an excluding decision may be rejected by the immigration officer in charge in his discretion.

"Subd. 4. *Where no appeal lies.*—No appeal lies where the decision of a board of special inquiry, based upon the certificate of the examining medical officer, as required by section 17, rejects an alien because (*a*) he is afflicted with tuberculosis in any form or a loathsome contagious or dangerous contagious disease, or (*b*) he is an idiot or an imbecile or an epileptic or is insane or feeble-minded, or (*c*) he is afflicted with constitutional psychopathic inferiority or has any mental defect or is a chronic alcoholic.

"Subd. 5. *Where appeal lies despite certificate.*—When an alien is certified for a physical defect other than tuberculosis in any form or a loathsome contagious or dangerous contagious disease, the board of special inquiry must decide, on the basis of all the evidence (including the certificate) whether or not such certified defect may affect his ability to earn a living. An alien rejected on said ground is entitled to appeal.

"Subd. 6. *Forwarding appeal record.*—The complete appeal record shall be forwarded promptly to the bureau with the views in writing of the immigration officer in charge.

"Subd. 7. *Bonds under section 21.*—Where the landing of an alien under bond is authorized, unless different instructions are given, the bond shall be in the sum of $500,

such assistant is acting Secretary after the death, resignation, or

and the alien shall not be released until it has been furnished and the immigration official in charge has satisfied himself of the responsibility of the sureties. If within a reasonable time after landing under bond is authorized a satisfactory bond is not furnished, instructions shall be requested of the bureau.

"Subd. 8. *Cash deposits under section 21.*—If the acceptance of a cash deposit is authorized, the deposit, unless different instructions are given, shall be in the form of a postal money order and in the sum of $500. A receipt for the deposit shall be issued by the officer in charge, showing the object for which the money has been accepted and the disposition to be made thereof. The money order shall be then transmitted to the department, by which it will be deposited in the postal savings bank at Washington, in such manner as to permit the interest accruing thereon to be paid semiannually and transmitted to the person making the cash deposit.

"Subd. 9. *Reopening of cases.*—Whenever a case is referred back to a board *by the bureau or the department* in order that additional evidence may be taken, such case is thereby reopened; and after the new evidence has been taken the board shall render a new decision, in which it may in its discretion reaffirm, alter, or reverse its previous decision. The mere action of referring back a case under such circumstances is not to be taken as an indication of any disapproval by the bureau or the department of the board's decision or of what the new decision should be.

"Subd. 10. *Requests for reopening.*—Whenever, either before or after receipt of a decision from the bureau or the department affirming an excluding decision, the local immigration officials learn of new evidence of such relevancy and materiality as in their opinion to require that, in justice to the alien or the United States, it be considered by the board, they may stay deportation and request the bureau's permission to reopen the case, at the same time briefly stating the general nature of the new evidence. This usually should be done by letter. Whenever it is necessary to resort to a telegram, such telegram shall be in substantially the following form:

For the purpose of receiving new material evidence, recommend reopening case of..... (Very briefly indicate character of new evidence.)

"The words 'For the purpose of receiving new material evidence, recommend reopening case of' shall be represented by the code word 'Renvoy.' Thus it will be possible to phrase the telegram in a few words. Upon receipt of the bureau's permission to reopen, the board again acquires full control of the case as under subdivision 9 hereof.

"Subd. 11. *Procedure in reopened cases.* The hearing in a case reopened before a board of special inquiry shall be of the same nature and be subject to the same conditions, limitations, and privileges as an original hearing before such body.

"Subd. 12. *Detention expenses during extended time.* The immi-

during the absence or disability of the Secretary.[6] A decision is none the less made by the Secretary when it is written and signed by the Assistant Secretary or the solicitor[7] of the department and approved by the Secretary.[8] The Secretary is not concluded by his ruling and may reverse it.[9] The signature of a preliminary warrant of arrest by the Assistant Secretary does not invalidate it.[10]

Similar sections of the former statutes did not apply to citizens of the United States,[11] nor to aliens, not Chinese, who had been already admitted into the United States.[12]

gration officer in charge may decline, in his discretion, to extend an alien's time to appeal or to delay deportation except on condition that there be deposited a sum of money sufficient to defray the cost of maintenance during the extension or delay granted.

"Subd. 13. *Application for privilege of reapplying for admission.* Aliens rejected or arrested and deported under any provision of the act who apply for admission within one year after such deportation are mandatorily excluded, unless prior to so applying, at either a seaport or a land border port, they shall have obtained the consent of the Secretary to their presenting themselves for examination. (Secs. 3 and 18.) Application for this privilege always shall be submitted to the immigration official in charge at the port where the alien was previously rejected or the immigration official in charge of the district in which the alien was arrested for deportation, and shall be forwarded by such official to the bureau, accompanied by the record previously formulated, unless the bureau already, through warrant or appeal proceedings, has come into possession of such record. The telegraphing of such application shall be avoided as far as possible and, when granted, always shall be at the expense of the alien or those interested in him both as to the application (which should be prepaid), and telegraphic response from the department (which will be transmitted 'collect'). Aliens rejected solely as 'accompanying aliens,' or deported solely on the ground of being 'under 16 unaccompanied' may reapply for admission without securing permission in advance."

6 Ibid.

7 Tang Tun v. Edsell, 223 U. S. 673, 683, 56 L. ed. 606.

8 Chin Hing v. White, C. C. A., 234 Fed. 616.

9 U. S. ex rel. Tremaine v. Commissioner of Immigration, 209 Fed. 137.

10 Moy Wing Sun v. Prentis, C. C. A., 234 Fed. 24.

11 Act of March 3, 1903 ch. 1012, 32 St. at 1213; U. S. ex rel. Fischer v. Rodgers, 144 Fed. 711.

12 Redfern v. Halpert, C. C. A., 186 Fed. 150; *Ex parte* Koerner, 176 Fed. 478; Botis v. Davies, 173 Fed. 996. *Contra,* Prentis v. Di Giacomo, C. C. A., 192 Fed. 467; Prentis v. Stathakos, C. C. A., 192 Fed. 469.

The Act of February 5, 1917, further provides for the deportation of objectionable aliens as follows:

"SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law;[13] any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry.[14] Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute." [15]

A similar section of a former statute was held to be constitutional,[16] although that part of the former statute which

13 The Chinese Exclusion Laws Sen. Doc. 64th Cong. 1st Sess. 352.

14 See note 1, *supra*. When an alien enters into the United States more than once the period runs from the date of his last entry if he has not in the meantime been naturalized. Le Pinna v. Williams, 232 U. S. 78; Lewis v. Frick, 233 U. S. 291; U. S. ex rel. Bauder v. Uhl, C. C. A., 211 Fed. 628. The declaration of an intention to become a citizen, and the taking out of first papers, does not make a man cease to be an alien. U. S. ex rel. Bauder v. Uhl, C. C. A., 211 Fed. 628.

15 This includes the class of what Dryden has termed a mackerel, and in modern slang is called a mack, or pimp; *Ex parte* Psimoules, 222 Fed. 118; but not the lessor of premises for such an illicit use. Katz v. Commissioner of Immigration, C. C. A., 245 Fed. 316.

16 U. S. v. Williams, 183 Fed. 904; *Cf.* U. S. v. Weis, 181 Fed. 860.

made it a felony to harbor, in a house of prostitution, an alien woman within three years after her entry, was unconstitutional.[17]

"Any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute;[18] any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose.[19]

"Any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported:

"*Provided*, That the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this act:

17 Keller v. U. S., 213 U. S. 138, 29 Sup. Ct. 470, 53 L. ed. 737.

18 This contemplates only assistance furnished to enable her to continue her illegal trade, *Ex parte* Young, 211 Fed. 370.

19 The bringing of a woman for the purpose of concubinage is such an immoral purpose although no prostitution by her is intended or committed. U. S. v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. ed. 543; U. S. ex rel. Bauder v. Uhl, C. C. A., 211 Fed. 628.

Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: *Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided further*, That the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof: *Provided further*, That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

This makes the time for deportation unlimited except when particularly specified.[20] It has been held to apply to aliens within the United States before its enactment, provided that the offense was subsequently committed.[21]

By the Act of May 10, 1920: "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit: (1) All aliens who are now interned under section 4067 of the Revised Statutes of the United

[20] U. S. v. Weis, 181 Fed. 860; U. S. v. Prentis, 182 Fed. 834; U. S. v. No. G. Lloyd S. S. Co., 185 Fed. 158.

[21] U. S. v. Williams, 183 Fed. 904; Sire v. Berkshire, 185 Fed. 967; Ladeux v. Berkshire, 185 Fed. 971.

States and the proclamations issued by the President in pursuance of said section under date of April 6, 1917, November 16, 1917, December 11, 1917, and April 19, 1918, respectively.

"(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

"(a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918;

"(b) An Act entitled 'An Act to prohibit the manufacture, distribution, storage, use, and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use, and possession of the same, and for other purposes,' approved October 6, 1917;

"(c) An Act entitled 'An Act to prevent in time of war departure from and entry into the United States contrary to the public safety,' approved May 22, 1918;

"(d) An Act entitled 'An Act to punish the willful injury or destruction of war material or of war premises or utilities used in connection with war material, and for other purposes,' approved April 20, 1918;

"(e) An Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, or any amendment thereof or supplement thereto;

"(f) An Act entitled 'An Act to punish persons who make threats against the President of the United States,' approved February 14, 1917;

"(g) An Act entitled 'An Act to define, regulate, and punish trading with the enemy, and for other purposes,' approved October 6, 1917, or any amendment thereof;

"(h) Section 6 of the Penal Code of the United States.

"(3) All aliens who have been or may hereafter be convicted of any offense against section 13 of the said Penal Code committed during the period of August 1, 1914, to April 6, 1917, or of a conspiracy occurring within said period to commit an offense

under said section 13, or of any offense committed during said period against the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, in aid of a belligerent in the European war.

"SEC. 2. That in every case in which any such alien is ordered expelled or excluded from the United States under the provisions of this Act the decision of the Secretary of Labor shall be final.

"SEC. 3. That in addition to the aliens who are by law now excluded from admission into the United States all persons who shall be expelled under any of the provisions of this Act shall also be excluded from readmission."

By the Act of June 5, 1920, the following aliens shall be excluded from admission into the United States:

"(a) Aliens who are anarchists;

"(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government;

"(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

"(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching opposition to all organized government, or advising advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals

or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

"(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

"For the purpose of this section: (1) the giving, loaning or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning, or promising of money or any thing of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation."

In deportation cases, the court upon *habeas corpus* may determine whether the petitioner belongs to one of the classes subject to deportation,[22] and it has been said, may inquire into

22 Prentis v. Stathakos, C. C. A., 192 Fed. 469. Except in the cases so specified, a conviction of the offense or misconduct is not a prerequisite to the deportation. Lewis v. Frick, 233 U. S. 291. An acquittal of a charge of such offense in a criminal court is not *res adjudicata* nor does it prevent the deportation; Lewis v. Frick, 233 U. S. 291; *Ex parte* Young, 211 Fed. 370. The warrant of arrest must contain a statement of the facts showing the inadmissibility of the alien and not mere conclusions of law. U. S. v. Sibray, 178 Fed. 144; U. S. ex rel. Huber v. Sibray, 178 Fed. 150. The mere statement that the alien entered the United States for an immoral purpose is not sufficiently specific. Ibid. The alien cannot be excluded or deported upon ground entirely different from those stated in the warrant. Davies v. Mandolis, C. C. A., 179 Fed. 818. *Cf.* U. S. ex rel. Huber v. Sibray, 178 Fed. 150. The warrant of arrest for such a deportation must give the alien sufficient information of the acts charged to bring him within the class subject thereto to enable him to offer testimony in refutation, U. S. ex rel. Bauder v. Uhl, C. C. A., 211 Fed. 628. But it need not have the formality or particularity of an indictment, U. S. ex rel. Bauder v.

Uhl., C. C. A., 211 Fed. 628, 633. An irregularity therein, does not justify the discharge of the alien when a warrant for his deportation has been issued after a fair hearing. Ibid. Provided it clearly appeared that he understood the nature of the charge. *Ex parte* Young, 211 Fed. 370. Nor because the deportation is based in part upon a charge not stated in the warrant of arrest. Ibid. Siniscalchi v. Thomas, C. C. A., 195 Fed. 701. Nor because a criminal charge is pending against him in the country to which he is deported. Siniscalchi v. Thomas, C. C. A., 195 Fed. 701, *Ex parte* Lew Lin Shew, 217 Fed. 317.

By Immigration Rule 22.

"Subd. 2. *Investigation and report of cases.*—Officers shall make thorough investigation of all cases when they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found to be.

"Subd. 3. *Application for warrant of arrest.*—The application must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government (except in cases of public charges covered by subdivision 4 hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector. In all cases shown in subdivision 1 to be subject to a time limitation the application must be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where landing occurred, unless entry without inspection within such limitation is confessed, or a reason given for its absence. In the absence of such certificate, effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity, or when some substantial interest of the Government would be subserved thereby, and must state (*a*) that the usual written application is being forwarded by mail, and (*b*) the substance of the facts and proof therein contained. The code supplied by the department should be used whenever practicable. See Jouras v. Allen, C. C. A., 222 Fed. 756.

"Subd. 4. *Proof in cases of aliens who have become public charges.*—The application in such cases must be accompanied by a certificate of the official in charge of the institution in which the alien is confined, or other responsible public official if the alien is not confined, showing that the alien is being maintained at public expense. There should be submitted also, whenever readily available, evidence, (such as certificates from attending

physicians, etc.), tending to show that the causes for the alien's being a public charge existed prior to entry.

"Subd. 5. *Execution of warrant of arrest and hearing thereon.*—(*a*) Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served.

"(*b*) At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record." The Circuit Court of Appeals for the Ninth Circuit upheld a former rule providing that the alien should be appraised of his right to counsel at such stage of the hearing as the inspector before whom it was held might deem proper. Choy Gum v. Backus, C. C. A., 223 Fed. 487. "If counsel be selected, he shall be permitted to be present during the conduct of the hearing, and to offer evidence to meet any evidence presented or adduced by the Government." See *Ex parte* Hidekuni Iwata, 219 Fed. 610. "Objections and exceptions of counsel shall not be entered on the record, but may be presented by him in accompanying brief." If the alien or his counsel wishes to cross-examine the deponent in an *ex parte* affidavit, he waives his right unless he makes a demand. U. S. v. Uhl, C. C. A., 266 Fed. 34, 40. "If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to the facts which constitute such reason, and he shall be given an opportunity to show cause why he should not be deported therefor.

"(*c*) At the close of the hearing the full record shall be forwarded to the bureau, together with any written argument submitted by counsel, and the recommendations of the examining officer and the officer in charge, for determination as to whether or not a deportation warrant shall issue.

"(*d*) The record of the hearing accorded an alien who is suffering from any physical or mental disability shall be supplemented by a medical certificate showing (1) whether such alien is in condition to be deported without danger to life; (2) whether he will require special care and attention on the ocean voyage.

"Subd. 6. *Release under bond.*—The amount of any bond under which

an arrested alien may be released shall be $500, unless different instructions are given by the department, which, prior to release, shall approve the bond, except that the approval of the local United States attorney as to form and execution shall be sufficient when the immigration officer in charge deems it proper, with a view to avoid delay, to submit the bond to such attorney for approval. United States bonds may be accepted in lieu of sureties on bail bond, or sureties may deposit United States bonds instead of justifying in real estate. Aliens who are unable to give bail shall be held in jail only in case no other secure place of detention can be found.

"Subd. 7. *Warrant for deportation and deportation thereon.*—Upon receipt of the department's decision, or as soon thereafter as the circumstances of the case may require, the alien shall be taken into the custody of the immigration officials (if this has not occurred already) for deportation. Thereafter he shall be deported, previous notice of deportation having been given the steamship company concerned, together with a brief description of the alien and any other appropriate data, including the cause of deportation, physical and mental condition, and destination.

"Subd. 8. *Cost of maintenance pending deportation on warrant.*—(*a*) The cost of maintaining aliens during these proceedings may be borne by the Government, but as to aliens who have become public charges from causes existing prior to landing, such cost will not be allowed unless or until an appropriation becomes available for that purpose.

"(*b*) If proceedings against a procurer or contractor are instituted within 5 years after the entry of the alien (secs. 4, 5, and 20), immigration officers shall report to the United States district attorney the amount of the cost of deporting the alien, including one-half of the entire cost of removal to the port of deportation, so that a proper effort may be made to recover such expense from the procurer or importer and the reimbursement of the Government and the transportation company for their respective parts thereof.

"(*c*) If, after the Government has completed its investigation, request is made by or on behalf of an arrested alien for an extension of time that seems unusual or unreasonable and any expenses will arise from granting such request, the deposit in advance of a sum sufficient to cover such expenses shall be required as a condition precedent to the granting of such request.

"Subd. 9. *Place of deportation.*—The deportation warrant shall specify the place to which the alien covered thereby will be deported in accordance with section 20. 'Foreign port' as used in said section includes ports of the insular possessions of the United States.

"Subd. 10. *Women and girls, special procedure concerning treatment and care of.*—(*a*) When it is necessary to detain or hold arrested women and girls they shall not be incarcerated by immigration officials in jails or other similar places unless such incarceration is absolutely

the whole case.[23] The court may inquire by *habeas corpus* to determine whether there is sufficient evidence to establish that the person sought to be excluded or deported is in fact an alien.[24] In all cases, except in deportation proceedings under the Chinese Exclusion Act,[25] the court may upon *habeas corpus* inquire into the fact whether there was any evidence before the administrative officers to show that he is one of the excluded classes;[26] but not to determine the weight of evidence.[27]

unavoidable; but if there is not attached to the immigration station or quarters a room suitable for such purpose, and if such aliens are not already being held in some proper institution, arrangements shall be made for their detention by some philanthropic or advise the bureau fully in each case in which they believe correspondence of the nature herein designated should be conducted. Such reports shall be in triplicate so that the bureau, whenever it deems that course proper, may forward copies thereof to the Government and society representatives abroad prior to or simultaneously with the deportation of the alien. At stations where it is impracticable to designate a special officer for this duty such reports shall be furnished by the officer in charge.

"Subd. 11. *Deportation by consent.*—Any alien who is a lawful resident of the United States and who has become a public charge from physical disability arising subsequent to landing may be deported, with his consent and the approval of the bureau, within three years from date of landing, at Government expense, provided he is delivered to the immigration officers at a designated port free of charge. If the alien's deportation is directed, the charges incurred for his care and treatment in any public or charitable institution from the date of notification to an immigration official until the expiration of one year after landing may be paid by the bureau at such rates as it shall accept as reasonable." *See Amendment of 1920.*

23 Redfern v. Halpert, C. C. A., 186 Fed. 150. *Cf.* U. S. v. Ruiz C. C. A., 203 Fed. 441; Whitfield v. Hanger, C. C. A., 222 Fed. 745; contra, Prentis v. Di Giacomo, C. C. A., 192 Fed. 467; Prentis v. Stathakes, C. C. A., 192 Fed. 469; U. S.. ex rel. Ng. Sam v. Redfern, 210 Fed. 548; Whitfield v. Hanger, C. C. A., 222 Fed. 746.

24 Gonzales v. Williams, 192 U. S. 1, 48 L. ed. 317. But see De Bruler v. Gallo, C. C. A., 184 Fed. 566.

25 U. S. ex rel. Fong On v. McCarthy, 228 Fed. 398.

26 Gonzales v. Williams, 192 U. S. 1, 48 L. ed. 317; Rodgers v. United States ex rel. Buchsbaum, C. C. A., 152 Fed. 346; Srung v. Morton, 182 Fed. 330; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218; *Ex parte* Petterson, 166 Fed. 536; U. S. ex rel. Rosen v. Williams, C. C. A., 200 Fed. 538; *Ex parte* Lam Fuk Tak, 217 Fed. 468; *Ex parte* Prout, 253 Fed. 97.

27 Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218; U. S. ex rel. Rosen v. Williams, C. C. A., 200

The court may also examine the record to see whether the proceedings were in conformity with the statute,[28] and whether the immigrant had a fair hearing;[29] but the proceedings for the Secretary and the Boards are summary in their nature,[30] and the rules of evidence which ordinarily regulate proceedings in courts of justice need not be followed.[31] The alien is entitled to be rep-

Fed. 538; *Ex parte* Chan Kam, C. C. A., 230 Fed. 990; Wallis v. U. S., C. C. A., 230 Fed. 71; *Ex parte* Ng Kwack Kang, 233 Fed. 478; U. S. ex rel. Cavanaugh v. Howe, 235 Fed. 990; *Ex parte* Chin Doe Tung, No. 3378, 236 Fed. 1017.

[28] Gegiow v. Uhl, 239 U. S. 3; Sibray v. U. S. ex rel. Yee Yok Yee, C. C. A., 227 Fed. 1.

[29] Chin Yow v. U. S., 208 U. S. 8, 52 L. ed. 369; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218; U. S. ex rel. Rosen v. Williams, C. C. A., 200 Fed. 538; *Re* Tang Tun, 161 Fed. 618; Davies v. Manolis, C. C. A., 179 Fed. 818; *Ex parte* Wing You, C. C. A., 190 Fed. 294; *Ex parte* Petkos, 212 Fed. 275. The fact that a case is quickly decided, for example, two days after its submission to the Secretary, does not show a denial of due process of law. Tang Tun v. Edsell, 223 U. S. 673, 682, 56 L. ed. 606, 610.

[30] Low Wah Suey v. Backus, 225 U. S. 460, 472.

[31] *Ex parte* Joyce, 212 Fed. 282; U. S. ex rel. Gegiow v. Uhl, C. C. A., 215 Fed. 573; Choy Gum v. Backus, C. C. A., 223 Fed. 487, 492; *Ex parte* Garcia, 205 Fed. 53, 55. The board may consider *ex parte* affidavits when the witnesses are not within reach. Healy v. Backus, C. C. A., 221 Fed. 358; Choy Gum v. Backus, C. C. A., 223 Fed. 487, 492; U. S. v. Uhl, C. C. A., 266 Fed. 34, 40. To prove the condition of the labor market and the probability of the alien securing employment, interviews, letters and newspaper clippings were held to have been properly considered. Healy v. Backus, C. C. A., 221 Fed. 358, 364. The insertion of the unverified statement of the inspector who arrested the alien is improper. *Ex parte* Lam Fuk Tak, 217 Fed. 468. The certificate of a United States Commissioner that after a full hearing he had adjudged the alien to be lawfully in the United States by reason of being a citizen thereof is incompetent. You Fook Hing v. U. S., C. C. A., 214 Fed. 77. Where the witnesses live in the city where the hearing is held *ex parte* depositions identifying by inspection of photographs the persons sought to be deported are entitled a little credence. Yee Et (Ep) v. U. S., C. C. A., 222 Fed. 66. An objection that a witness, whose testimony in another suit is offered, is not produced in person is waived unless duly made. A refusal to allow a witness to testify on behalf of the alien is not fatal error when his affidavit is afterwards admitted. Ibid. Jung Back Sing v. White, C. C. A., 257 Fed. 416. The credibility of the witnesses is to be determined by the immigration authorities. *Ex parte* Greaves, 222 Fed. 57.

resented by counsel [32] to attend the examination of all of the wit-

[32] An alien is entitled to be represented by counsel before his deportation or exclusion if he demands the privilege. U. S. v. Ruiz, C. C. A., 203 Fed. 441; *Ex parte* Lalime, 244 Fed. 279. But see *Re* Madeiros, 225 Fed. 90; U. S. v. Greenawalt, 213 Fed. 901, 905. It has been held that he is not entitled to be represented by counsel before a special board of inquiry. U. S. ex rel. Buccine v. Williams, 190 Fed. 897; U. S. ex rel. Faleo v. Williams; unless he claims to be a citizen of the United States. *Re* Tang Tun, 161 Fed. 618. And in deportation proceedings, which are termed warrant proceedings, after his admission. *Ex parte* Loung June, 160 Fed. 251; Bosny v. Williams, 185 Fed. 598. In both these classes of cases it seems that he is entitled to counsel at hearings before such board if he demands the privilege. Ibid. An alien is entitled to consult with counsel if he wishes. Mah Shee v. White, C. C. A., 242 Fed. 865, 870; New Hoy Quong v. White, C. C. A., 249 Fed. 869. Where the aliens were intimidated and thus persuaded not to exercise their right to be represented by counsel. U. S. ex rel. Bosny v. Williams, 185 Fed. 598, or otherwise so persuaded. Roux v. Commissioner of Immigration, C. C. A., 203 Fed. 413; they were discharged. A preliminary examination of an alien without counsel may be permitted even in deportation proceedings. Low Wah Suey v. Backus, 225 U. S. 460, 471, 56 L. ed. 1165; Choy Gum v. Backus, C. C. A., 223 Fed. 487. *Cf.* Unless the Government offers further evidence upon the appeal. Mah Shee v. White, C. C. A., 242 Fed. 868, 872. Pending an appeal he has the right to confer with counsel. Ibid.

IMMIGRATION RULE NO. 31

"Subdivision 1. *Admission to practice.*—No person who has been convicted of any crime or misdemeanor deemed by the bureau to involve moral turpitude, or who is disbarred from practice before any court of record in the United States, shall be permitted to appear, as an attorney on behalf of an alien. Any person desiring to appear on behalf of an alien may be required to submit proof to show that he is a person of good character and reputation, and if such proof fails to satisfy the immigration officer in charge he shall forward it to the bureau for determination as to whether or not such person shall be permitted to practice before the immigration authorities. Any unseemly or unprofessional conduct on the part of an attorney shall be similarly reported to the bureau.

"Subd. 2. *Change of representative.*—Pending an appeal or warrant proceedings no alien shall change his representative except upon such reasonable terms as the immigration officer in charge shall prescribe, nor shall such change be permitted to delay the conduct or disposition of the matter pending.

"Subd. 3. *Fees of attorneys, etc.*—Attorneys and persons appearing in behalf of aliens applying for admission shall not charge a sum exceeding $10 in each case unless the immigration officer in charge shall in writing allow an additional compensation. Should any alien be so poorly supplied

nesses,[33] to cross-examine them,[34] to examine the translation submitted of testimony and examinations taken in a foreign language,[35] to examine all documentary evidence considered,[36] to offer evidence,[37] to be free from intimidation [38] to have his witnesses free from tampering and intimidation.[39] A denial of any

with money that the payment by him of a fee of $10 would impair seriously his chance of admission or increase materially the likelihood of his becoming a public charge if admitted, no fee may be charged. A family or party of aliens traveling together shall be regarded as constituting a single case within the meaning hereof. If an attorney deems himself entitled to a larger fee or if it is necessary for him to incur expenses, he shall report the facts to the immigration officer in charge when applying for the privilege of charging an additional fee or claiming reimbursement for expenses. If permission be granted, he shall collect such additional fee and expenses only through the immigration officer in charge.

"Subd. 4. *Disbarment of attorneys.*—Anyone charging an alien a fee prior to his detention, or charging or receiving from an alien or his relatives or friends a fee, gift, or compensation for his services in excess of the above rate, except in the manner provided, or who shall deprive an alien of any part of his chattels or effects in lieu of or as security for said fee, if unable after a fair opportunity to answer the complaint, will be disbarred by the department (to which a full report of the matter shall be made) from practicing at any immigration station of the United States." *See Amendment of 1920.*

Cf. Dr. Bruler v. Gallo, C. C. A., 184 Fed. 567. But see *Ex parte* Lam Pui, 217 Fed. 456. Upon the appeal to the Secretary or the Department from an order of deportation a Chinese has no right to an oral argument by counsel or to present further evidence. Chin Hing v. White, C. C. A., 234 Fed. 616; *Ex parte* Chin Quock Wah, 224 Fed. 138.

33 The examination of witnesses in the absence of the alien is a fatal defect in the proceedings. U. S. ex rel. Huber v. Sibray, 178 Fed. 150; U. S. v. Sibray, 178 Fed. 144.

34 U. S. v. Sibray, 178 Fed. 144; *Ex parte* Ung King Ieng, 213 Fed. 119; *contra, Ex parte* Garcia, 205 Fed. 53, 56.

The demand for cross-examination must be duly made. U. S. v. Uhl, C. C. A., 266 Fed. 34, 40. The refusal of the affiants for cross-examination when not induced by an official was held not to invalidate the proceedings. *Ex parte* Garcia, 205 Fed. 53, 56.

35 White v. Wong Quen Luck, C. C. A., 243 Fed. 547.

36 *Ex parte* Keisuki Sata, 215 Fed. 173.

37 Chew Hoy Quong v. White, C. C. A., 249 Fed. 869.

38 U. S. v. Ruiz, C. C. A., 203 Fed. 441.

39 Jouras v. Allen, C. C. A., 222 Fed. 756.

of these rights will authorize his discharge, or the direction of a further hearing at which his rights will be protected.[40] He will be discharged when the record shows that the decision was based on erroneous grounds.[41] He will be discharged when an appeal by him is denied,[42] or prevented,[43] or withdrawn by a mistake of the petitioner caused by unfair conduct of the official;[44] but the writ will not issue to review the decision of the examining officers in other cases when there has been no such appeal.[45] Nor ordinarily pending an appeal.[46] The writ may issue pending such an appeal where, on the admitted facts, there is no warrant of law for the deportation or restraint of liberty.[47] Otherwise, it seems that in no case can the finding of the Secretary be reviewed.[48]

40 U. S. v. International Harvester Co., 214 Fed. 987; Billings v. Sitner, C. C. A., 228 Fed. 315; White v. Wong Quen Luck, C. C. A., 243 Fed. 5547.

41 Gegiow v. Uhl, 239 U. S. 3; U. S. v. Lee Chung, 206 Fed. 367; *Ex parte* Tom Toy Tin, 230 Fed. 747.

42 Rodgers v. United States ex rel. Cachigan, C. C. A., 157 Fed. 381.

43 The exclusion from the record of material testimony taken upon the hearing is, in substance, a denial of the right of appeal and entitles the appellant to obtain a hearing by *habeas corpus*. *Re* Can Pon, C. C. A., 168 Fed. 479. The submission to the Secretary of additional testimony as to the qualifications of the alien, taken pending an appeal, does not affect the validity of his decision, provided that the immigrant had an opportunity for cross-examination. U. S. ex rel. Falce v. Williams, 191 Fed. 1001.

44 *Ex parte* Chan Shee, 236 Fed. 579.

45 Mok Chung v. U. S., C. C. A., 133 Fed. 166; *Ex parte* Wong Sang, 143 Fed. 147; aff'd Wong Sang v. U. S., 144 Fed. 968.

46 U. S. v. Sing Tuck, 194 U. S. 161, 24 Sup. Lt. 621, 48 L. ed. 917. But see Whitfield v. Hanger, C. C. A., 222 Fed. 745, 753.

47 *Ex parte* Koerner, 176 Fed. 478.

48 Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 56 L. ed. 606; Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165; *Ex parte* Watchorn, 160 Fed. 1014; *Ex parte* Lee Kow, 161 Fed. 592; *Ex parte* Chow Chok, 161 Fed. 627; *Re* Tang Tun, C. C. A., 168 Fed. 488; *Ex parte* Long Lock, 173 Fed. 208; *Ex parte* Chin Hen Lock, 174 Fed. 282; U. S. ex rel. Boulbol v. Fielding, 175 Fed. 290; U. S. ex rel. Chanin v. Williams, C. C. A., 177 Fed. 689; Haw Moy v. North, C. C. A., 183 Fed. 89; U. S. ex rel. Canfora v. Williams, 186 Fed. 354; *Ex parte* Avakian, 188 Fed. 688; U. S. ex rel. Glavas v. Williams, 190 Fed. 686; U. S. v. Rodgers, C. C. A., 191 Fed. 970; Frick v. Lewis, C. C. A., 195 Fed. 693; Prentis v. Cosmas, C. C. A., 196 Fed. 372; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218; U. S. ex rel. Rosen v. Williams, C. C. A., 200 Fed. 538. The immigrant has no right to com-

The petition for the writ should set forth the proceedings before the administrative officer.[49] Conclusions of law therein set forth will be disregarded.[50] Such are allegations that the proceedings of the Board are illegal, void, null, wanting in jurisdiction in respect to the petitioner, and contrary to the rules, regulations and statutes in pursuance of the Constitution of the United States;[51] and that the petitioner was not given a fair hearing.[52] If the petitioner is unable to annex a complete copy of the record, he must state the reasons of his inability and annex as complete a copy or abstract as it is within his power to furnish.[53]

Where it is claimed that the evidence was insufficient or illegal, the evidence should be annexed to the petition or set forth therein,[54] and the petition should contain an averment that this is all the evidence upon the point.[55] Otherwise, the evidence will be presumed to be sufficient.[56] It is the safer practice to have the evidence certified.[57] If the petitioner was arrested under a warrant, a copy thereof must be thereto annexed or substantially stated therein,[58] unless that is impracticable, when sufficient cause for its omission must be set forth.[59] Upon a demurrer to the petition its allegation of facts must be presumed to be true; but not its allegations of conclusions of law.[60]

Where the petition showed that the immigrants were illegally

pulsory process from any executive officer to compel the attendance of witnesses on his behalf. Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165. The charge that an admission of alienage was obtained through plying with liquor and threats, was held to be a question of fact for the executive authorities, whose decision was not reviewed by the court. U. S. ex rel. Glavas v. Williams, 190 Fed. 686.

49 Low Wah Suey v. Backus, 225 U. S. 460, 472, 56 L. ed. 1165, 1169; Haw Moy v. North, C. C. A., 183 Fed. 89; *infra*, § 466.

50 U. S. v. Williams, 204 Fed. 844; Lee Leong v. U. S., C. C. A., 217 Fed. 48.

51 U. S. v. Williams, 204 Fed. 844.

52 Lee Leong v. U. S., C. C. A., 217 Fed. 48.

53 Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165.

54 *Ex parte* Yabucanin, 199 Fed. 365.

55 See § 479, *infra*.

56 *Ex parte* Yabucanin, 199 Fed. 365.

57 Ibid.

58 Haw Moy v. North, C. C. A., 183 Fed. 89. See Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165.

59 Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165.

60 Choy Gum v. Backus, 223 Fed. 487.

detained and the return set forth simply the conclusion of law that the respondent had the right to detain them the latter was held to be insufficient.[61] A return is sufficient which states that the Board of Special Inquiry was duly constituted and the certificate of the examining medical officers was duly made although it does not set forth that these had the statutory qualifications.[62] The alien is entitled to inspect the warrant and the papers upon which it was issued.[63] The warrant should state the country from which the immigrant came and that to which he is to be deported and should also state facts showing under what statute the proceedings were instituted.[64] The deportation shall "at the option of the Secretary of Labor be to the country whence they came or to the foreign port at which such aliens embarked for the United States, or if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or if such aliens entered foreign contiguous territory from the United States and later entered the United States or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit them re-entry or imposes any conditions permitting the re-entry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States."[65] The ports of the insular possessions of the United States are treated as foreign ports.[66] The phrase, "the country whence they came," means that where they were last domiciled.[67] The alien has the burden

61 Stretton v. Shaheen, C. C. A., 176 Fed. 735.

62 U. S. v. Williams, 203 Fed. 203; *infra*, § 466.

63 *Ex parte* Avakian, 188 Fed. 688.

64 *Ex parte* Yabucanin, 199 Fed. 365. Immigration Rule 22, subd. 9 U. S. ex rel. N. G. Hen v. Sisson, 220 Fed. 538. A warrant which directed the alien's return to the country whence he came is too indefinite in such a case, the facts being in doubt. The court ordered the petitioner to continue under bail for twenty days in order to afford time to the Secretary to issue a warrant designating the proper country. *Ex parte* Callow, 240 Fed. 212.

65 Act of February 5, 1917, ch. 29, § 20, 39 St. at L. 896. See *Ex parte* Jung Sew, 221 Fed. 500; Wallace v. U. S. C. C. A., 230 Fed. 71; U. S. v. Sission, C. C. A., 230 Fed. 974.

66 Immigration Rule 22, Subd. 9.

67 *Ex parte* Gytl, 210 Fed. 918.

of proving that the wrong port is named in the warrant or order of deportation,[68] and he must then show that to which he should be deported.[69]

The court to which writ is returnable instead of discharging the prisoner when the deportation has been ordered to the wrong place may direct that he be deported to the proper country.[70] It is no objection to an order of deportation that the alien is charged with "having entered the United States without inspection" instead of "being unlawfully within the United States."[71]

Where the warrant is defective, the order should direct that the prisoner be not discharged until a reasonable time thereafter, without prejudice to the right of the United States to issue a sufficient warrant and detain and deport the petitioner thereupon.[72] Where the testimony of the alien is needed in a suit or prosecution by the United States, notwithstanding his release from deportation or admission to the United States he may be detained in custody unless he gives security for his attendance upon the trial.[73] Where because of war or pestilence or other causes passenger service between this and the foreign country to which he is to be deported has been suspended, he may be detained until a reasonable opportunity for his transportation is found.[74]

If the petitioner is discharged, an appeal may be taken by the United States to the proper court of review, which is usually the Circuit Court of Appeals.[75] Where the court below exceeded its jurisdiction in deciding a case within its cognizance the appeal should be taken to the Circuit Court of Appeals.[76] If the writ is denied or vacated, the petitioner has the right to appeal.[77]

68 U. S. ex rel. N. G. Hen v. Sisson, 220 Fed. 538.

69 Ibid.

70 *Ex parte* Gytl, 210 Fed. 918. *Contra* U. S. v. Redfern, 186 Fed. 603. See U. S. v. Ruiz, C. C. A., 203 Fed. 441.

71 *Ex parte* Hamaguchi, 161 Fed. 185.

72 *Ex parte* Yabucanin, 199 Fed. 365, holding that ten days is sufficient.

73 *Re* Aliens, 231 Fed. 335.

74 U. S. ex rel. Schlimm v. Howe, 222 Fed. 96.

75 Tang Tun v. Edsell, 223 U. S. 673, 682, 56 L. ed. 606, 610; *infra*, § 467.

76 Jim Houj, C. C. A., 211 Fed. 73.

77 Wong Heung v. Elliott, C. C. A., 179 Fed. 110.

The court of review has the right to decide anew all questions and facts that were open to consideration by the court of original jurisdiction;[78] but when the latter had discharged the prisoner upon an erroneous view of the law without an examination of the facts, it was held that the appellate court had no authority to order a deportation but upon reversal must remand the case to the court below to be disposed of upon the merits.[79]

It seems that pending the decision upon a writ of *habeas corpus,* except perhaps in Chinese cases, the petitioner may be released on bail.[80] Where the prisoner is discharged he may be required to give bail pending an appeal by the Government.[81] Where the writ is dismissed or denied, the court to which the application is made has not right to release the petitioner upon bail.[82] If the relator is at large on bail at the time of the application for the writ, it will be denied.[83]

§ 464. Discharge of soldiers from the army by the writ of habeas corpus. A minor, under the age of eighteen, who has not deserted, may, upon the petition of his father,[1] or, in case of the father's death, upon the petition of his mother,[2] or guardian, or person to whom the parents have given the right to the minor's custody,[3] be discharged from the army or navy by means of the writ of *habeas corpus,* because his enlistment was unlawfully made without the consent of his parents or guardian;[4] but not, it is held, when he is under arrest upon the charge of fraudulent enlistment by misrepresentation of his age,[5]

78 Ibid.

79 Frick v. Lee Tung Jung, C. C. A., 205 Fed. 38.

80 This was done in *Re* Crawford, 165 Fed. 830; U. S. ex rel. Castro v. Williams, S. D. New York, February, 1913.

81 U. S. ex rel. N. G. Hen v. Sisson, 220 Fed. 538.

82 Ibid.

83 Sibray v. U. S. ex rel. Kupples, C. C. A., 185 Fed. 401.

§ 464. 1 *Re* Carver, 103 Fed. 624; *Ex parte* Reaves, 121 Fed. 848; *Ex parte* Houghton, 129 Fed. 239.

2 Doane v. Burkman, C. C. A., 190 Fed. 541.

3 Ibid; U. S. ex rel. Hendricks v. Pendleton, 167 Fed. 690; *Ex parte* Hubbard, 182 Fed. 76; *Ex parte* Avery, 235 Fed. 248.

4 See U. S. R. S., § 1117.

5 *Re* Miller, C. C. A., 114 Fed. 838. *Contra, Re* Carver, 103 Fed. 624. *Ex parte* Winfield, 236 Fed. 552; Hoskin v. Dickerson, C. C. A., 239 Fed. 275; *Ex parte* Foley, 243 Fed. 470; U. S. ex rel. Laikund v. Williford, C. C. A., 220 Fed. 291.

or of desertion,[6] or other military offense[7] before[8] or after[9] conviction. It has been held that when he has committed such a military offense, the court will not order a discharge, although he has not been arrested or convicted before the application.[10]

A minor who has voluntarily enlisted cannot be discharged upon the writ of *habeas corpus* issued on his own behalf.[11]

Where there was no proof of the enlistment by the prisoner, while a minor, without his parents' consent, except by an *ex parte* affidavit, attached to the petition; and the return, alleging due enlistment for an unexpired term, desertion, surrender, commitment and confinement under pending charges for the desertion was not traversed; it was held that the writ was properly denied.[12] Documentary evidence of the date of birth, by a certified copy of such public record as there may be upon the subject, should usually be furnished.[13]

When the facts were not in dispute the courts have discharged upon *habeas corpus* persons not subject to the military draft who had been required by the selective service boards to serve,[14] but they have refused to interfere when disputed questions of fact were involved[15] and also when the exempt had failed

6 *Re* Kaufman, 41 Fed. 876; *Re* Miller, C. C. A., 114 Fed. 838; U. S. v. Reaves, C. C. A., 126 Fed. 127, 60 C. C. A., 675; reversing 121 Fed. 848; Dillingham v. Booker, C. C. A., 18 L.R.A. (N. S.) 956, 163 Fed. 696; McConologue's Case, 107 Mass. 154, 170; *Re* Morrissey, 137 U. S. 157, 34 L. ed. 644. But see *Ex parte* Bakley, 148 Fed. 56.

7 U. S. ex rel. Lazarus v. Brown, 242 Fed. 983; *Ex parte* Dostal, 243 Fed. 664.

8 *Re* Cosenow, 37 Fed. 668; Re Carver, 142 Fed. 623; Solomon v. Davenport, C. C. A., 87 Fed. 318.

9 *Re* Morrissey, 137 U. S. 157, 34 L. ed. 644; *Re* Grimley, 137 U. S. 147, 34 L. ed. 644; *Re* Cosenow, 37 Fed. 68; *Re* Spencer, 40 Fed. 149; *Ex parte* Hubbard, 182 Fed. 76.

10 Hoskins v. Dickerson, C. C. A., 239 Fed. 275. *Contra, Ex parte* Avery, 235 Fed. 248, where the minor had received no allowances.

11 Morrissey v. Perry, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. ed. 644; *Ex parte* Dunakin, 202 Fed. 290.

12 Moore v. U. S., C. C. A., 159 Fed. 701.

13 *Re* Carver, 103 Fed. 624.

14 *Ex parte* Beck. D. Montana, 245 Fed. 967; *Ex parte* Cohen, 254 Fed. 711; Arbitmann v. Woodside, C. C. A., 258 Fed. 441.

15 U. S. ex rel. Troiani v. Heyburn, 245 Fed. 360; Franke v. Murray, C. C. A., 248 Fed. 865; U. S. ex rel. Pascher v. Kinkead, 250 Fed. 692; Brown v. Spelman, 254 Fed. 215; Ellen v. Johnson, 254 Fed. 909. *Contra, Ex parte* Fuston, 253 Fed. 90.

to object to his registration before the local board.[16] It was held that an appeal to the District Board was not a condition precedent[17] to his relief. The decision of the proper boards as to rejecting claims for exemption on account of the dependency of a wife[18] or because of physical condition[19] were not thus reviewed. The burden of proof to show that he is exempt is upon the applicant.[20]

The court denied the request of a registrant, who had since his registration been convicted upon his plea of guilty to an offense involving moral turpitude, to discharge from imprisonment thereunder although he was liable to military service upon the expiration of his term.[21]

§ 465. Suspension of writ of habeas corpus. The Constitution provides that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[1] By the Bill of Rights of the Philippine Islands,[2] and of Porto Rico[3] "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, whenever during such period the necessity for such suspension shall exist." During the civil war the question as to the department of the Government in which the right of suspension rests was much debated, but never authoritatively decided. President Lincoln claimed that he had the authority to suspend the writ, and many arrests were made in accordance with this ruling.[4]

16 Summertime v. Local Board, 248 Fed. 832; *Ex parte* Blazekovic, 248 Fed. 327.

17 *Ex parte* Cohen, 254 Fed. 710. *Contra, Ex parte* Tinkoff, 254 Fed. 222.

18 *Ex parte* Tinkoff, 254 Fed. 912.

19 De Genaro v. Johnson, 249 Fed. 504.

20 *Ex parte* Blazekovic, 248 Fed. 328.

21 *Ex parte* Calloway, 246 Fed. 263.

§ 465. 1 Constitution article 1, § 9.

2 Act of August 29, 1916, ch. 416, § 3, 39 St. at L. 546, Comp. St., § 3810.

3 Act of March 2, 1917, ch. 145, § 2, 39 St. at L. 951; Comp. St., § 3803.

4 See, for a highly colored enumeration of such arrests. The American Bastile, by John A. Marshall, Phila. In 1871 Governor Holden of North Carolina was re-

Subsequently Congress by statute suspended the writ, and sought to validate the arrests previously made.[5] Mr. Justice Miller inclined to the view that so much of the statute as validated an arrest previously made was constitutional, and deprived the party arrested of the right to damages for false imprisonment.[6] A number of pamphleteers, amongst them Horace Binney, defended the position of the President. Other pamphleteers, amongst them Ex-Judge Benjamin R. Curtis, claimed that the

moved by impeachment for doing this. Foster's Commentaries on the Constitution, vol. I, p. 676. According to General Schuyler Hamilton, during 1861 the filing of the return to a writ of *habeas corpus*, issued by Mr. Justice Wayne of the Supreme Court of the United States, in the matter of a private in Colonel Willett Gorman's regiment of Minnesota volunteers, was prevented by the colonel's taking the clerk of the court out of town under guard by the latter's consent, after the clerk had given orders that no papers should be filed until he had enforced them. Subsequently, the Justice quashed the writ, deciding in favor of the Government the question involved, holding that the President had the right under the Constitution to call out volunteers as militia. The writ was locked in the safe of the State Department; but has since disappeared.—N. Y. World, February, 1891.

On the morning appointed for the execution of Mrs. Surratt for complicity in the assassination of President Lincoln, Judge Wylie of the Supreme Court of the District of Columbia issued a writ of *habeas corpus* directed to the commander of the military district, directing him to produce Mrs. Surratt in court at ten o'clock on that morning, and show legal cause why she was held in custody. The President issued the following order: "Executive Office, July 7, 1865, 11 o'clock a. m. To Major-Gen. W. S. Hancock, commanding, &c.: I, Andrew Johnson, President of the United States, do hereby declare that the writ of *habeas corpus* has been heretofore suspended in such cases as this, and I do hereby especially suspend this writ and direct that you proceed to execute the order heretofore given upon the judgment of the military commission, and you will give this order in return to this writ. Andrew Johnson, President." Judge Wylie acquiesced in the suspension of the writ, and declined to take any further proceedings, Mrs. Surratt was executed.

[5] 12 St. at L. 755; 14 St. at L. 482. See the proclamation of President Lincoln, 14 St. at L. 734. A bill to suspend the writ of *habeas corpus* passed the Senate January 23, 1807, and was defeated in the House by John Randolph of Roanoke on January 26, 1807. 8 Benton's Abr. 414. See also *Re* Boyle (Idaho, 1899), 57 Pac. 706; and Foster's Commentaries on the Constitution, vol. II.

[6] *Re* Murphy, 1 Woolw. 141. To the same effect is McCall v. McDowell, 1 Abb. U. S. 212.

writ could only be suspended by Congress. Chief Justice Taney held this, in an opinion upon an application for the writ of *habeas corpus;* but his decision was not obeyed.[7] Judge Hall held that the right to suspend the writ was vested in the courts, and that a necessity for the suspension had arisen when the arrest reviewed by him was made.[8] Judge Smalley held that the War Department had no power to suspend the writ.[9] When the application for the writ was denied, because the writ had been suspended, and thereafter, before the allowance of an appeal, the suspension was revoked; the Supreme Court refused to decide the validity of the suspension, since the question had ceased to be of any practical importance.[10] "The suspension of the privilege of the writ does not bar the writ. The writ issues as a matter of course, and on the return made the court decide whether the party applying is denied the right of proceeding any further with it."[11]

7 *Ex parte* Merryman, Taney, 246. *Contra, Ex parte* Field, 5 Blatchf. 63; *Ex parte* Vallandigham, U. S. D. C., D. Ohio, per Leavitt, J.

8 Judge Hall, in the Matter of the Petition of Oliver P. Thomas, in behalf of Joel McKee, U. S. D. C., Judicial District of Colorado, Oct. 14, 1861.

9 *Ex parte* Field, 5 Blatchf. 63.

10 Fisher v. Baker, 203 U. S. 174, 51 L. ed. 142.

11 *Ex parte* Milligan, 4 Wall. 2, 131, 18 L. ed. 281, 298. On the subject treated in this section, see *Ex parte* Merryman, Taney, 246; *Re* Benedict, Hall, J., 4 West. L. Month, 449; McCall v. McDowell, 1 Abb. U. S. 212; *Ex parte* McQuillon, 3 West. L. Month, 440; s. c., 9 Pitts, L. J. 29; Griffin v. Wilcox, 21 Ind. 370; Kemp v. State, 16 Wis. 359; *Re* Dunn, 25 How. Pr. (N. Y.) 467; *Ex parte* Field, 5 Blatchf. 63; *Ex parte* Vallandigham, U. S. D. C., D. Ohio, by Leavitt, J. This judge had so much doubt about the correctness of his decision that, as his grandson informed the writer, he prayed to Heaven for guidance before he made it. *Re* Fagan, 2 Spr. 91; Commonwealth v. Frink, 4 Am. Law Reg. (N. S.) 700, Philadelphia, 1882. Opinion of Attorney-General Cushing on Martial Law, 8 Op. A. G. 365; *Ex parte* Milligan, 4 Wall. 2, 131. Opinion of Attorney-General Bates on the Suspension of the Writ of *Habeas Corpus*, 10 Op. A. G. 74. *Habeas Corpus* and Martial Law. A review of the opinion of Chief Justice Taney in the Case of John Merryman. By Joel Parker, 1861. Judge Parker here argues that in time of war, whether foreign or domestic, there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose. This, he says, does not arise from the President's power to suspend

§ 466. Practice on application for habeas corpus. The application for a writ of *habeas corpus* should be made by a written complaint addressed to the court or judge from whom

the writ, which he cannot constitutionally do, but from the co-ordinate jurisdiction of the military authorities. The Privilege of the Writ of *Habeas Corpus* under the Constitution. By Horace Binney. Second edition, Philadelphia; C. Sherman & Son, 1862. In this pamphlet Mr. Binney argues that there is nothing in the constitutional clause which, either directly or by any fair or reasonable implication, gives or confines the authority to suspend the writ to Congress, or takes it from the executive (p. 31) and he makes an elaborate reply to Chief Justice Taney's opinion in Merryman's case, *supra*. A "Second Part" to the same pamphlet was published by Mr. Binney, in the same year, by John Campbell of Philadelphia. The object of this publication was to "confront a doctrine of certain writers, that the *habeas corpus* clause in the Constitution does not give power to anybody to suspend the privilege of the writ, but is only restrictive of the otherwise plenary power of Congress!" This pamphlet is a reply to the answers which Mr. Binney's first pamphlet drew forth. A "Third Part" of Horace Binney's discussion was published by Sherman & Co., Philadelphia, 1867. Review of Mr. Binney's Pamphlet on the Privilege of the Writ of *Habeas Corpus* under the Constitution. By J. C. Bullitt. Philadelphia, Sherman & Co., 1862. Remarks on Mr. Binney's Treatise. By George M. Wharton. Philadelphia, 1862. Answer to Mr. Binney's Reply to "Remarks," in his treatise on the *Habeas Corpus*. By G. M. Wharton. Philadelphia, 1862. *Habeas Corpus* the Law of War and Confiscation. By S. S. Nicholas. Bradley & Gilbert, Louisville, 1862. In these pamphlets the position that the President has no right on his own motion to suspend the writ, is maintained with great force. It is not, at the same time, claimed that a return by a military officer in time of war, that the relator is in military custody, is not a sufficient discharge. The Writ of *Habeas Corpus* and Mr. Binney, by John T. Montgomery. John Campbell, Philadelphia, 1862. Personal Liberty and Martial Law, Philadelphia, 1862. By Edward Ingersoll. *Habeas Corpus*. By D. A. Mahoney, Prisoner of State, 1863. The Suspending Power and the Writ of *Habeas Corpus*. By James F. Johnson. John Campbell, Philadelphia, 1862. Martial Law: What is it, and who can declare it? By Tatlow Jackson. John Campbell, Philadelphia, 1862. Authorities Cited Antagonistic to Mr. Binney's Conclusions. By Tatlow Jackson. Philadelphia, 1862. *Habeas Corpus*. A Response to Mr. Binney, by S. S. Nicholas. Bradley & Gilbert, Louisville, 1862. Martial Law, by S. S. Nicholas, 1862. Presidential Power over Personal Liberty, a Review of Horace Binney's essay on the writ of *Habeas Corpus* imprinted for the author; Anon., dated February 12, 1862. Judge Curtis on Executive Power; reprinted 2 Curtis' Works, 309. Com-

the writ is sought, and sworn to by the complainant, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or

pare 1 Curtis' Life, 240, 349. Opinions of Founders of Republic on *Habeas Corpus,* &c. Washington, 1864. Facts and Authorities on the Suspension of Writ of *Habeas Corpus,* 1864. Anon. The Privilege of the Writ of *Habeas Corpus* under the Constitution of the United States. In what it consists. How it is allowed. How it is suspended. It is the regulation of the law, not the authorization of an exercise of legislative power. Philadelphia, 1862. A Reply to Horace Binney's Pamphlet on the *Habeas Corpus,* by C. H. Gross. Philadelphia, 1862. Reply to Horace Binney on the Privilege of the Writ of *Habeas Corpus* under the Constitution, by a Member of the Philadelphia Bar. James Challen & Son, Philadelphia, 1862. A Treatise on the Martial Power of the President of the United States. By Daniel Gardner, Jurist. War Power of the President. By J. Hermans, Loyal Publication Society, No. 32. C. S. Westcott & Co., Printers, 1863. Argument of John A. Bingham, Special Judge Advocate, on the Constitutionality of the Trial of the Assassins of President Lincoln by a Military Commission, in Mrs. Surratt's Trial; also republished in pamphlet form. Speech of Senator R. S. Field, of New Jersey, in the United States Senate, January 7th, 1863. Towers & Co., Washington, 1863. An Undelivered Speech on Executive Arrests, by C. R. Ingersoll. Philadelphia, 1862. Several of these pamphlets may occasionally be bought bound together, under the title of "Campbel's Pamphlets," "Martial Law and *Habeas Corpus,*" &c. Incomplete sets may be found in the library of Harvard University, in that of the author of this work, who has a collection formerly owned by Charles O'Connor; and in some of the book stores at Washington. Dr. Francis Wharton, says, in his Criminal Pleading and Practice, 9th Ed., § 979, note 2, after enumerating some, but not all of the above named works: "The following conclusions may now be ventured on the topics discussed in the foregoing publications: First: The President of the United States has no constitutional power to suspend the writ of *habeas corpus.* Second: On the return by a general military officer, in time of war, that he holds the relator either as a military subordinate, or as a spy, or as deserter, or as a prisoner of war, an attachment should be refused. *Infra,* § 996. Third: When a person, not in military service, or a prisoner of war, or charged with being a spy or deserter, is arrested by any authority whatsoever, he should be discharged by a Federal judge on *habeas corpus,* unless there is evidence produced against him at the hearing sufficient to justify an indictment to be found against him by a grand jury. See *Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281. Fourth: If the return be that the relator is held under Federal authority, the revision by a writ of *habeas corpus* is vested exclusively in the Federal courts." According to Judge Curtis. "Military law is

authority, if known.[1] A father may thus apply when his child is illegally restrained.[2]

that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person or any property of any citizen. It could not even apply to the teamsters of an army save by force of express provisions of the laws of Congress making such persons amenable thereto. The persons and property of private citizens of the United States are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain. But there is also martial law. What is this? It is the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends. . . . In time of war, without any special legislation, not the Commander-in-Chief only, but every Commander of an expedition or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatsoever is necessary to accomplish the lawful objects of his command. . . . But when the Military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. . . . He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the property of the country subject to his military requisitions.'' 2 Curtis Life and Works, 327. Compare authorities cited in Lawrence's Wheaton, 516-520, as to distinction between martial and military law, and the right to suspend the writ of *habeas corpus*. Between martial law and military law the distinction is this: Martial law is the law adopted by civilized belligerents in matters connected with army discipline; military law is the law a conqueror imposes in a subjugated province to determine matters of State. See Whart. Com. Am. Law, §§ 37, 38; *Ex parte* Mason, 105 U. S. 696, 26 L. ed. 1213. See, also, Waters v. Campbell, 5 Sawyer, 17. Charles Sumner, in his speech in the Senate June 27, 1862, took the ground that the power of Congress in this relation was supreme. See also The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery, by William Whiting. Tenth edition, Boston, 1862.

§ 466. 1 U. S. R. S., § 754.

2 U. S. v. Anderson, Cooke (Tenn.), 143; U. S. v. Green, 3 Mason, 482; Bennett v. Bennett, Deady, 299; *supra*, § 461, note 25. See as to the former right of a master thus to obtain a slave, U. S. ex rel. Wheeler v. Williamson, 4 Am. Law Reg. 5. By the Rules of U. S. D. C., S. D. N. Y., ''In any action or proceeding any order, whether known in practice as a

A deputy United States marshal, with a warrant for the extradition of a person arrested under State civil process, has the right to apply for the writ.[3] A party who had a suit pending in a court was allowed the writ where a judge of that court was arrested.[4] In an extraordinary case the writ may be granted at the request of a stranger who has no legal interest in the matter and whom the prisoner has not authorized to represent him.[5] Such an application entitles the petitioner to no more relief than if the prisoner made the application in his own name.[6] It is the safer practice in such a case to show some good reason for not obtaining the consent of the party detained. Where the proceedings had been instituted on behalf of an alleged lunatic by his next friend, the court superseded his next friend by the appointment of a guardian *ad litem*, with authority to investigate the facts and recommend whether the proceeding be abandoned. Pending such an investigation the proceeding was stayed.[7] An appeal in this case was entertained although taken by the next friend who has been removed.[8] Neither an Indian agent, nor, except perhaps under extraordinary circum-

Court order or Judge's order, may be made and entered by any judge."

3 *Re* Mineau, 45 Fed. 188.

4 *Ex parte* Des Rochers, 1 McAll. 68.

5 *Ex parte* Des Rochers, 1 McAll. 68; *Re* Hoyle, 12 Chic. L. N. 279; s. c., 9 Am. L. Rec. 65; *Re* Ferrens, 3 Ben. 445; The Hottentot Venus, 13 East, 194; Wheeler v. Williamson, 14 Am. Law Reg. 5; People v. Mercein, 3 Hill, 399, 407, 38 Am. Dec. 644. But see *Re* Poole, 2 McA. (D. C.) 583; *Ex parte* Dorr, 3 How. 103, 11 L. ed. 514. In Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, the petition was by the Governor of West Virginia. There seems to have been no objection taken to this; but immediately thereafter another petition was presented by a citizen of West Virginia, and subsequently the name of the party restrained was substituted for that of the petitioner, and the proceedings on the petition were conducted in his name. At what particular stage of the proceedings the substitution of the name was made does not appear; but there seems to have been no objection taken to the petition being signed by the citizen or by the Governor. See Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386; *infra*, § 388. See learned articles on the subject by Theodore Connoly, Esq., in N. Y. L. J., June 5, 1890; Hon. S. D. Thompson, in 18 Fed. 68; and the Jurisdiction of the Federal Courts in *Habeas Corpus* Cases, 12 Crim. Law Mag. 193.

6 *Ex parte* Dastal, 243 Fed. 664.

7 King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 26 L.R.A. 784, 64 Fed. 331, 353.

8 Ibid, C. C. A., 64 Fed. 325.

stances, the United States, can sue out the writ to restore an Indian child to the custody of its mother.[9]

The petition must show the jurisdiction of the court or judge to grant the writ.[10] A general averment that the petitioner is detained in violation of the Constitution and laws of the United States, and that the court below had "no jurisdiction or authority to try and sentence him in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment."[11] So are allegations that a defense was arbitrarily overruled[12] or that evidence detrimental to the petitioner was offered in his absence, without a statement of the nature thereof.[13] An allegation that the petitioner is a specified officer in the army of a foreign nation, of which he is a subject, and committed the acts, which are the subjects of criminal prosecution, as a necessary part of an attack upon the territory of a country with which his nation is at war, is insufficient to show that he is domiciled abroad or that such acts were authorized or commanded by his Government.[14] But it was held to be sufficient to allege that the petitioner was unlawfully and wrongfully confined in imprisonment under the orders of the commanding officer of a military camp, naming such officer and camp with its location, and that the police department was in charge of a specified officer under whose particular charge he was.[15] But it was said that "A simple application to the court, stating that the party is unlawfully confined, is in most cases sufficient."[16] The proceedings under which the petitioner is imprisoned must be set forth with sufficient detail that their invalidity may appear.[17] A copy of the record of the

9 *Re* Celestine, 114 Fed. 551.

10 *Ex parte* Milburn, 9 Pet. 704, note, 9 L. ed. 280. See Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406; King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 26 L.R.A. 784, 64 Fed. 331; Howard v. U. S., 34 L.R.A. 509, 75 Fed. 986.

11 *Re* Cuddy, 131 U. S. 280, 286, 33 L. ed. 154, 157, per Mr. Justice Harlan.

12 Collins v. Johnston, 237 U. S. 502.

13 Choy Gum v. Backus, C. C. A., 223 Fed. 487.

14 Horn v. Mitchell, 223 Fed. 549.

15 *Ex parte* Mikell, 253 Fed. 817.

16 *Ex parte* Mikell, 253 Fed. 817, 819.

17 Anderson v. Treat, 172 U. S. 24, 43 L. ed. 351; Craemer v. Washington, 168 U. S. 124, 42 L. ed. 407.

proceedings which are attacked must be supplied by the petitioner[18] or a reasonable excuse for its omission must be set forth.[19] And, in the latter case, the petitioner must comply with the rule so far as is in his power.[20] When the prisoner has been committed to jail by a public officer, the complaint should be accompanied by a copy of the commitment, or an affidavit that the jailer has refused a copy.[21] The petitioner may state facts outside of and not inconsistent with the record, showing that the court under the process of which the prisoner is held has no jurisdiction over his person, or in respect to the subject with which he is charged.[22]

When the proceedings of an inferior tribunal are reviewed by a writ of *habeas corpus,* a writ of *certiorari* issues with it and should be asked for in the petition.[23] The facts may thus be reviewed.[24] It is improper to submit a bill of exceptions setting forth the proceedings of the court whose commitment is sought to be reviewed.[25] The court or judge to whom such an

For the necessary averments in a petition after an order for extradition, see *Re* Count de Toulouse Lautrec, 102 Fed. 878.

18 Craemer v. Washington State, 168 U. S. 124, 42 L. ed. 407; Low Wah Suey v. Backus, 225 U. S. 460, 472, 56 L. ed. 1165, 1169.

19 Low Wah Suey v. Backus, 225 U. S. 460, 472, 56 L. ed. 1165, 1169; per Day, J.: "The reasons given for failure to comply with this rule, as stated in the petition, are that the record is too voluminous to be made a part thereof, that to incorporate a copy of the entire proceedings would 'burden the petition and cloud the issue,' that the petitioner was not in the possession of the entire record and was unable to secure it in time to file it with his petition, and that the Commissioner of Immigration had a copy of the record which he could produce with the body of Li A. Sim. It does not appear that a copy of the essential part of the proceedings was not in the possession of the petitioner or could not be had, and so far as it was within his power he should have complied with the rule."

20 Low Wah Suey v. Backus, 225 U. S. 460, 472, 56 L. ed. 1165, 1169.

21 Harrison's Case, 1 Cranch, C. C. 159; U. S. v. Bollman, 1 Cranch. C. C. 373. See *supra,* § 463.

22 *Re* Mayfield, 141 U. S. 107, 116; *Re* Cuddy, 131 U. S. 280, 33 L. ed. 154.

23 *Ex parte* Burford, 3 Cranch, 448, 2 L. ed. 495; *Ex parte* Bollman, 4 Cranch, 75, 2 L. ed. 554; *Ex parte* Martin, 5 Blatchf. 303; *Re* Stupp, 12 Blatchf. 501. See *supra,* § 460.

24 *Re* Watts & Sachs, 190 U. S. 1, 47 L. ed. 933; Bessette v. W. B. Conkey Co., 194 U. S. 324, 334, 48 L. ed. 997, 1004.

25 *Ex parte* Harlan, 180 Fed. 119, 131.

application is made, if his jurisdiction appears, should forthwith grant a writ of *habeas corpus*, unless it appears from the petition that the parties are not entitled thereto, when the writ should be denied,[26] or that he is doubtful, in which latter case an order to show cause may be issued.[27] The writ is a writ of right;[28] but it does not issue as of course. Some ground for it must be shown.[29]

Instead of issuing the writ in the first instance the court may enter a rule to show cause why it should not issue,[30] and the rights of the petitioner may be determined upon the merits upon a hearing on the application.[31] Such a decision may be made in the absence of the petitioner.[32]

The Supreme Court will ordinarily refuse to issue the writ in a case of which a District Court of the United States has jurisdiction, unless it is intended to review a decision of such District Court.[33] The Supreme Court[34] and the inferior courts of the United States will ordinarily refuse to discharge by *habeas corpus* a prisoner held under indictment by a State court before trial of the indictment,[35] and even after his conviction, or, in the case of an alleged lunatic after his commitment, if he

26 U. S. R. S., § 755; *Re* Haskell, 52 Fed. 795; Horn v. Mitchell, 223 Fed. 549.

27 *Re* King, 51 Fed. 434, 435.

28 *Re* King, 51 Fed. 434, 435; *Re* Durrant, 169 U. S. 39.

29 *Ex parte* Milburn, 9 Pet. 704, note, 9 L. ed. 280; Trial of Vallandigham, 45. See *Re* Durrant, 84 Fed. 317; Erickson v. Hodges, C. C. A., 179 Fed. 177; Walters v. McKinnis, 221 Fed. 746.

30 *Ex parte* Mirzan, 119 U. S. 584, 30 L. ed. 513; *Ex parte* Royall, 117 U. S. 254, 29 L. ed. 872; Wales v. Whitney, 114 U. S. 564, 29 L. ed. 277; *Re* Kemmler, 136 U. S. 436, 34 L. ed. 519; *Re* Huntington, 137 U. S. 63, 34 L. ed. 567; Riggins v. U. S., 199 U. S. 547, 50 L. ed. 303.

31 *Ex parte* King, 200 Fed. 622; *Ex parte* Hyde, 194 Fed. 207; Horn v. Mitchell, C. C. A., 232 Fed. 819.

32 Murdock v. Pollock, C. C. A., 229 Fed. 392.

33 *Ex parte* Royall, 117 U. S. 254, 29 L. ed. 872; *Ex parte* Clark, 128 U. S. 395, 32 L. ed. 487; *Ex parte* Fonda, 117 U. S. 516, 29 L. ed. 994.

34 Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760.

35 *Ex parte* Royall, 117 U. S. 241, 254, 29 L. ed. 868, 872; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934; New York v. Eno, 155 U. S. 89, 39 L. ed. 80; Pepke v. Corilari, 155 U. S. 100, 39 L. ed. 84; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406; *Re* Matthews, 122 Fed. 248, 259 and citations; *Ex parte* Roach, 166 Fed. 344.

has still a remedy in the courts of such State by writ of error or appeal,[36] or otherwise,[37] or in the Supreme Court of the United States by a writ of error of *certiorari* addressed to a State court;[38] except when the prisoner is an officer or employee of the United States,[39] or perhaps in the case of an alien who claims under a treaty,[40] or of an alien who is in custody for an act done or omitted under a right claimed under the color of a commission, order or sanction of a foreign state,[41] or of a witness who has been unlawfully imprisoned for contempt during a trial,[42] or other extraordinary circumstances. In a case where, upon a similar question, the State courts had decided erroneously, the court granted the writ and discharged the prisoner before trial.[43]

Where a District Judge had upon the trial decided adversely to the claim of the petitioner, the Circuit Judge refused to review the question collaterally by *habeas corpus*.[44] The Su-

36 *Ex parte* Frederich, 149 U. S. 70, 37 L. ed. 653; Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845; *Ex parte* Rearick, 118 Fed. 928; Filer v. Steele, 228 Fed. 242; *Ex parte* Coatz, 242 Fed. 1003. But see *Ex parte* Green, 114 Fed. 959.

37 *Ex parte* Collins, 154 Fed. 980.

38 Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760; *Ex parte* Merrill, 245 Fed. 778; *Re* Lincoln, 202 U. S. 178, 50 L. ed. 984, where the sentence was imprisonment for a specified term and until a fine of $100 and costs were paid, nothing in the record showing whether the fine was collected on execution, as the record authorized, and if not collected the petitioner could shortly be discharged upon taking the poor debtor's oath. *Ex parte* Chadwick, 159 Fed. 576.

39 Ohio v. Thomas, 173 U. S. 276, 285, 43 L. ed. 699, 702; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846; *Re* Turner, 119 Fed. 231; West Virginia v. Laing, C. C. A., 133 Fed. 887.

40 Cohn v. Jones, 100 Fed. 639; *Ex parte* Royall, 117 U. S. 241, 254, 29 L. ed. 868, 872.

41 *Ex parte* Bartlett, 197 Fed. 98. See § 461, *supra*. But see *Ex parte* Collins, 149 Fed. 373.

42 *Ex parte* Hudgins, 249 U. S. 378.

43 *Re* Reinitz, 4 L.R.A. 236, 39 Fed. 204. But see as to Supreme Court of District of Columbia, *Re* Chapman, 156 U. S. 211, 39 L. ed. 401. The writ was denied where the petitioner alleged that the State Supreme Court had decided that the statute under which he was arrested was constitutional, and that he could not obtain a review of a decision against him by the Supreme Court of the United States until the sentence that would be imposed had expired, since the State court had the power to impose a fine as a punishment and to order his enlargement pending an appeal. *Ex parte* Bartlett, 197 Fed. 98.

44 *Re* Simmons, 45 Fed. 241. But

preme Court will ordinarily refuse to entertain a petition for a *habeas corpus* by a prisoner held under an indictment found in a court of the United States or of the District of Columbia, when no motion to quash or proceeding to test the sufficiency of the indictment has been taken in the District Court;[45] or after conviction where there is a remedy by writ of error or appeal.[46] Similar rules apply to the Circuit Courts of Appeals.[47]

In extradition proceedings between the States, the Court may properly defer the hearing until after the decision of the Governor of the State of the asylum.[48]

The writ may issue after an affirmance of a conviction, when there is no right to an appeal or writ of error.[49] The writ will be denied by the Supreme Court when it is impossible to dispose of it before the term of imprisonment expires.[50] The prisoner will not be discharged if his present confinement is legal, although he has also been sentenced to a further illegal term, which has not yet begun.[51] When the application is made to a judge, he may decline to grant it if there is a doubtful question of law involved, since there is no appeal from his decision.[52]

see *Re* Johnson, 46 Fed. 477. In a case where, upon demurrer to an indictment, the Circuit Court was equally divided, and certified the question to the Supreme Court, which remanded the case without any decision as to the sufficiency of the indictment, a District Judge subsequently discharged the assured upon *habeas corpus* when held under a second and different indictment for the same acts. *Re* Benson, 58 Fed. 962, 972.

45 Allen v. Black, 43 Fed. 228; Morgan v. Ward, C. C. A., 224 Fed. 698. "If the questions are of such a character that it is thought desirable that the opinion of an appellate court should be obtained, such a proceeding as this is the more appropriate way in which to raise them, for a decision adverse to the government is reviewable by appeal, but a similar decision on the trial is final, as the government cannot appeal from a criminal judgment." Lacombe, J., in *Re* Terrell, 51 Fed. 213, 214. See Henry v. Henkel, 235 U. S. 219.

46 Anderson v. Treat, 172 U. S. 24, 43 L. ed. 351. See *Re* Lincoln, 202 U. S. 178, 50 L. ed. 984.

47 Jones v. Perkins, Deputy United States Marshal, et al., 245 U. S. 390; Morgan v. Ward, C. C. A., 224 Fed. 698.

48 *Ex parte* Thaw, 209 Fed. 56.

49 Matter of Heff, 197 U. S. 488, 49 L. ed. 848.

50 *Re* Baez, 177 U. S. 378, 44 L. ed. 813.

51 *Re* Swan, 150 U. S. 637, 37 L. ed. 1207.

52 Matter of Kaine, 14 How. 103, 119; 14 L. ed. 345, 351; U. S. R. S., §§ 911, 912; *infra*, § 467.

The writ when issued from the court, like other writs issued out of the Federal courts, must bear the seal of the court, be signed by the clerk, and bear teste of the presiding Justice of the Supreme Court when issued therefrom, and when issued from a District Court, of the judge thereof, or when that office is vacant, of the clerk thereof.[53]

The writ must be directed to the person in whose custody the prisoner is detained.[54]

When the writ is issued in the case of an alien prisoner domiciled in a foreign State to which he owes allegiance, who is in custody by or under the law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect of which depend on the law of nations; notice of the said proceeding, to be prescribed by the court or judge issuing the writ, must be served on the Attorney-General or other officer prosecuting the pleas of said State; and due proof of such service must be made to the court or judge before the hearing.[55] Otherwise, such notice is not necessary, although the prisoner is confined under the judgment or order of a State court or magistrate;[56] but the courts frequently require it.[57]

The person to whom the writ is directed must make a due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond the distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.[58] The return must be in writing, signed by the person to whom the writ is directed,[59] and certifying the true cause of the prisoner's detention.[60] The person making the return must at the same time bring the body of the

53 U. S. R. S., §§ 911, 912.

54 U. S. R. S., § 755.

55 U. S. R. S., § 762.

56 Matter of Leary, 10 Ben. 197. But see U. S. v. Jailer of Fayette County, 2 Abb. U. S. 265.

57 U. S. v. Jailer of Fayette County, 2 Abb. U. S. 265.

58 U. S. R. S., § 756.

59 Seavey v. Seymour, 3 Cliff. 439.

60 U. S. R. S., § 757. The return is not defective if a material fact not stated therein appears in the petition. *Re* Ah Toy, 45 Fed. 795.

prisoner before the judge who granted the writ,[61] but where the petition is addressed to the court and not to any particular judge thereof, any judge of the court may hear a motion to quash the same,[62] and it seems that the writ may be returnable to the court, instead of to the judge who grants it.[63] A failure to produce the prisoner or to make a return may be punished by attachment.[64] A false return may be similarly punished.[65] If the prisoner is no longer under the control of the person to whom the writ is addressed the latter must declare so far as he knows what has become of him.[66]

Pending the hearing upon the return to a writ of *habeas corpus* the prisoner is in the custody of the court or judge that issued the writ, and may be admitted to bail or remanded to the jail from which he came, or placed in the custody of the marshal.[67] This is forbidden upon applications for the writ by Chinese seeking to land in the United States.[68] The prisoner cannot, while in such custody, be arrested on a second warrant.[69]

When the writ is returned, a day must be set for the hearing of the cause not exceeding five days after the return, unless the party petitioning requests a longer time.[70] When the writ is granted by a Justice of the Supreme Court in a case of which that court has jurisdiction, and the proceeding is in its nature

61 U. S. R. S., § 758.

62 *Re* Thaw, C. C. A., 166 Fed. 71.

63 This was the course pursued in *Re* Geissler, S. D. N. Y., 196 Fed. 168, in which the writer was counsel.

64 U. S. v. Bollman, 1 Cranch, C. C. 373; U. S. v. Green, 3 Mason, 482.

65 U. S. v. Davis, 5 Cranch, C. C. 622; U. S. v. Williamson, 3 Am. L. Reg. 729; s. c., 4 Am. L. Reg. 5.

66 U. S. v. Williamson, 4 Am. L. Reg. 5. It was held that a State judge acted within his jurisdiction in punishing a parent for disobedience to the writ when the child whose production was ordered had been removed from the State. *Ex parte* Young, 50 Fed. 526.

67 Matter of Kaine, 14 How. 103, 14 L. ed. 345. See 27 St. at L., ch. 60, p. 25; *Re* Farez, 7 Blatchf. 345.

68 Act of May 5, 1892, c. 60, § 5; 27 St. at L. 25. *Re* Chin Yuen Sing, 65 Fed. 571, 572, 788; *Re* Ong Lung, 125 Fed. 813; holding that this section of the earlier statute was not repealed by the provision, in Sundry Civil Appropriation Bill of August 18, 1894, § 301, 28 St. at L. 390, that decisions of immigration officers, when adverse to the immigrant, should be final.

69 U. S. R. S., § 759.

70 *Ex parte* Clarke, 100 U. S. 399, 403, 25 L. ed. 715, 716. But see Matter of Kaine, 14 How. 103, 14 L. ed. 345.

appellate, that is to review the proceedings of an inferior court, the Justice may postpone the hearing until a session of the whole court.[71]

The applicant for the writ or the party imprisoned or restrained may deny under oath any of the facts.

In case of a conviction for a contempt of court, the petition may supplement the record by alleging such additional facts, set forth in the return, or may allege any other material facts,[72] as tend to show that his misbehavior was not in contempt.[73] Only distinct and unambiguous statements of fact not denied by the return nor controverted by other evidence will be presumed to be admitted.[74]

The court or judge may allow the return, and all suggestions against it, to be amended before or after the same are filed.[75]

The return is deemed to import verity unless impeached.[76]

The court or judge, upon the day set for the hearing, must proceed in a summary way to determine the facts, by hearing the testimony and arguments, and thereupon make an order discharging the prisoner, or remanding him to the custody from which he was removed by the writ.[77] The petitioner has the burden of proving that the allegations in the return are false.[78] The court may look beyond the record of the conviction by a State court sufficiently to test the jurisdiction of the latter;[79] but in such a case it should examine the entire course of the proceedings.[80] A finding of facts sustained by the State court of last resort as to what occurred upon the trial should ordinarily

71 U. S. R. S., § 760.

72 U. S. R. S., § 760.

73 Cuddy, Petitioner, 131 U. S. 280, 33 L. ed. 154; *Ex parte* O'Neal, 125 Fed. 967.

74 Whitten v. Tomlinson, 160 U. S. 231, 242, 40 L. ed. 406, 412; Kohl v. Lehlbock, 160 U. S. 293, 40 L. ed. 432.

75 U. S. R. S., § 760.

76 Crowley v. Christensen, 137 U. S. 86, 94, 34 L. ed. 620, 624; Stretton v. Rudy, C. C. A., 176 Fed. 727.

77 U. S. R. S., § 761. See U. S. v. Fowkes, C. C. A., 53 Fed. 13; s. c., 49 Fed. 50; *Re* Gut Lun, 83 Fed. 141; *Ex parte* Lennon, 166 U. S. 548, 41 L. ed. 1110. In *Ex parte* Harlan, 180 Fed. 119, 125, the court admitted all evidence offered, reserving decision upon its relevancy and materiality until it decided upon the merits.

78 Tiberg v. Warren, C. C. A., 192 Fed. 458; Innes v. Tobin, 240 U. S. 127; *Ex parte* Risse, 257 Fed. 102.

79 Filer v. Steele, 228 Fed. 242.

80 Ibid.

be followed by the Federal tribunal.[81] In cases which involve a conflict of jurisdiction between State and Federal authorities, or where the treaty rights and obligations of the United States are involved, and in cases of urgency involving in a substantial sense the authority and operation of the general Government or embarrassing the administration of justice by tending to intimidate witnesses; the court hearing the application will carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require;[82] but ordinarily the hearing should be confined to the single question of jurisdiction.[83] If the writ is returned to the court that entered the judgment under which the petitioner is held, the sentence may be corrected *nunc pro tunc* and the prisoner held under the same as modified.[84]

The present rule seems to be that the petitioner will ordinarily not be discharged if at the time of the return his imprisonment is lawful, although the application was made at a time when he was unlawfully restrained.[85] The petitioner was discharged when his imprisonment was lawful when the writ was allowed, but illegal at the time of its return.[86]

The order for a discharge may provide that ten days' notice thereof be given to the prosecuting officer,[87] or to the immigration authorities;[88] or that the discharge may be delayed a reasonable time sufficient to afford an opportunity for the correction of a judgment under which the prisoner is held,[89] or that he be returned for that purpose to the court which committed him;[90] or in the case of deportation that he be returned to the immigration authorities with the direction to give him a fair hearing;[91] or that the decision be without prejudice to the right

81 Frank v. Mangum, 237 U. S. 309, 335.

82 *Re* Loney, 134 U. S. 372; Henry v. Henkel, 235 U. S. 219.

83 Henry v. Henkel, 235 U. S. 219.

84 *Ex parte* Harlan, 180 Fed. 119, where the words "at hard labor" were stricken out upon the return.

85 Iasigi v. Van de Carr, 166 U. S. 391, 41 L. ed. 1045. *Cf.* Ekiu v. U. S., 142 U. S. 651, 35 L. ed. 1146. *Contra, Re* Doo Woon, 18 Fed. 898.

86 U. S. v. Patterson, 29 Fed. 775.

87 *Re* Medley, 134 U. S. 160, 175, 33 L. ed. 835, 841; *Re* Savage, 134 U. S. 176, 177, 33 L. ed. 842.

88 *Ex parte* Yabucanin, 199 Fed. 365.

89 *Re* Bonner, 151 U. S. 242, 259-262, 38 L. ed. 149, 152, 153.

90 Bryant v. U. S., C. C. A., 214 Fed. 51.

91 White v. Wong Quen Luck, C. C. A., 243 Fed. 547.

of the government to take any lawful measures to have a new and valid sentence imposed by the trial court;[92] or when the court finds that the imprisonment is illegal, it seems that it may in a proper case, instead of ordering a discharge, direct that the prisoner be delivered to the marshal of the district[93] or to a representative of a foreign nation.[94]

The order of discharge may be vacated at the term at which it was entered,[95] and a supplemental return after its entry may be permitted to support a motion for that purpose.[96] The order of discharge is *res adjudicata* as to all questions therein determined.[97]

When an officer of the United States is discharged after an indictment by a State court, it seems that no further prosecution for the same cause can be maintained against him in the courts of such State.[98]

The doctrine of *res adjudicata* does not apply to denials of the application for the writ, and successive petitions may be presented to different judges, who have power to entertain it, after the same prayer has been previously denied.[99] The fact that

92 *Re* Bonner, 151 U. S. 242, 38 L. ed. 149.

93 *Re* Gut Lun, 84 Fed. 323; *Re* Mineau, 45 Fed. 188.

94 Motherwell v. U. S. ex rel. Alexandroff, C. C. A., 107 Fed. 437, 440. But see *Re* Fitton, 45 Fed. 471.

95 Tiberg v. Warren, C. C. A., 192 Fed. 458.

96 Ibid.

97 U. S. v. Chung Lee, 71 Fed. 277; s. c. in C. C. A., 76 Fed. 951; *Re* White, 45 Fed. 237.

98 *Re* Neagle, 135 U. S. 1, 34 L. ed. 55; Kelly v. Georgia, 68 Fed. 652.

99 *Ex parte* Kaine, 3 Blatchf. 1. But see s. c., 14 How. 103, 14 L. ed. 345; *Ex parte* Robinson, 6 McLean, 355; *Ex parte* Cuddy, 40 Fed. 62; *Ex parte* Jugiro, 44 Fed. 754; Carter v. McClaughry, 105 Fed. 614; King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 26 L.R.A. 784, 64 Fed. 331, 350; *Re* Kopel, 148 Fed. 505; *Ex parte* Thaw, 209 Fed. 954; cited *supra*, § 462. But see Lui Lum v. U. S., C. C. A., 166 Fed. 106; *Re* Simmons, 45 Fed. 241, where the petition showed a previous denial of the writ. See People v. Jugigo, 128 N. Y. 589, for a case where after two applications for the writ had been denied and taken to the Supreme Court by appeal and there affirmed Jugiro v. Brush, 140 U. S. 291, 35 L. ed. 510; s. c., 140 U. S. 686, 35 L. ed. 749, a third application was prevented by the absence from New York City of all the Federal judges during the week preceding the executions. In Wood's case, after two similar applications and appeals (Wood v. Brush, 140 U. S. 278, 35 L. ed. 505; s. c., 140 U. S. 370, 35 L. ed. 510) there was a similar judicial

the same petition has been denied by a State court will not, consequently, prevent the Federal courts from entertaining it.[100] The trial and acquittal of the petitioner in the State court, after the writ was issued, was held to be no ground for dismissing the same.[101] After the writ, however, has been refused by one Federal judge, it is customary, upon subsequent applications, for other Federal judges to deny it, leaving the party to his remedy by appeal from the first order of denial.[102]

State courts have held that a proceeding to obtain the custody of a child is in the nature of a private suit, in which the public is not concerned; and that, consequently, an order upon an application therein for the writ of *habeas corpus* is *res adjudicata* between the parties so long as the conditions have not changed.[103]

absence. The counsel for Wood found Judge Lacombe at his country residence, and where he applied for an order denying the application for the writ, and an allowance of an appeal from such order to the Supreme Court of the United States. Judge Lacombe took the papers, and subsequently sent them to the clerk of the Circuit Court for the Southern District of New York, with instructions to erase his signature from the allowance of the appeal and the citation if it appeared that the name of the counsel who made the application was not on the roll of members of the bar of that court. This was done by the clerk against the protest of Wood's counsel, who was a member of the bar of the Supreme Court of the United States, and as such claimed the right to practice in all courts of the United States. See *supra*, § 168. For a defense of the lawyer's conduct, see 14 Alb. L. J. 21. Judge Lanning, of the District of New Jersey, has directed an entry, upon the minutes of the Circuit Court of the United States for the District of New Jersey, stating that, when future applications for the writ of *habeas corpus* are made in cases of homicide, he would at once consult with his associate, and if the application was, without merit, made with the evident intention of thwarting the ends of justice, the name of the applicant's attorney would be stricken from the rolls of the court. A recent act of Congress quoted *infra*, § 467, has checked this practice.

100 *Re* Kopel, 148 Fed. 505; Filer v. Steele, 228 Fed. 242.

101 *Ex parte* Martin, 180 Fed. 209.

102 *Ex parte* Moebus, 148 Fed. 39.

103 Cormack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077; Knapp v. Tolan (North Dakota, Aug. 1913), 142 N. W. 915; Burns v. Shapley (Ala. Jan'y, 1918), 77 So. Rep. 447, *contra* Patten v. Shapiro (Tex. Civ. App.), 154 S. W. 687. See Morill v. Morill (Conn.), 77 Atl. 1; People v. Dewey, 23 Misc. (N. Y.), 524.

§ 467. Appeals in habeas corpus proceedings. Before the Evarts Act of March 3, 1891, an appeal might be taken to the Supreme Court from the final decision of a Circuit Court of the United States, upon an application for a writ of *habeas corpus*, or upon such writ when issued, in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States; and in the case of a prisoner who, being a subject or citizen of a foreign state and domiciled therein, was committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depended upon the law of nations, or under color thereof.[1] No appeal lay from a decision of a judge of a District Court of the United States, either to the Supreme Court,[2] or to a Cir-

§ 467. [1] U. S. R. S., § 764, as amended by 23 St. at L., ch. 353, p. 437.

[2] Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882. In that case the petition was presented to the Circuit Judge at his chambers in Baltimore. He directed the clerk of the Circuit Court for the Eastern District of Virginia, within which the petitioner was imprisoned, to issue a writ returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, under the seal of the court in the usual form of Circuit Court writs, returnable "before the Honorable Hugh L. Bond, Judge of our Circuit Court of the United States for the Eastern District of Virginia, sitting at the United States Court House in Baltimore, Maryland." Upon a demurrer to the return of the writ, an order of discharge was entered. At the foot of this order was the following: "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court. Hugh L. Bond, Circuit Judge." The order was held to be not a court order, but a judge's order, and consequently appealable, although Supreme Court, although it had been docketed there as an appeal from the Circuit Court.

Re Palliser, 136 U. S. 257, 34 L. ed. 514, the following order was held by the Supreme Court to be a court order and not a judge's order, and consequently appealable, although the Circuit Court which rendered it was of a contrary opinion:

"In the matter of the petition of Charles Pallister for the writ of *habeas corpus*. Upon reading and filing the petition of Charles Palliser, sworn to November 26, 1889,

cuit Court of Appeals.[3] From the final decision of a justice or judge of the United States inferior to the Circuit Court, upon an application for a writ of *habeas corpus,* or upon such writ when issued, an appeal, before the Evarts Act of March 3, 1891, might be taken to the Circuit Court for the district in which the cause was heard, under the same circumstances as would authorize an appeal from a Circuit Court to the Supreme Court.[4]

The Supreme Court may review an order of a District Court upon an application for the writ of *habeas corpus* when a constitutional [5] or a jurisdictional [6] question or a question involving

and the writs of *habeas corpus* and *certiorari* thereupon issued, directed to Hon. Martin T. McMahon, marshal for the United States for the Southern District of New York, and the Hon. John A. Shields, United States Commissioner, and returns to said writs made by said marshal and said commissioner; now after hearing Roger Foster, Esq., of counsel for Charles Palliser, in support of an application for the discharge of said Palliser from custody, said Palliser having been produced before this court by said marshal in obedience to said writ of *habeas corpus;* and after hearing Daniel O'Connell, Esq., Assistant United States Attorney, in opposition to said application, and in support of an application to remand said Palliser to custody, and due deliberation having been had, it is

"Ordered that said writ be dismissed, and that said Palliser be, and he hereby is, remanded to the custody of the said Martin T. McMahon, marshal of the United States for the Southern District of New York.

"E. Henry Lacombe."

See also Carico v. Wilmore, 51 Fed. 200; *Re* King, 51 Fed. 434, 440.

The order is appealable when the writ was granted at chambers, but the order discharging the prisoner was entered at a stated term of the Circuit Court. Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399. The hearing of the argument in chambers is immaterial when no objection was made upon that ground below and the order is a court order. Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544. The Supreme Court cannot review a decision of a District Court upon an application for the writ because of a certificate of a division between two judges. *Ex parte* Fom v. Fong, 108 U. S. 556, 27 L. ed. 826; *Ex parte* Cota, 110 U. S. 385, 28 L. ed. 172. *Ex parte* Jacobi, 104 Fed. 681.

3 Ibid.

4 U. S. R. S., § 763.

5 Ekiu v. U. S., 142 U. S. 651, 35 L. ed. 1146; Horner v. U. S., 143 U. S. 207, 36 L. ed. 126; *Re* Arnstein, S. C., U. S., Nov. 8, 1920; Horn v. Mitchell, 243 U. S. 247; *Re* Marmo, 138 Fed. 201; Collins v. Board of Control, C. C. A., 219 Fed. 885, *infra,* Chapter XXXIV on Writs of Error and Appeals.

6 Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633; *infra,* Chapter

the construction of a treaty is involved.[7] In the case of a jurisdictional question which does not involve the construction of the Constitution of the United States, that question alone is certified to the Supreme Court by the court below.[8] Where the dispute is as to an excess of jurisdiction in a case where initial jurisdiction was possessed by the court below, the Supreme Court has no immediate jurisdiction of review.[9] It has been held that the Supreme Court of the United States will not take jurisdiction of an appeal from an order of the Supreme Court of a Territory within the United States, which awards the custody of a child, three years of age, to one of several claimants.[10]

In other cases of *habeas corpus* the Circuit Court of Appeals may review the decisions of the District Courts,[11] and perhaps those of the District Judges at chambers.[12]

XXXIV on Writs of Error and Appeals.

7 Jud. Code, § 250, re-enacting 26 St. at L. 827, § 5; Wright v. Henkel, 190 U. S. 40, 47 L. ed. 948; Horn v. Mitchell, 243 U. S. 247; Collins v. Miller, 252 U. S. 364.

8 Jud. Code, § 250, re-enacting 26 St. at L. 826, § 4.

9 *Ex parte* Jim Hong, C. C. A., 211 Fed. 73.

10 N. Y. Foundling Hospital v. Gatti, 203 U. S. 429, 51 L. ed. 254.

11 26 St. at L. 826, § 5; Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. ed. 340; U. S. v. Fowkes, 53 Fed. 13; King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 64 Fed. 325; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606.

Prior to the abolition of the District Courts, it was provided by the Revised Statutes. "§ 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of *habeas corpus* or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

"1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

"§ 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section."

12 Webb v. York, C. C. A., 74 Fed.

Where there is no question as to the jurisdiction to grant the writ of *habeas corpus,* but the application attacks collaterally another judgment, decree or order of the same or another court, it seems that the appeal lies only to the Circuit Court of Appeals, unless a constitutional or a treaty question is distinctly raised below;[13] or, perhaps, unless in the case of a "prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or committed under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity or effect whereof depend upon the law of nations, or under color thereof."[14] In the latter case the Supreme Court may have jurisdiction to review the decision of the Circuit Court of Appeals upon an appeal from an order of a District Judge as well as from an order of a District Court.[15]

Where there has been a trial by jury the order is usually reviewed by writ of error.[16] In other cases usually by appeal.[17] An appeal to a Circuit Court of Appeals from an order or judgment upon a writ of *habeas corpus* must be taken within six months from the judgment or order appealed from.[18] An appeal to the Supreme Court from the judgments and orders of the District Courts and of the District Judges, upon writs of *habeas corpus,* must be taken within three months from the judgment or order of which complaint is made.[19] The same limitation applies to appeals from orders or judgments of the Circuit Courts of Appeals which review decisions of the District Courts and District Judges.[20]

The Supreme Court may by *certiorari* review any decision of a Circuit Court of Appeals in such a case; and a Circuit Court

753. Held that they cannot. Hoskins v. Funk, C. C. A., 239 Fed. 278.

13 *Re* Lemon, 150 U. S. 393, 37 L. ed. 1120; Dimmick v. Tompkins, 194 U. S. 540, 48 L. ed. 1110.

14 U. S. R. S., § 763.

15 Ibid.

16 U. S. ex rel. Rakies v. Uhl, C. C. A., 266 Fed. 646.

17 Ibid.

18 39 St. at L. 729, *infra,* § 698.

19 *Re* Lennon, 150 U. S. 393, 37 L. ed. 1120.

20 Ibid.

of Appeals may certify to the Supreme Court any questions or propositions of law arising therein, concerning which it desires instruction.[21]

No appeal lies to the Supreme Court from a decree, or judgment, or order, of a court of the District of Columbia upon a writ of *habeas corpus*.[22]

No writ of error lies to, nor can an appeal be taken from a judgment or order of a District Court upon an application for the writ unless such judgment or order finally disposes of the matter.[23] When the petitioner was committed upon three charges, as to one of those his application for relief was denied and as to the other a further hearing was directed; it was held that the judgment was not final and could not be reviewed.[24]

No writ of error lies to the order or judgment of a District Court granting an application for a writ of *habeas corpus*.[25] Nor from an order overruling a demurrer to the petition for the writ.[26] An appeal can be taken from an order refusing to grant the writ in the same manner as from an order refusing to discharge the prisoner upon the return.[27] A Circuit Court refused to allow an appeal from an order denying the writ in a capital case where the conviction had been affirmed by the Supreme Court of the United States and the case was clearly frivolous.[28]

Where the petition was based upon the ground that excessive bail was required, and before the decision below the bail was furnished, the appeal from the judgment denying the writ was dismissed.[29]

Upon an appeal from a decision upon an application for the writ of *habeas corpus*, the appellate court has the power to

21 Jud. Code, § 251, re-enacting 26 St. at L. 826, § 6; Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. ed. 340.

22 Cross v. Burke, 146 U. S. 82, 36 L. ed. 896.

23 Ollins v. Miller, 252 U. S. 364.

24 Ibid.

25 *Re* Morrissey, 137 U. S. 157, 158, 34 L. ed. 644, 645; *Re* Neagle, 135 U. S. 1, 42, 34 L. ed. 55, 63; Rainbow et al. v. Young, C. C. A., 154 Fed. 489.

26 Backus v. Yep Kim Yuen, C. C. A., 227 Fed. 848.

27 *Ex parte* Snow, 120 U. S. 274, 30 L. ed. 658.

28 *Re* Durrant, 84 Fed. 314. But see *Re* Marmo, 138 Fed. 201; *supra*, § 466.

29 Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497.

review the decision below upon the facts as well as the law;[30] but not the power to review the decision of disputed questions of fact by a tribunal or magistrate whose decision is brought before it collaterally.[31]

Objections to the form of the petition, not made below, cannot be raised by the appellant for the first time upon the appeal.[32] No new evidence can be offered upon such an appeal, except such evidence as was offered and excluded in the court below.[33] Where the record does not show that the petitioner demanded a trial of the issues raised by his traverse to the return, he cannot object upon appeal because the return was made upon hearsay or contend that he was denied a full hearing.[34]

Pending an appeal from a final decision declining a writ of *habeas corpus*, the custody of the prisoner must not be disturbed.[35] Pending an appeal from the denial of the writ, there will be no interference by the Federal court with the requirement by the State authorities that a prisoner perform hard labor.[36] This rule does not prevent the reprieve, pending an appeal from an order denying the writ, of a prisoner sentenced to capital punishment.[37] After a dismissal of the writ and an actual remand of the prisoner to the custody of the State authorities, he cannot be committed to bail by the Federal court.[38] The issue of a writ of error by the Supreme Court of the United States for a review of the decision of a State court denying the writ of *habeas corpus*, upon an application involving Federal questions, admitting the prisoner to bail, does not deprive the State court of jurisdiction to set aside an order made by it, when the writ of error was issued, in a case where no bail has been previously accepted.[39] Pending an appeal from a final

30 *Re* Neagle, 135 U. S. 1, 42, 34 L. ed. 55, 63; Wong Heung v. Elliott, C. C. A., 179 Fed. 110.

31 Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234.

32 U. S. v. Lee Yen Tai, C. C. A., 113 Fed. 465.

33 Seavey v. Seymour, 3 Cliff. 439.

34 Tiberg v. Warren, C. C. A., 192 Fed. 458.

35 S. C. Rule 34, 117 U. S. 708, U. S. R. S., § 765. But see King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 64 Fed. 325.

36 *Re* McKane, 61 Fed. 28, 205.

37 Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256.

38 *Re* Bissert, 113 Fed. 12.

39 *Ex parte* Collins, 151 Fed. 358.

decision discharging the writ after it has been issued, the prisoner must be remanded to the custody from which he was taken, unless for good cause shown he is detained in the custody of the court or judge that granted the writ, or is enlarged upon recognizance.[40] It seems that this can be ordered only by the judge who grants the appeal or by the appellate court.[41] It has been held that a single judge of the Circuit Court of Appeals cannot grant a stay after the appeal has been allowed.[42] It has been held that the judge who discharges the writ cannot admit the person to bail.[43] He will not be admitted to bail unless probable cause for an appeal is shown.[44] In a Chinese deportation case a release upon bail pending an appeal will rarely be granted.[45] Pending an appeal from the final decision of any court or judge discharging a prisoner upon *habeas corpus,* he must be enlarged upon recognizance for appearance to answer the judgment of the appellate court, with a surety, unless for special reasons a surety is not required.[46] Pending such proceedings and appeal and until final judgment therein, and after final judgment of discharge, any proceeding for any matter so heard and determined, or in process of being heard and determined, taken in any State court or by or under the authority of any State, against the person whose body is the subject of the writ, is null and void.[47] It is more appropriate and orderly for the State court to defer action in such a case until the mandate of the Supreme Court has been issued and filed in the District Court of the United States; but after judgment has been entered in the Supreme Court an order of the State court is not void; although

40 S. C. Rule 34, C. C. A., Rule 33, 17 U. S. 708, U. S. R. S., § 765.

41 U. S. ex rel. Kantor v. Johnson, 251 Fed. 889.

42 Ibid.

43 *Re* Iasigi, 79 Fed. 755; *Ex parte* Ronchi, 165 Fed. 558.

44 He will not be admitted to bail unless probable cause for an appeal is shown. *Ex parte* Green, 165 Fed. 557.

45 In *Ex parte* Crawford, 165 Fed. 830, the district attorney was ordered to give five days notice of the entry of the order dismissing the writ, in order that the petitioner might have an opportunity to appeal. *Re* Chin Own et al. 242 Fed. 996.

46 S. C. Rule 34, 117 U. S. 708; U. S. R. S., § 765. $250 is the reasonable amount of such a recognizance on the part of an immigrant resisting deportation. *Ex parte* Gregory, 210 Fed. 680.

47 U. S. R. S., § 766. See *Ex parte* Jugiro, 44 Fed. 754.

the State court then acts at the risk that its orders may be controlled, and if need be annulled, if the Supreme Court during the term should suspend or set aside its own judgment.[48] Security for costs is required upon such an appeal.[49] The court cannot apply to the payment of the costs awarded to successful parties upon an appeal, the proceeds of the forfeiture of such a recognizance, or appeal bond given to the United States pending an appeal from an order for the discharge.[50]

When a judgment has been entered upon the writ discharging a petitioner who was held for foreign extradition the appeal should be taken by the marshal and not by the consul upon whose complaint the extradition proceedings were instituted.[51]

The next friend of an alleged lunatic was allowed to take an appeal from a judgment remanding him to an insane asylum, and to prosecute the appeal until a guardian was appointed.[52]

Other proceedings upon such an appeal, including the time when the transcript is to be filed in the appellate court, are regulated by the court or judge hearing the cause.[53] The appeal may thus be heard at a term pending when it is taken.[54] Even when the case is brought before the Supreme Court, upon a certificate of jurisdiction, all the merits of the original application will be considered.[55]

The recent act of Congress provides: "That from a final decision by a court of the United States in a proceeding in *habeas corpus* where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a Justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.[56]

48 *Re* Jugiro, 140 U. S. 291, 296, 35 L. ed. 510, 512; Lambert v. Barrett, 159 U. S. 660, 40 L. ed. 296.

49 *Re* Newman, 79 Fed. 615.

50 U. S. v. Alexandroff, 148 Fed. 652.

51 Collins v. Miller, 252 U. S. 363.

52 King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 64 Fed. 325.

53 U. S. R. S., §§ 765, 768. But see *Ex parte* Jugiro, 44 Fed. 754, cited *supra*, § 466.

54 Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544.

55 Storti v. Massachusetts, 183 U. S. 138, 144, 46 L. ed. 120, 124; holding that U. S. R. S., § 761, applies.

56 Act of March 10, 1908, 35 St. at L. 40.

§ 468. The writ of quo warranto. In general. The writ of *quo warranto* was originally in the nature of a writ of right for the king against any who claimed or usurped any office, franchise, or liberty, to inquire by what authority the claimant or usurper supported his claim or usurpation, in order to determine the right.[1] It lay also in case of non-user or long neglect of a franchise or mis-user or abuse thereof. In such a case the writ commanded the defendant to show by what warrant he exercised such a franchise without a grant or act of forfeiture.[2] The writ was in the nature of a writ of right.[3] The judgment thereupon was final and conclusive even against the Crown.[4] This, together with the length, the cumbrousness and technicality of the proceedings upon writs of right, occasioned its disuse and the substitute of an information in the nature of a *quo warranto;* in which the process is speedier and the judgment said to be not quite so decisive.[5] This was begun by an information filed in the Court of King's Bench by the Attorney General. It was properly and originally a criminal prosecution to punish the usurper by a fine for his misconduct as well as to oust him or seize the franchise for the Crown.[6] The fine was usually nominal.[7] A statute approved by Queen Anne permits an information in nature of *quo warranto* to be brought with leave of the court at the relation of any person desiring to prosecute the same, who is then styled the relator, against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate.[8]

In the courts of the American Union, the original writ of *quo warranto* is unknown. Informations in the nature of a *quo warranto* are usually authorized by statute; but the statute of Anne has rarely, if ever, been adopted.[9] Substantial fines have there been imposed in such proceedings.[10]

§ 468. 1 2 Coke Institutes, 282; Finch, 322; Blackstone's Commentaries, III, 262.

2 Blackstone's Commentaries, III, 262.

3 1 Sib., 86; 2 Show, 47; 12 Mod., 225; 3 Blackstone's Comm., 263.

4 Ibid.

5 3 Blackstone's Comm., 263.

6 Ibid; Standard Oil Co. v. Missouri, 224 U. S. 282.

7 Ibid.

8 9 Anne. 20; A. D., 1710.

9 Newman v. U. S. ex rel. Frizzell, 238 U. S. 537, 544; Torbert v. Bennett, 24 Wash. Law Rep. 156.

10 Standard Oil Co. v. Missouri, 224 U. S. 270, 282 ($50,000); State

The Supreme Court of Florida affirmed a judgment of the Circuit Court of that State which sustained an information in the nature of *quo warranto* and ousted persons claimed to have been elected as presidential electors in that State.[11] The electoral commission by majority of one, disregarded the judgment and decision.[12]

The Supreme Court of South Carolina held that the writ of *quo warranto* would not lie to determine the title to the office of presidential electors, since they were held to be not officers of the State, although the State had the right to appoint them.[13] Both these decisions were made during the contest between Hayes and Tilden for the presidency.

Proceedings in the nature of *quo warranto* may be instituted in the State courts to determine whether the exercise by national banking associations of functions as trustees, executors, administrators or registrars of stocks and bonds is in contravention of State or local laws.[14]

A writ of *quo warranto* in a Territorial court to test the right of the defendant to exercise the functions of a Territorial judge, cannot be brought in the name of the Territory.[15] It must be brought in the name of the United States.[16]

§ 468a. Writs of quo warranto in the District Courts. The better opinion is that the District Courts of the United States have original jurisdiction to grant the writ of *quo warranto* only when specifically authorized by statute; and that no writ of *quo warranto* can issue from them to try the title to the office of President of the United States.[1]

v. Armour Packing Co., 173 Missouri, 356, 393 ($5,000); in both of which the unlawful act were in aid of a monopoly; State ex Inf. v. Delmar Jockey Club, 200 Missouri 34, a forfeiture for criminality in selling pools on horse races.

11 State of Florida ex rel. Wilkinson Call and others v. Pearce Florida.

12 Proceedings of the Electoral Commission, Government Printing Office, 1887, pp. 195, 196.

13 State ex rel. Barker v. Bowen, 8 Rich. (S. C.) 400.

14 Act of Dec., 1913, 38 St. at L. ch. 6, 251, 262; First National Bank v. Union Trust Co., 244 U. S. 416, 427.

15 Territory v. Lockwood, 3 Wall. 236, 18 L. ed. 47.

16 Ibid.

§ 468a. 1 This was the opinion of Hon. David Dudley Field, as expressed before the Electoral Commission:—

"Is not the same right implied in the motion which I find to prevail everywhere, that Congress might authorize a writ of *quo warranto* to

"The District Courts of the United States have jurisdiction of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or

try the title of President within the purview of the Constitution. Can that be doubted?

"The Constitution has declared that the person having the highest number of votes shall be President, not the one certified. Congress has not as yet invested any tribunal with the power to try the title to the Presidency by *quo warranto*. No such law exists, I am sorry to say. Such a law, if I might be permitted to say so, ought to be made. It is no small reproach to our statesmanship that for a hundred years no law has been provided for this great exigency. I know that one eminent member of this Commission has labored assiduously to procure the passage of such a law, and of all his titles to respect I am sure that will be especially remembered hereafter."

Mr. Commissioner Bradley: "Does not the law of the District apply to the case?"

Mr. Representative Field: "I think not, sir. I should be glad to learn that it does. The judiciary act of 1789, as if *ex industria*, omitted to mention writs of *quo warranto*. It gave the several courts power to issue writs of mandamus and certain other writs, but not that of *quo warranto*. I know that the statutes lately passed gave a right to a *quo warranto* in respect to certain offices, enumerating them, arising out of the amendments to the Constitution providing for the emancipated slaves; but I do not find any provision whatever for a writ of *quo warranto* to try the title to any such office as that of President or presidential elector."

Mr. Commissioner Bradley: "You are aware, of course, that the whole body of the Maryland law as existing in 1801 is the municipal law of the District, so far as not modified?"

Mr. Representative Field: "I am."

Mr. Commissioner Bradley: "I do not know whether there is any such provision in those laws or not."

Mr. Representative Field: "Of course I speak entirely under submission to the better knowledge of the court. I have not been able to satisfy myself that there is any provision for a writ of *quo warranto* in the case of President." (Proceedings of Electoral Commission, pp. 42, 43; 2 Field's Speeches and Papers, pp. 404, 405.)

The same opinion was subsequently expressed by Mr. Field in Congress:—

Mr. Speaker: "The provisions of this bill are extremely simple. It provides that the title of President may be determined by an action in the nature of a *quo warranto* in any Circuit Court of the United States. In respect of the tribunal to take the jurisdiction, it follows the precedent of the act passed by Congress some years ago, authorizing a suit in respect of the Union Pacific Railway and Credit Mobilier Company to be brought in any Circuit Court. This bill authorizes a trial in any part of the country which the court may designate

Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial

as most convenient for witnesses and parties, and it provides that the court shall go to the very root of the matter by inquiring whether the votes sent from a state are the true electoral votes of that State. The object is to test the validity of votes that purport to come from a State. The bill authorizes the court to inquire whether there be in these votes any falsehood or any invalidity, and whether the person appointed elector was ineligible when he was appointed or incapacitated when he cast his vote; and provides that all votes of persons ineligible when appearing to be elected, or incapacitated when voting, shall be rejected. The Court is authorized further to inquire into any fact necessary to determine the rights of the parties. The trial is to be begun within ninety days from the commencement of the suit, and upon the decision there is to be no execution of the judgment if either party appeals to the Supreme Court within ten days, and that court, if not in session, is to be immediately convened. Its decision is to be executed.

"These are the provisions of the bill. Is it expedient that it should pass? The first question, of course, is whether the bill is constitutional. That is to say, is it constitutional to vest in any court of the United States the right to try the title to the Presidency? In respect of that, I have only to answer that the Constitution declares that the judicial power shall extend to all cases arising under this Constitution or the laws of the United States. Is not a disputed title to the Presidency a case arising under the Constitution or the laws? Most unquestionably it is. Congress has already determined as much, because there now stands upon the statute-book authority for a *quo warranto*—and for aught I see, a *quo warranto* to try the title to the Presidency—in cases arising under the Fourteenth Amendment. This is the language:

" 'Jurisdiction is given to the circuit courts of all suits to recover possession of any office except that of elector of President and Vice-President, or representative or delegate in Congress, or member of a State Legislature, where the sole question arises out of the denial of the right to vote on account of race, color, or previous condition of servitude.'

"In short, I think there can be no question that the proposed bill is constitutional. Then, is it expedient? This is a question which gentlemen on this floor can determine from their own observation. There are but two alternatives—a trial by law or a trial by force. And you know from what you have seen, that but for the electoral statute we might have had a conflict here this very month. The two Houses of Congress are diametrically opposed to each other upon the question whether they must agree to count particular votes, or both must agree to reject them. You cannot solve that question except by legislation. The Anglo-Saxon mode, the mode which makes the Anglo-Saxon

of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided,* That such jurisdiction shall extend only so far as to determine

races the superior of the Latin races, and will always make them so, is, that when they have any internal question to solve they prefer to try it by the arbitrament of reason rather than by the arbitrament of force.

"Therefore, I insist that this bill is not only constitutional but that it is expedient and of the very highest expediency. In the present emergency, I appeal to gentlemen of the other side of the House. You have a President counted in whose just claim to the office is disputed. I make no imputations against any one in regard to this matter. But there is a question about the title of the incoming President. You know that there is a question, and you can best satisfy the conscience and relieve the doubts of the country by allowing that question to be settled as other questions in dispute are settled. Give us this bill, and you have conciliation for the present and safety for the future. . . .

"It is disputed whether there is at present a remedy or not. Mr. Justice Bradley, when I was arguing before the Commission, intimated that there might be a remedy under an old law of Maryland, still in force in this District; and Mr. Carpenter, in his argument, insisted that under a provision of our statutes which he drew the writ might be issued. But I answer to these suggestions that, if the writ be issued under those laws, supposing it to be issued at all, it must be in the name of the United States, and the proceeding must be conducted by the Attorney-General. Do you imagine that an Attorney General appointed by the incumbent of the office will willingly carry on a lawsuit to oust his superior? The bill which I offer provides that the prosecution shall be under the direction of the claimant, as it ought to be." (2 Field's Speeches and Papers, pp. 414-417.) Charles O'Connor gave Governor Samuel J. Tilden an opinion to the same effect.

Senator Matthew H. Carpenter expressed the opposite view in his argument before the Electoral Commission:

"At this point let me refer to the remedy of *quo warranto*, touching the matter in question.

"It has been settled in England for more than one hundred years, and is perfectly well settled in this country, that information in the nature of *quo warranto* is in its *nature* a civil proceeding, and must be so classified in the distribution of cases between courts of civil and courts of criminal jurisdiction. Rex v. Francis, 2 D. & E. 484. In State Bank v. The State, 1 Blackford, 272, the court said: 'We have no need of resorting to the general doctrine on informations, for a *quo warranto* information is a criminal proceeding only in name and in form; in its *nature* it is *purely a civil proceeding.*' Citing 2 Mid. on Corpo. 439; King v. Francis, 2 T. R. 494. 'The proceeding by information in the nature of a *quo warranto* is essentially a civil proceeding, and the pleadings in it

the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the

are as much subject to amendment as they are in ordinary civil actions. It is criminal only in form.' State of Florida v. Gleason, 12 Flor. 190.

"In Brison v. Lingo, 26 Mo. 496, the Supreme Court said: 'The inquiry arises, is this a criminal case? For a great while it has been applied to the simple purpose of trying civil right, and regarded as a remedy to try the right to office.' The court held it was a civil case. See also State v. Kupferle, 44 Mo. 154. 'A proceeding by *quo warranto* is not a criminal proceeding.' Ensminger v. People, 47 Ill. 384. In Commonwealth v. Browne, 1 S. & R. 382, it was held that 'an information in the nature of a *quo warranto*, although a *criminal* proceeding in *form*, is in *substance* but a *civil* one, and is therefore not within the prohibition of the tenth article of the constitution of Pennsylvania.' In State *ex rel.* Bashford v. Barstow, 4 Wis. 567, the Attorney-General, after some proceedings, filed a formal discontinuance on the part of the State, but the court held the suit must proceed as between the relator and the defendant, and the court proceeded and rendered judgment in favor of the relator; and he thereupon entered into and held the office for the balance of the terms.

"The Constitution of the United States, art. 3 § 2 declares that the judicial power of the United States 'shall extend to all cases arising under this Constitution, the laws of the United States, and treaties made under their authority,' &c. A contest between Mr. Tilden, if he shall be counted out, and Mr. Hayes, if he shall be counted in, touching the right to exercise the office of President, would undoubtedly be a case arising under the Constitution and laws of the United States.

"Now let us see whether any court has jurisdiction to try the case.

"The Act of Congress, March 3, 1875, 18 Statutes at Large, part 3, provides as follows:

" 'That the circuit courts of the United States shall have original cognizance, concurrent with the courts, of the several States, of all suits of a *civil nature* at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority,' &c.

"It is well settled that where the title to an office is in dispute, the amount involved, for the purpose of jurisdiction, is the salary of the office. U. S. v. Addison, 22 How. 174.

"It is true that the Act of Congress quoted above says nothing about writ or information of *quo warranto*. But when an Act of Congress confers upon a Circuit court jurisdiction of a case or controversy, the power of the court to issue the proper writ or entertain the proper proceedings to bring the

United States to vote in all the States."[2] The Revised Statutes provide that "whenever any person holds office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution, the district attorney for the district in which such person holds office shall proceed against him by writ of *quo warranto,* returnable to the Circuit or District Court of the United States in such district, and prosecute the same to the removal of such person from office."[3] This

case or controversy before the court, cannot be questioned.

"It is well settled that in proceedings by *quo warranto* the court will ascertain the right to the office, and go through all forms, fictions, certificates of canvassing-boards and commissions of office, to ascertain that right. People v. Van Slyck, 4 Cow. 297; People v. Ferguson, 8 Cow. 102; Jeter v. State, 1 McCord, 233; People v. Vail, 20 Wend. 12; Bashford v. Barstow, 4 Wis. 567; Hill v. State, 1 Ala. N. S. 559.

"As a determination of this question by this tribunal based upon the broad merits of the case would give peace to the country, and set the obstructed wheels of enterprise once more in motion, so, on the other hand, a narrow and technical decision which would throw the question into a judicial controversy, to continue for months, would be a calamity to the country, and raise a doubt as to the efficiency of free institutions.

"This is undoubtedly the reason why Congress has directed this Commission to inquire into the ultimate, final fact, as a court of law would on a *quo warranto,*—reserving to itself, however, the right to adopt or reject such conclusion in the final counting of votes, which is to be done by the two Houses themselves after this Commission shall have performed its functions. The duty cast upon this Commission to inquire and decide—that is, report—what persons were '*duly* appointed electors' can be performed in no way but by an inquiry into the ultimate fact; that is, the legality of such appointment. This Commission must take judicial notice of the laws of Louisiana. Pennington v. Gibson, 16 How. 65. It must, therefore, ascertain whether any law of that State directs the manner in which electors shall be appointed; whether such State law is in accordance with the Constitution of that State, and whether in fact, the electors were appointed according to such law. Without this it is impossible to say whether or not they were *duly* appointed." (Proceedings of Electoral Commission, pp. 272-273.)

[2] Jud. Code § 24, Subd. 15; 36 St. at L. 1087.

[3] U. S. R. S., § 1786, disabilities removed, 30 St. at L. 432, Comp. St. § 3219. A former statute (U. S. R. S., § 2010) which has been repealed, 28 St. at L. 36, provided: "Whenever any person is defeated or deprived of his election to any office, except elector of President or Vice-President, representative or

applied to persons disqualified from holding office by the Fourteenth Amendment, whose disabilities had not been removed.

A civil action in the nature of a *quo warranto* to try the right

delegate in Congress, or members of a State Legislature, by reason of the denial to any citizen who may offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and the person so defeated or deprived may bring any appropriate suit or proceeding to recover the possession of such office, and in cases where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceedings may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And the circuit or district Court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured herein." It was said that the jurisdiction conferred by this statute was limited to those actions in which the sole question as to the title to an office arose from the denial to citizens of the right to vote on account of their race, color, or previous condition of servitude; Johnson v. Jumel, 3 Woods, 69. In November, 1872, the Circuit Judge of that District of Louisiana, E. H. Durell, issued an injunction founded upon a bill in equity in the suit of Kellogg, who claimed to be Governor, enjoining certain persons who claimed to be members of the returning board from canvassing the votes, and enjoining McEnery, who claimed to have been elected Governor, from acting as Governor, or setting up any claim to the office. Subsequently the following order was made by the same Circuit Judge:

"In order to prevent the further obstruction of the proceedings in the cause, and further to prevent the violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered, that the marshal of the United States for the District of Louisiana, shall forthwith take possession of the building known as the Mechanics' Institute, and occupy the State House, for the assembling of the Legislature there in the city of New Orleans, and hold the same subject to further order of this court; and meanwhile prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretending returning officers in contempt and violation of said restraining order. But the marshal is directed to allow the ingress or egress to and from the public office in said building of persons entitled to the same." *Ex parte* Warmouth, 17 Wall. 64, 21 L. ed. 543. An ap-

to exist as a corporation or to annul a corporate charter may be removed to the District Court of the United States, if the defendant has a defense founded upon the Constitution or a statute of the United States.[4] It was held that an action of *quo warranto* to determine the title to the office of presidential elector could not be removed from a State to a Federal court upon the ground that it arose under the Constitution and laws of the United States.[5] This decision was made during the contest between Hayes and Tilden for the Presidency. It has been also held that an action of *quo warranto* to try the title of a citizen of another State to an office in a corporation of the State where the suit is brought, cannot be removed into a Federal court because of a difference of citizenship between the defendant and the relator.[6]

Orders have been granted by a District Court to compel persons claiming still to be district attorney and marshal to deliver the official books and papers in their possession to others who had been appointed by the President to succeed them, and whose title they disputed.[7]

It has been held that a writ of *quo warranto* to try the title to an office cannot be issued except at the instance of the United States, even by the consent of both parties.[8]

In an action in the nature of a *quo warranto* to try the title to an office, the amount of salary for the remainder of the term as to which the dispute exists is the value of the subject-matter

plication was made to the Supreme Court for a writ of prohibition against the Circuit Judge. The Supreme Court held, that when a final decree had been rendered to the Circuit Court, an appeal would lie to the Supreme Court; but that the Supreme Court had no right to issue a writ of prohibition until an appeal was taken. *Ex parte* Warmouth, 17 Wall. 64, 21 L. ed. 543. This order of the Circuit Court was severely condemned by a committee of the Senate, and the judge escaped impeachment by resigning his office. Senate Doc. 42 Cong. 3d Sess. 457.

4 Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482; State of Illinois v. Illinois Cent. R. Co., 33 Fed. 721; State ex rel. Barker v. Bowen, 8 Rich. (S. C.) 382.

5 State ex rel. Barker v. Bowen, 8 Rich. (S. C.) 382.

6 Place v. Illinois, C. C. A., 69 Fed. 481.

7 *Re* Parsons, 150 U. S. 150, 37 L. ed. 1034; *Re* Nissinger, Ibid.

8 Wallace v. Anderson, 5 Wheat. 291, 5 L. ed. 91.

in dispute,[9] but not the amount of the fine which might be imposed,[10] nor the effect of the judgment as *res adjudicata* upon a subsequent suit to recover the emoluments of the office in question.[11]

§ 468b. Jurisdiction of the Supreme Court to review decisions in proceedings upon quo warranto. The Supreme Court of the United States has the same jurisdiction to review the proceedings upon applications for the writ of *quo warranto,* or upon informations in the nature thereof which it has in other cases.[1] A writ of error from the Supreme Court of the United States will issue in a case otherwise within its appellate jurisdiction to the judgment of a State court, removing or refusing to remove a person from a State office in an action in the nature of a *quo warranto,* even when the office is that of Governor of such State.[2] In such a case where a judgment of the State court removes a State officer and thereby vacates the office, and a writ of error from the Supreme Court is allowed for the reversal of the judgment; the person appointed to the vacancy with knowledge of the grant of the writ of error on the part of the State judge making the appointment, but before the filing of the writ in the clerk's office where the record remains, is guilty of no contempt of the Supreme Court in assuming to perform the duties of the office.[3]

§ 468c. Writs of quo warranto in the Supreme Court of the District of Columbia. The extent of the jurisdiction of the Supreme Court of the District of Columbia to issue the writ of *quo warranto* was before the adoption of the District Code uncertain.[1] It seems that it has jurisdiction to try the title to a municipal office in the District by an action in the nature of *quo warranto.*[2] The statute of ninth Anne, chapter 20, which

9 Gorman v. Havird, 141 U. S. 206, 35 L. ed. 717. See U. S. v. Addison, 6 Wall. 291, 297, 18 L. ed. 919.

10 Albright v. New Mexico ex rel. Sandoval, 200 U. S. 9, 11.

11 Ibid, 200 U. S. 9, 12.

§ 468b. 1 Territory v. Lockwood, 3 Wall. 236, 18 L. ed. 47.

2 Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103. See the vigorous dissenting opinion of Mr. Justice Field in the latter case.

3 Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629.

§ 468c. 1 See the discussion before the Electoral Commission quoted *supra,* § 468b, note 1.

2 U. S. v. Addison, 6 Wall. 291, 18 L. ed. 919.

has been previously discussed,[3] has never been enforced in this District.[4] The District Code now regulates the subject as follows: "A *quo warranto* may be issued from the Supreme Court of the District in the name of the United States."

"First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.

"Second. Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise with in the District an corporate rights, privileges, or franchises not granted them by the laws in force in said District.

"And said proceedings shall be deemed a civil action.[5]

"The Attorney General or the District Attorney may institute such proceedings on his own motion, or on the relation of a third person. But such writs shall not be issued on the relation of a third person, except by leave of the court, to be applied for by the relator by a petition duly verified, setting forth the grounds of the application, or until the relator shall file a bond with sufficient surety, to be approved by the Clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.[6]

"If the Attorney General and the District Attorney shall refuse to institute such proceedings on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued; and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States on the relation of said person, on his compliance with the condition prescribed in the last section as to security for costs.[7]

"When such proceeding is against a person for usurping an office on the relation of a person claiming the same office, the

3 *Supra*, § 468.

4 Newman v. U. S. ex rel. Frizzell, 238 U. S. 538, 544; Torbert v. Bennett, 24 Wash. Law Rep. 156.

5 D. C. Code, § 1538, 31 St. at L. 1189, 32 St. at L. 529.

6 D. C. Code, § 1539, 31 St. at L. 1189, 32 St. at L. 529.

7 D. C. Code, § 1540, 31 St. at L. 1189, 32 St. at L. 529.

relator shall set forth in his petition the facts upon which he claims to be entitled to the office." [8]

The Revised Statutes declare that the District of Columbia shall be the seat of Government and all offices attached to the seat of Government shall be there exercised.[9] Apparently these sections of the District Code give to the Supreme Court of the District of Columbia jurisdiction of *quo warranto* against all national officers, whose offices are located within the District,[10] except possibly the President and the Justices of the Supreme Court, without the consent of the Attorney General.

No person can act as a relator in such proceedings to test the right to an office, elective or appointed, unless he has an interest in the office itself peculiar to himself.[11] His interest as a citizen and taxpayer is insufficient.[12]

The final judgment or order in such a proceeding may be reviewed in a proper case by the District Court of Appeals and their decision by the Supreme Court of the United States.[13]

§ 469. Writs of scire facias. The Judicial Code provides: "The Supreme Court and the District Courts shall have power to issue writs of *scire facias*." [1] A *scire facias* is a judicial writ founded on some matter of record, as a judgment, recognizance, or letters-patent, on which it lies either to enforce the execution thereof, or to vacate and set it aside.[2]

Writs of *scire facias* are of two kinds, the continuation of a previous suit, such as a writ to revive and to have execution thereupon,[3] and writs in the nature of a new suit such as to recover upon a recognizance or judicial bond or undertaking,[4] or to review what has happened.[5]

8 D. C. Code, § 1541, 31 St. at L. 1189, 32 St. at L. 529.

9 U. S. R. S., §§ 1795, 1796.

10 Newman v. U. S. ex rel. Frizzell, 238 U. S. 537, 552.

11 Newman v. U. S. ex rel. Frizzell, 238 U. S. 537, 550.

12 Ibid.

13 Newman v. U. S. ex rel. Frizzell, 238 U. S. 537, 552.

§ 469. 1 Jud. Code, § 262, re-enacting U. S. R. S. 710.

2 2 Sellon's Pr. 187; Winder v. Caldwell, 14 How. 434, 442, 14 L. ed. 487, 491.

3 Owen v. Henry, 161 U. S. 642; Bryan v. Weigant, 163 U. S. 618; Brown v. Chavez, 189 U. S. 68.

4 Collin Co. National Bank v. Hughes, 155 Fed. 389; Grantland v. Memphis, 12 Fed. 287; Wonderly v. Lafayette Co., 77 Fed. 65; King v. Davis, 137 Fed. 198; Davis v. Davis, 174 Fed. 786.

5 Insley v. United States, 150 U. S. 512; Hollister v. United States,

Since the writ is authorized by Federal statute it may be issued by a District Court held in a State which has abolished the writ.[6] Where a State statute authorizes the remedy in a new class of cases it will be enforced by the Federal courts there held.[7]

Where a judgment becomes dormant by the expiration of time, this writ is the proper process to revive it.[8] The use of the writ in the revivor of actions at law and suits in equity is hereinbefore described.[9]

In England a *scire facias* was the usual proceeding to repeal a patent, and was brought in chancery where the patent was of record.[10] In the United States such a writ of *scire facias* is not in use as a chancery proceeding; and the appropriate method to obtain the vacation of a patent is by a bill in equity brought by the United States.[11] In one case a writ of *scire facias* to forfeit the title of a corporation to lands was maintained.[12]

Where this is permissible under the State practice, as in Pennsylvania, the writ may issue to foreclose a mortgage;[13] but not in Illinois when the execution of the mortgage is not

145 Fed. 773; United States v. Ambrose, 7 Fed. 554; Kirk v. United States, 131 Fed. 331; 137 Fed. 753; 204 Fed. 688; United States v. Taylor, 157 Fed. 718.

6 Universal Transp. Co., Inc. v. National Surety Co., 252 Fed. 293.

7 Loewe v. Union Savings Bank, 226 Fed. 294.

8 Davis v. Davis, C. C. A., 174 Fed. 786. The statute of Westminster, II, 13 Ed. W. I. c. 45, extended the remedy to revive a judgment, which theretofore was issued at common law only, as to real actions and writs of annuity, so as to include judgments in personal actions which had not become dead but only dormant by a failure to issue execution within a year and a day. In the Federal courts held in the districts of Pennsylvania, it is the proper remedy to revive a judgment which has ceased to be a lien upon real estate by the expiration of time. Davis v. Davis, C. C. A., 174 Fed. 786.

9 *Supra*, § 220.

10 Atty. Gen. v. Vernon, 1 Vernon 277, 282; King v. Butler, 3 Levinz 220; Mowry v. Whitney, 14 Wall. 434, 440, 20 L. ed. 858, 859.

11 Mowry v. Whitney, 14 Wall. 434, 20 L. ed. 585; U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 32 L. ed. 450; U. S. v. Stone, 2 Wall. 525, 17 L. ed. 765. See Pennsylvania ex rel. Atty. Gen. v. Boley, 1 Weekly Notes, 302.

12 Vermont v. Society for the Propagation of the Gospel, 1 Paine 652.

13 Black v. Black, 74 Fed. 978; Mutual Life Ins. Co. v. Patterson, 28 Pittsb. Leg. J. (N. S.) 413.

duly acknowledged.[14] In Connecticut it will lie to collect a debt from a garnishee under a foreign attachment.[15]

A *scire facias* has been issued to show cause why execution should not be taken, *de bonis propriis;*[16] to enforce the liability of the indorser of a writ for costs;[17] to collect a recognizance or bail bond;[18] to enforce the liability of a surety upon a *supersedeas* bond.[19] The right to a writ of mandamus for the enforcement of a judgment is equivalent to the right to issue an execution thereon for the purpose of an application to revive the judgment on *scire facias.*[20] "The writ of *scire facias* is no more an execution than an action of debt would have been."[21]

It has been said that in the absence of a rule in the District Court, the procedure should be in accordance with the settled practice at common law.[22] The declaration upon a *scire facias* is usually in the form of a writ of *scire facias sur mortgage,* according to the form of the writ. Where there is no declaration a demurrer will lie to the writ itself; practice prescribed by the State statute.[23]

In the District of Connecticut proceedings upon the writ to enforce a foreign attachment follow the State practice,[24] but applications to open final judgments of the fault do not.[25] In the District of Tennessee a State practice permitting amendments is followed.[26]

By the common law practice in England the writ to revive a judgment would issue as of course upon a precipe without rule

14 Kenosha & R. R. Co. v. Sperry, 3 Biss. 309.

15 Loewee v. Union Savings Bank, 226 Fed. 294.

16 Teasdale v. Branton, 2 Hayw. 377.

17 Pullman's Palace Car Co. v. Washburn, 66 Fed. 290.

18 Hollister v. U. S., C. C. A., 145 Fed. 772; Ewing v. U. S., C. C. A., 240 Fed. 241.

19 Universal Transp. Co. v. National Surety Co., 252 Fed. 293, aff'd C. C. A., 256 Fed. 450.

20 Wonderly v. Lafayette County, 74 Fed. 702.

21 Denealo v. Stump, 8 Pet. 526, 528, 531, 8 L. ed. 1032, 1033, per Marshall, C. J.; Hatch v. Eustis, 1 Gall. 160; McKnight v. Craig's Adm'rs, 6 Cranch 183, 3 L. ed. 193.

22 Universal Transp. Co. v. National Surety Co., 252 Fed. 293, aff'd C. C. A., 256 Fed. 450.

23 Black v. Black, 74 Fed. 978; Mutual Life Ins. Co. v. Patterson, 28 Pittsburg Leg. J. (N. S.) 413.

24 Loewe v. Union Sav. Bank, 226 Fed. 294.

25 Loewe v. Union Sav. Bank, 222 Fed. 342.

26 Ewing v. U. S., C. C. A., 240 Fed. 241.

or motion, if the judgment was less than seven years old; if over seven and less than ten years old, a treasury rule was requisite; if more than ten and less than fifteen years old only by a judge's order which during term time had to be obtained on motion; if more than fifteen years old only upon a rule to show cause.[27] As a general rule an affidavit by the judgment creditor or his attorney that the judgment was still unsatisfied was required.[28] This practice was followed by the State courts in Missouri,[29] and in Virginia,[30] and in Massachusetts[31] under statute.[32] It seems that in the District of Massachusetts the writ in such a case may be issued by the clerk, like an execution, when he is satisfied that there is a judgment of record;[33] but not otherwise.[34] The writ when issued upon the death of a party pending litigation,[35] or to award execution upon a bond or recognizance[36] should be allowed by the court.

The writ should set forth in general language the facts which support the claim of the party at whose instance it is issued.[37] A *scire facias* to show cause why a forfeiture of lands for failure to perform a condition in the grant requiring cultivation should not be enforced, containing an express averment that the lands had not been cultivated, was held sufficient.[38] Averments in such a writ tending to show a violation of its charter by a corporation in matters not affecting the grant of such land, were disregarded as irrelevant, since such matter, it was held, could only be pleaded in a direct proceeding to vacate the charter of the corporation,[39] and a general allegation of non-performance of the conditions of the grant of the lands was construed as

27 Foster's *Scire Facias*, London 1851; Memorandum of James S. Allen, Clerk, of D. C. D. Mass., in Kinney v. Plymouth Rock Squab Co., quoted in 252 Fed. 298, note.

28 Ibid.

29 Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

30 Lewis v. Commonwealth, 106 Va. 20, 54 S. E. 999.

31 Perkins v. Bangs, 206 Mass. 408, 413, 92 N. E. 623.

32 Mass R. S. ch. 73, § 21.

33 Memorandum of James S. Allen, Clerk of D. C. D., Mass., in Kinney v. Plymouth Rock Squab Co., quoted in 252 Fed. 298, note.

34 Ibid.

35 Ibid, 252 Fed. 297.

36 Lewis v. Commonwealth, 106 Va. 20, 54 S. E. 999.

37 Widner v. Caldwell, 14 How. 434, 443, 14 L. ed. 487, 488, 491.

38 Vermont v. Society for Propagation of the Gospel, 1 Paine 652.

39 Ibid.

having reference to the violations which were specifically pleaded.[40]

The declaration upon a *scire facias* is usually a copy of the writ.[41] A writ of *scire facias* founded upon a claim to a mechanics' lien filed in accordance with the act of March 2, 1883,[42] may be maintained without any declaration, provided that the writ recites the bill of particulars of the plaintiff's claims as filed.[43] Where there is no declaration a demurrer will lie to the writ itself.[44] A demurrer to a writ of *scire facias* to revive a judgment in ejectment raises only questions of law on the facts stated in the writ; and consequently no presumption from lapse of time against the judgment on which the writ was issued can be considered in a State where there is no Statute of Limitations to the revival of a judgment; and lapse of time can operate as a defense only by way of evidence.[45] The State Statute of Limitations is a defense to a *scire facias* to revive an action not founded upon a statute of the United States, or an action by the receiver of a national bank to collect a stockholder's subscription.[46] Although in strictness a *scire facias* is not an original but is merely a judicial writ, in a certain degree it is in the nature of an original, and is so far an original that the defendant may plead to it, and that in the common law a plea of a release of all causes and executions was a good plea in bar to a *scire facias*, and concluded "if the plaintiff ought to have or maintain his action." &c.[47]

The failure of the defendant in a *scire facias* against bail to join in a demurrer interposed to one of his two pleas was held a waiver of such plea.[48]

Where the surety upon an appeal bond resided in another Federal district, it was held that an order forfeiting the bond

40 Ibid.

41 Ibid.

42 4 St. at L. 659.

43 Winder v. Caldwell, 14 How. 434, 435, 443, 14 L. ed. 487, 488, 491.

44 Ibid.

45 Lessee of Walden v. Craig's heirs, 14 Peters 147, 152, 10 L. ed. 393, 396.

46 Butler v. Poole, 14 Fed. 586. So held of a State statute which by its terms was applicable to actions upon a judgment. Browne v. Chavez, 181 U. S. 68, 45 L. ed. 752; *supra*, § 220.

47 Fenner v. Evans, 1 T. R. (D. & E.) 267; Winder v. Caldwell, 14 How. 434, 443, 14 L. ed. 487, 491; 2 Sellon's Pr. 187.

48 Morsell v. Hall, 13 How. 212, 14 L. ed. 117.

and directing that execution issue to the marshal of both districts, which was entered upon a writ of *scire facias*, service whereof was made upon him only in the district of his residence, could not be enforced in the latter district.[49] It has been held that, in a proceeding upon a *scire facias* upon a forfeited recognizance [50] or bond,[51] the defendant is entitled to a trial by jury. In Connecticut after judgment entered by the clerk upon his default, the defendant is entitled to be heard upon an assessment of damages by the court, when the plaintiff must present evidence in support of his claim.[52]

It seems that upon the trial, the record upon which the writ was issued is admissible in evidence to establish the plaintiff's cause of action.[53]

Where the writ declared that the defendants appeared before the United States District Court, and entered into the recognizance in question on a specified date, and that it was conditioned that the principal should appear before the District Court of the United States at the next term thereof, upon a specified day, while the recognizance itself bore on its face the approval of the judge on the former date, but also an acknowledgment before a notary as of a day ten years before, and conditioned for the appearance at the next term of the court, without specifying the time of such term; it was held that the variances were immaterial.[54] In the Districts of Tennessee the writ after it is issued may be amended in accordance with the State statutes so as to set forth the missing jurisdictional facts that the court admitted the offender to bail,[55] and such admission may be proved by parole when it does not appear on the record.[56]

49 Kirk v. U. S., 124 Fed. 324; s. c., 131 Fed. 331; aff'd C. C. A., April 19, 1905, 137 Fed. 753; aff'd by a divided court, 204 U. S. 668, 51 L. ed. 671.

50 Hollister v. U. S., C. C. A., 145 Fed. 773.

51 Universal Transp. Co. v. National Surety Co., 252 Fed. 293, aff'd on another point, C. C. A., 256 Fed. 450.

52 Loewe v. Union Savings Bank, 226 Fed. 294, 301, citing Connecticut G. S. Rev. 1902, § 758; Connecticut Practice Book, § 142, page 244.

53 Hollister v. U. S., C. C. A., 145 Fed. 773.

54 Hollister v. U. S., C. C. A., 145 Fed. 773, 782.

55 Ewing v. U. S., C. C. A., 240 Fed. 241.

56 Ewing v. U. S., C. C. A., 240 Fed. 241, 251.

§ 470. Attachment of property. A Federal statute passed June 1, 1872, provides that "in common-law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."[1] Most of the District Courts have adopted by their rules the State laws in force within their respective districts.[2] It has been held that such a rule need not be in writing; and that the court of review will presume that such a rule has been adopted by the trial court when there is no affirmative showing to the contrary.[3]

It has been held that an attachment cannot be obtained in a suit in equity,[4] such as a suit to foreclose a lien on personal property,[5] in an action at common law to recover the statutory penalties or liquidated damages for breach of copyright.[6]

These rules and the statute do not give a District Court power thus to acquire jurisdiction over a person not a resident of the district nor served with process therein.[7] But an attachment thus levied in a suit begun in a State court without personal service will not be vacated for that reason after removal,[8] al-

§ 470. [1] U. S. R. S., § 915; 17 St. at L., ch. 255, p. 197. See Schunk v. Moline M. L. S. Co., 147 U. S. 500, 37 L. ed. 255.

[2] See, for example, the Common Law Rules of the U. S. D. C., S. D. N. Y.

[3] Logan v. Goodwin, C. C. A., 104 Fed. 490. See also Citizens' Bank v. Farwell, C. C. A., 56 Fed. 570.

[4] Bucyrus Co. v. McArthur, 219 Fed. 266.

[5] Ibid.

[6] Dixon v. Corinne Runkel Stock Co., 214 Fed. 418.

[7] *Ex parte* Railroad Co., 103 U. S. 794, 26 L. ed. 461; Sadlier v. Fallon, 2 Curt. 579; Nazro v. Cragin, 3 Dill. 474; Chittenden v. Darden, 4 Woods, 437; Anderson v. Shaffer, 10 Fed. 266; Boston El. Co. v. El. G. L. Co., 23 Fed. 838; Harland v. U. L. Tel. Co., 6 L.R.A. 252, 40 Fed. 308; *Ex parte* Railroad Co., 103 U. S. 794, 26 L. ed. 461; Smith v. Reed, 210 Fed. 968; Bucyrus Co. v. McArthur, 219 Fed. 266; Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co., 245 Fed. 200.

[8] Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, modifying Wells v. Clark,

though it may be upon other grounds.[9] Subsequent service of process by publication, in accordance with the State statute, is sufficient to give the Federal court jurisdiction to enter a judgment that can be enforced against the property attached.[10] In such a case, however, a personal judgment cannot be entered against a defendant who has not made a general appearance.[11] It is doubtful whether the writ of attachment can be issued in a suit originally instituted in a Federal court, before jurisdiction has been obtained by service of original process.[12] It cannot be issued in a case where no personal service can be made and there has been no general appearance.[13]

Where there is personal service upon the defendant the action is personal and not *in rem* although property is attached.[14] It was so held in a suit in a State court against the owners of a vessel for repairs where an attachment was issued under the State lien laws although there was no personal service and the defendant appeared especially to object upon the ground that the subject matter was exclusively cognizable in admiralty.[15]

A suit to enforce the lien of an attachment or garnishee process, by collecting the debt that has been attached or garnisheed, may, if the necessary difference of citizenship exists and the claim exceeds the jurisdictional amount, be brought in a Federal court, which could not have taken jurisdiction of a suit by the

136 Fed. 462; Crocker Nat. Bank v. Pagenstecher, 44 Fed. 705; Blumberg v. A. B. & E. L. Shaw Co., 131 Fed. 608; Vermilya v. Brown, 65 Fed. 149; Hubbard v. Central of Georgia Ry. Co., 135 Fed. 256; Lebensberger v. Scofield, C. C. A., 139 Fed. 380; Missouri Valley Bridge & Iron Co. v. Blake, C. C. A., 231 Fed. 417.

9 Corbitt v. Farmers' Bank, 114 Fed. 602; Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co., 245 Fed. 200.

10 Clark v. Wells, 203 U. S. 164, 51 L. ed. 138; Mercantile Nat. Bank of City of New York v. Barron, 165 Fed. 831.

11 Clark v. Wells, 203 U. S. 164, 51 L. ed. 138.

12 Quoted with approval in Smith v. Reed, 210 Fed. 970; Chittenden v. Darden, 4 Woods, 437. See Nazro v. Cragin, 3 Dill. 474; Treadwell v. Seymour, 41 Fed. 479; Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co., 245 Fed. 200.

13 Big Vein Coal Company of West Virginia v. Read, 229 U. S. 31.

14 Rederiaktiebolaget Amie v. Universal Transp. Co., C. C. A., 245 Fed. 282; 159 Kentucky 414, amended.

15 Rounds v. Cloverport Foundry, 237 U. S. 303.

original creditor against the defendant.[16] It has been held that the United States Court for the Eastern District of New York has power to issue an attachment, and direct it for same to the marshal of any district in the State.[17] As a general rule, actual physical possession is necessary to constitute a valid seizure under a writ of *fieri facias* or a writ of attachment, unless there be garnishee process, when service of papers on the garnishee suffices.[18] Where the State statutes provided for successive levies under successive writs in the order in which the writs were received by the sheriff or other officers, and for a reference to ascertain the amounts and priorities of the several attachments it was held that a writ of attachment in the hands of the marshal of the United States might be levied *sub modo* upon property in the hands of the sheriff under a prior levy, without actual seizure by the marshal, but by a constructive seizure; and that the plaintiff, after sustaining his attachment and suit in the Federal court, might have to go into the court from which the first writ of attachment issued, and intervene to obtain the proper relief, and to assert such priority of lien as the laws of the State respecting attachment might permit.[19]

Where the State statute permits a writ of attachment to be amended by the addition of a seal, the writ may be so amended by the Federal court after a removal.[20] The Federal court may permit an amendment of the affidavit on which the attachment was issued in a case where the State practice would not permit such an amendment.[21]

The decisions of the Supreme Court of a State construing and applying its attachment laws are, in so far as they are constitutional, rules of decisions in the Federal courts in like cases coming from that State.[22] The Massachusetts statute providing that no trust imposed by law or declared by the parties shall prevent a creditor, without notice of the same, from attaching

16 Brandenstein v. Helvetia Swiss Fire Ins. Co., 159 Fed. 589, § 51. But see § 63, *supra*.

17 Treadwell v. Seymour, 41 Fed. 579.

18 Brooks v. Fry, 45 Fed. 776.

19 Brooks v. Fry, 45 Fed. 776-778. See § 56, *supra*.

20 Wolf v. Cook, 40 Fed. 432.

21 Erstein v. Rothschild, 22 Fed. 61; Booth v. Denike, 65 Fed. 43; Bowden v. Burnham, 59 Fed. 752, 754; *supra*, § 453.

22 Price v. Alder G. Con. Co., C. C. A., 71 Fed. 151.

the land as if no trust existed, is enforced by the Federal courts there held.[23] In the District of Connecticut the court followed the Connecticut decisions that where a deposit in a Savings Bank had been attached and thereafter before final judgment the depositor assigned the dividends and interests subsequently accruing and declared, the assignee and not the attaching creditors were thereto entitled.[24]

Where the State Statute gives the creditor of a non-resident the election either to bring an action at law, supported by an attachment, or to sue out an attachment and bring a suit in equity to establish his claim and enforce the lien, the latter proceeding may, when the non-resident is a citizen of a different State from the plaintiff, be removed to the Federal court and there continued in equity.[25]

The Revised Statutes provide: "Whenever any property owned or held by the United States, or in which the United States have or claim an interest, shall, in any judicial proceeding under the laws of any State, district or Territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Secretary of the Treasury, in his discretion, may direct the Solicitor of the Treasury to cause a stipulation to be entered into by the proper district attorney for the discharge of such property from such seizure, arrest, attachment, or proceeding, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this and the following section. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any Department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."[26] "In all cases where a stipulation is entered into under the preceding section, and, in consequence thereof, the property is discharged, and final judgment is afterward given in the court of last resort to which the

[23] McDermott v. Hayes, C. C. A., 197 Fed. 129.

[24] Loewe v. Union Savings Bank, 230 Fed. 303.

[25] Craddock v. Fulton, 140 Fed. 426.

[26] U. S. R. S., § 3753.

Secretary of the Treasury may deem proper to cause such proceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings, notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of such property had not been changed. Whenever such claim is for the payment of money, and the same is by such judgment found to be due, the presentation of a duly authenicated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the Treasury not otherwise appropriated. The amount so to be allowed and paid shall not, however, exceed the value of the interest of the United States in the property in question."[27] These statutes are designed for the protection of the Government alone and the immunity from attachment cannot be asserted from a contractor.[28]

"All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."[29] "Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void."[30] "Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or

[27] U. S. R. S., § 3752; U. S. R. S., § 3754. See Opinion of Attorney-General Knox, In the Matter of Cruiser Galveston, June 19, 1903; 24 Op. A. G. 679.

[28] Missouri Valley Bridge & Iron Co. v. Blake, C. C. A., 4 Ct. 231 Fed. 417-418.

[29] U. S. R. S., § 934.

[30] U. S. R. S., § 4063.

prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court."[31] "The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office."[32] "All persons shall have resort to the list of names so posted in the marshal's office and may take copies without fee."[33]

The Revised Statutes further provide, concerning National Banking Associations, "that no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."[34] No attachment can, consequently, be issued against the property of a national bank before final judgment in a State court,[35] or in a Federal court.[36]

While railroads were under Government control without the prior written consent of the Director General no attachment by mean process or execution could be levied against the property, including traffic balances, used in the conduct of their business as common carriers.[37]

Now that Government control has ceased railroad cars, while in use for Interstate Commerce, may be attached; and sums due a

31 U. S. R. S., § 4064.
32 U. S. R. S., § 4065.
33 U. S. R. S., § 4066.
34 U. S. R. S., § 5242.
35 Van Reed v. People's Nat. Bank, 198 U. S. 554, 49 L. ed. 1161; Garner v. Second Nat. Bank, 66 Fed. 369.
36 Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567.
37 Proclamation of Dec. 26, 1917; Dooley v. Penn. R. Co., May 10, 1918, 250 Fed. 142; *supra*, § 96i.

railway company from other companies, as its share of freight collected as the terminal or final carriers on continuous interstate shipments, may be attached or garnisheed under the laws of another State, where the defendant cannot be personally sued.[38] The carrier will be protected against the shippers or consignee if their property has been seized or taken from its possession by attachment, replevin, or search warrant, at the instance of a third person,[39] without collusion.[40]

"No wages due or accruing to any seaman or apprentice shall be subject to attachment from any court, and every payment of wages to a seaman or apprentice shall be valid in law notwithstanding any previous sale or assignment of such wages, or of any attachment, incumbrance or arrestment thereon; and no assignment or sale of such wages, or of selvage made prior to the accruing thereof, shall bind the party making the same, except such advanced securities as are provided for in this act," namely, "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen."[41] This statute does not apply to seamen engaged "in the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."[42]

"No sum of money due, or to become due, to any pensioner

[38] Davis v. Cleveland, C., C. & St. L. R. Co., 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N. S.) 823, reversing 146 Fed. 403. It has been held that there can be no attachment of a sleeping car containing interstate passengers when waiting at a junction for a through train. Pullman Co. v. Linke, 203 Fed. 1017.

[39] Styles v. Davis, 1 Black 101; 17 L. ed. 33; Robinson v. Memphis & C. R. Co., 16 Fed. 57; Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co., C. C. A., 247 Fed. 265.

[40] Robinson v. Memphis & C. R. Co., 16 Fed. 57.

[41] Act of June 7, 1872, ch. 322, § 61, 17 St. at L. 262, 276; U. S. R. S. § 4536.

[42] In Inter-Island Steam Nav. Co. v. Byrne, 239 U. S. 459, citing act of June 9, 1874, ch. 260, 18 St. at L. 64; U. S. R. S., § 5601.

shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner.''[43]

A judgment directing a garnishee to pay a debt due a non-resident under a foreign attachment against the latter is binding upon such creditors, although it was entered without notice to him in pursuance of the statute of the State where it was rendered.[45]

Payment of the debt under attachment or garnishee process from a State court levied subsequently to the commencement of the suit in the Federal court is no defense to the latter,[46] and such attachments and levies have been held inoperative for any purpose.[47]

After the service of a Federal injunction restraining the transfer of property, no lien can be acquired thereupon by the attachment of the State courts.[48] It has been held that money paid into the registry of a Federal court cannot be attached, even after the entry of a final decree or order for its distribution.[49]

Where there is a dispute between the State sheriff and a United States marshal as to the right of possession, the proper remedy is, ordinarily, a petition of intervention *pro interesse suo,* filed by the sheriff in the Federal action.[50] Where the sheriff leaves the attached property in the possession of the attachment defendants upon their receipt he releases the attachment lien.[51]

43 U. S. R. S., § 4747, Comp. St. 9080.

45 Baltimore & Ohio Railroad Company v. Hostetter, 240 U. S. 620. For the rules regulating the mutual relations of the State and Federal courts respecting attachments and garnishee process, see Menees v. Matthews, 197 Fed. 633; § 56, *supra.*

46 Wallace v. McConnell, 13 Peters, 136, 10 L. ed. 95; Rosenstein v. Tarr, 51 Fed. 368.

47 Mack v. Winslow, 59 Fed. 316.

48 Johnson v. Garner, 233 Fed. 756.

49 Corbitt v. Farmers' Bank, 114 Fed. 602. See *supra,* § 56.

50 Pickett v. Filer & Stowell Co., 40 Fed. 313, *supra,* §§ 56, 258h. In McDermott v. Hayes, 194 Fed. 902, the attaching party was directed to give a bond for the protection of the intervenor's rights as an alternative to the dissolution of the attachment.

51 *Re* Schow, 213 Fed. 514.

It has been held that after an order has been entered in the Federal court directing the marshal to turn over the attached property to a claimant the sheriff may replevy such property while it is still in the marshal's possession.[52]

Where the marshal's return merely recited that, "in obedience to the annexed writ of attachment, I have attached the following described property, to-wit," &c., without specifying the acts that he had performed, it was presumed: that he had obeyed the statute; that the real property was attached by leaving a copy of the writ with the occupant thereof, or, if there was no occupant, in a conspicuous place thereupon; and that such personal property, as was not capable of manual delivery, was attached by leaving a copy of the writ with the person in possession of the same, in accordance with the statutes then in force.[53]

A third person claiming ownership of property that has been attached may intervene in the action and assert his claim, by a motion to vacate the attachment as regards such property;[54] but, ordinarily his application should not be decided upon *ex parte* affidavits.[55] He may in the alternative sue the attaching officer in trover or replevin and the judgment therein will bind the attachment plaintiff who has given a bond of indemnity to the officer who has acted under such plaintiff's direction and given the latter notice of the suit with a sufficient opportunity to defend.[56]

A lien acquired by an attachment within four months before is dissolved by the filing of a petition in bankruptcy,[57] although no order of dissolution is entered in the court which issued the attachment.[58] The liability of sureties who have executed a bond or undertaking to release the property attached is not thereby affected.[59]

A motion to quash an attachment is not equivalent to a general appearance.[60] The motion may be denied with leave

52 Daniels v. Lazarus, 65 Fed. 718; *supra*, § 56.

53 Griffin v. Am. Gold Min. Co., C. C. A., 136 Fed. 69.

54 U. S. v. Neely, 146 Fed. 764.

55 U. S. v. Neely, 146 Fed. 764.

56 Nisbet v. Federal Title & Trust Co., 229 Fed. 644. *Supra*, § 186s.

57 Act of July 1, 1898, ch. 541, § 67f, 30 St. at L. 564, *infra*, § 644.

58 *Re* Federal Biscuit Co., C. C. A., 214 Fed. 221, 224.

59 Ibid.

60 Davis v. Cleveland, C., C. & St. L. R. Co., 146 Fed. 403; *supra*, §§ 168, 169.

to renew when made shortly before the trial term.[61] The order upon such a motion is not res adjudicata of any fact in the action.[62]

It has been held that a writ of error does not lie to an order quashing an attachment.[63]

The Revised Statutes provide: "In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents, or employees of the Post-Office Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employee, and his sureties, or either of them, in the following cases: First. When such officer, agent, or employee, and his sureties, or either of them, is a non-resident of the district where such officer, agent, or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process. Second. When such officer, agent, or employee, and his sureties, or either of them, has conveyed away, or is about to convey away his property, or any part thereof, or has removed or is about to remove the same or any part thereof from the district wherein it is situate, with intent to defraud the United States. And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof."[64] "Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Post-

[61] Griffith v. Alois Aufrichtig Copper & Sheet Iron Mfg. Co., 256 Fed. 969.

[62] Lowe v. Swinehart Tire & Rubber Co., 211 Fed. 165.

[63] Hammer v. Scott, C. C. A., 60 Fed. 343. But see *infra*, Chapter XXXVI on Writs of Error and Appeals; Standley v. Roberts, C. C. A., 59 Fed. 836. Approved as to this but reversed on another point, 217 U. S. 157, 174, 54 L. ed. 708, 718, 27 L.R.A. (N. S.) 823; Atl. Lumber Co. v. L. Bucki & Son L. Co., C. C. A., 92 Fed. 864.

[64] U. S. R. S., § 924.

master-General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt."[65] "Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court.[66] "At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof, shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby."[67] "When the property attached is sold on any interlocutory order of the court is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same."[68] "Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months and of non-residents for four months. The publication shall be made

[65] U. S. R. S., § 925.
[66] U. S. R. S., § 926.
[67] U. S. R. S., § 927.
[68] U. S. R. S., § 928.

in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued."[69] "After the first publication of such notice of attachment as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment."[70] "Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises."[71] "Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of State laws by, the United States courts."[72] "An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: Provided that nothing herein contained shall interfere with any priority of the United States in the payment of debts."[73] "In any suit by the

69 U. S. R. S., § 929.
70 U. S. R. S., § 930.
71 U. S. R. S., § 931.
72 U. S. R. S., § 932.
73 U. S. R. S., § 933.

United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such depositions; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States: Provided, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, nor until the sum in which the garnishee stands indebted is actually due."[74] "When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit."[75] "If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court."[76]

§ 471. Arrests. The Revised Statutes regulate arrests in civil actions as follows: "No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such State."[1] The statute does not apply to imprisonment for failure to pay a

74 U. S. R. S., § 935.
75 U. S. R. S., § 936.
76 U. S. R. S., § 937.

§ 471. [1] U. S. R. S., § 990; *Re* Bergen, 2 Hughes, 513; Low v. Durfee, 5 Fed. 256; Catherwood v. Gapete, 2 Curt. 94; Moan v. Wilmarth, 3 W. & M. 399.

fine [2] or a penalty; [3] nor, perhaps, to imprisonment in suits to which the United States is a party,[4] such as a suit to enforce a forfeiture; [5] nor, it has been said, to suits for torts.[6]

"When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the Circuit Court for the district where the defendant is so held." [7] A subsequent statute provides for the appointment for the District Courts of each district, of United States Commissioners, with the same powers and duties that were previously given to Commissioners of the Circuit Courts.[8] United States Commissioners have now jurisdiction of proceedings for the discharge of persons arrested on *mesne* process, issued out of a Federal court, and to obtain the arrest of a judgment debtor upon an execution issued from such a court.[9]

"Persons imprisoned on process issuing from any court in the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restrictions." [10]

The effect of these provisions and others previously quoted [11] is to make the practice and proceedings in arrests in civil

2 *Re* Sanborn, 52 Fed. 583.

3 U. S. v. Walsh, Deady, 281.

4 U. S. v. Hewes, Crabbe, 307. But see U. S. v. Tetlow, 2 Lowell, 159; *Re* Sanborn, 52 Fed. 583, 585.

5 U. S. v. Banister, 70 Fed. 44.

6 U. S. ex rel. Deinell v. Arnold, 69 Fed. 987, 992. See Stroheim v. Deinell, C. C. A., 77 Fed. 802.

7 U. S. R. S., § 991.

8 Act of May 28, 1896, ch. 252, § 19, 29 St. at L. 184, Comp. St. 1901, p. 499. *Supra*, § 418a; *infra*, § 483g.

9 Hayes v. Canada, A. & P. S. S. Co., C. C. A., 184 Fed. 821.

10 U. S. R. S., § 992.

11 U. S. R. S., § 914; *supra*, § 453; U. S. R. S., § 716; *supra*, § 461.

actions in the Federal District Courts almost exactly similar to those in the State courts held in their respective districts.[12] A judgment debtor may be arrested, under civil process of a Federal court, in any case where the State practice authorizes it.[13] A person arrested under civil process of a Federal court may be incarcerated in any of the jails of the district.[14]

"Whenever any collector of the revenue, receiver of public money, or other officer who has received the public money before it is paid into the Treasury of the United States, fails to render his account, or pay over the same in the manner or within the time required by law, it shall be the duty of the First Comptroller of the Treasury or the Commissioner of Customs, as the case may be, to cause to be stated the account of such officer, exhibiting truly the amount due to the United States, and to certify the same to the Solicitor of the Treasury, who shall issue a warrant of distress against the delinquent officer and his sureties, directed to the marshal of the district in which such officer and his sureties reside. Where the officer and his sureties reside in different districts, or where they, or either of them, reside in a district other than that in which the estate of either may be, which it is intended to take and sell, then such warrant shall be directed to the marshals of such districts, respectively."[15] "The warrant of distress shall specify the amount with which such delinquent is chargeable, and the sums, if any, which have been paid."[16] "The marshal authorized to execute any warrant of distress shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officer; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town and county

12 Moan v. Wilmarth, 3 W. & M. 399; Gray v. Monroe, 1 McLean 528; Low v. Durfee, 5 Fed. 256; U. S. v. Tetlow, 2 Lowell, 159; *Re* Bergen, 2 Hughes, 513. But see Duncan v. Darst, 1 How. 301, 11 L. ed. 139; *Re* Watson Freeman, 6 Curt. 491; U. S. v. Knight, 14 Pet. 301, 10 L. ed. 465; U. S. v. Arnold, C. C. A., 69 Fed. 987. For the practice in Equity, see *supra*, §§ 326-328.

13 Johnson v. Crawford & Yothers, 154 Fed. 761.

14 Johnson v. Crawford & Yothers, 154 Fed. 761.

15 U. S. R. S., § 3625.

16 U. S. R. S., § 3626.

where the goods or chattels were taken, or in the town or county where the owner of such goods or chattels may reside. If the goods and chattels be not sufficient to satisfy the warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law."[17] "If the delinquent officer absconds, or if goods and chattels belonging to him cannot be found sufficient to satisfy the warrant, the marshal or his deputy shall proceed, notwithstanding the commitment of the delinquent officer, to levy and collect the sum which remains due by such delinquent, by the distress and sale of the goods and chattels of his sureties; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the goods or chattels were taken, or in the town or county where the owner resides."[18] "For want of goods and chattels of a delinquent officer, or his sureties, sufficient to satisfy any warrant of distress issued pursuant to the foregoing provisions, the lands, tenements, and hereditaments of such officer and his sureties, or so much thereof as may be necessary for that purpose, after being advertised for at least three weeks in not less than three public places in the county or district where such real estate is situated, before the time of sale, shall be sold by the marshal of such district or his deputy."[19] "For all lands, tenements, or hereditaments sold in pursuance of the preceding section, the conveyance of the marshal or his deputy, executed in due form of law, shall give a valid title against all persons claiming under such delinquent officer or his sureties."[20] "The amount due by any delinquent officer is declared to be a lien upon the lands, tenements, and hereditaments of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them, and a record thereof made in the office of the clerk of the district court of the proper district, until the same is discharged according to law."[21] These statutes are constitutional.[22]

"No enlisted man shall, during his term of service, be arrested

17 U. S. R. S., § 3627.
18 U. S. R. S., § 3628.
19 U. S. R. S., § 3630.
20 U. S. R. S., § 3631.
21 U. S. R. S., § 3629.
22 U. S. v. Dillin, C. C. A., 16 Fed. 813.

on mesne process, or taken or charged in executions for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted."[23] "Marines shall be exempt, while enlisted in said service, from all personal arrest for debt or contract."[24]

The prohibitions of the arrest of foreign ministers, and their domestic servants, are quoted in the section on attachments.[25]

§ 472. Consolidation at law and in equity. The Revised Statutes provide that when causes of a like nature or relative to the same question are pending before a court of the United States or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.[1] This statute has been held to apply to suits in equity as well as at law.[2]

The court will usually order a consolidation of several suits brought for the administration of the same property,[3] or of parts of the same system, which are operated as a unit and devoted to a public service.[4] Where a railway company filed a bill in a State court asking that its property be placed in the hands of a receiver, and the trustee of a mortgage upon its property after removal filed a cross-bill in the Federal court to

[23] U. S. R. S., § 1237.

[24] U. S. R. S., § 1610.

[25] U. S. R. S., § 369.

§ 472. [1] U. S. R. S., § 921; U. S. v. U. P. R. Co., 98 U. S. 569, 25 L. ed. 143; Andrews v. Spear, 4 Dill, 472; Bank of Alexandria v. Young, 1 Cranch, C. C. 458; Wolverton v. Lacey, 18 Law R. (N. S.), 672; Weide v. Ins. Co. of N. A., 3 Chic. L. N. 353; Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513; Ferrett v. Atwill, 4 N. Y. Leg. Obs. 215; Holmes v. Sheridan, 1 Dill. 351; Young v. Grand Trunk Ry. Co., 9 Fed. 348; Keep v. Ind. & St. L. R. Co., 10 Fed. 454; Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786.

[2] Andrews v. Spear, 4 Dill. 472; Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513.

[3] Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513; Lant v. Kinne, C. C. A., 75 Fed. 636; Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., C. C. A., 95 Fed. 497; Cole v. Phila. & E. Ry. Co., 140 Fed. 944, 947. See Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98.

[4] Morton Tr. Co. v. Metropolitan St. Ry. Co., 170 Fed. 336; Gay v. Hudson River El. Power Co., 190 Fed. 773.

foreclose the mortgage, and then began a foreclosure suit in the State court, which was afterwards removed; the Federal court consolidated all three proceedings.[5] A creditor's bill in which a receiver has been appointed will ordinarily be consolidated with an ancillary foreclosure suit,[6] whether the foreclosure affects the whole or a part of the system[7] and even when some of the parties thereto are not joined in the former suit.[8] The court may refuse to consolidate two foreclosure suits, when the result would be to delay that which was first brought.[9]

A bill filed in aid of an attachment may be consolidated with a bill to restrain the enforcement of the attachment; and the latter, if subsequently brought, will then be considered as a cross-bill to the former.[10] A consolidation has been ordered of separate suits in equity to enjoin the infringement of a mechanical and a design patent upon the same article.[11] This has been done in actions of ejectment by the same plaintiff claiming under the same title against several defendants;[12] in actions by different plaintiffs against the same defendant, to recover damages for personal injuries,[13] or for the deaths of persons killed, at the same time and in the same manner;[14] in two suits against separate defendants for the same injury, although one was an action in tort and the other on contract;[15] when several actions were brought between the same parties upon different notes with the same makers, payees, and indorsers;[16] where several actions at common law were based

5 Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 23 Fed. 513. *Supra*, § 302b.

6 Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., C. C. A., 95 Fed. 497; Cole v. Phila. & E. Ry. Co., 140 Fed. 944, 947. See Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98.

7 Bankers Trust Co. v. Missouri K. & T. Ry. Co., C. C. A., 251 Fed. 789, 793.

8 Ibid.

9 Mercantile Tr. Co. v. Mo., K. & T. Ry. Co., 41 Fed. 8.

10 Lant v. Kinne, C. C. A., 75 Fed. 636.

11 Crystal Percolator Co., Inc. v. Landers, Frary & Clark, 258 Fed. 28.

12 Keep v. Indianapolis & St. Louis R. Co., 10 Fed. 454.

13 Denver City Tramway Co. v. Norton, C. C. A., 141 Fed. 599; Am. Window Glass Co. v. Noe, C. C. A., 158 Fed. 777.

14 Diggs v. Louisville & N. R. Co., C. C. A., 156 Fed. 564.

15 Ibid.

16 Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786.

upon insurance policies on the same life,[17] or the same property,[18] and the defenses were the same; where several actions for different publications of the same libel were brought by the same plaintiff against the different publishers of several newspapers,[19] and where several actions had been brought for penalties because of the violation of the same statute.[20] A consolidation was allowed when cross-actions had been brought between the same parties for breach of the same contract.[21] A consolidation was refused when several actions were pending between the same parties upon assigned claims for overcharges.[22] Where actions were consolidated, which were brought against several insurance companies upon different policies, containing a clause for contribution, the court ordered: that one of the causes be transferred to the equity docket, and the other defendants be made parties thereto; that the pleadings in that case be reformed according to the equity practice; and that the proceedings in the other causes be stayed.[23]

The court may order several cases involving substantially the same evidence to be tried together and direct the jury to bring in separate verdicts.[24]

The consolidation of two suits will not prevent the subsequent remand of one of them which has been improperly removed;[25] nor the right to dismiss either of them.[26] It has been said that a consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. It has been held that the consolidation does "not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in

17 Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707.

18 Falls of Neuse Mfg. Co. v. Ga. Home Insurance Co., 26 Fed. 1.

19 Butler v. Courier-Citizen Co., 127 Fed. 1015.

20 B. & O. Southwestern R. R. Co. v. U. S., 220 U. S. 94, 106, 55 L. ed. 384, 388.

21 Am. Tr. & Sav. Bank v. Zeigler Coal Co., C. C. A., 165 Fed. 34.

22 Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786.

23 Falls of Neuse Mfg. Co. v. Ga. Home Insurance Co., 26 Fed. 1.

24 Keep. v. I. & St. L. R. Co., 10 Fed. 454.

25 Colburn v. Hill, C. C. A., 101 Fed. 500.

26 Young v. Grand Trunk Ry. Co., 9 Fed. 348.

their respective suits. The parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense.''[27] It has been held: that, where actions have been consolidated, both the plaintiffs[28] and the defendants[29] are entitled to the same number of challenges to jurors as they would be if the cases had been tried separately, but the rights of the plaintiffs in this respect are doubtful.[30] The court of review will not reverse because of an improper consolidation unless it appears that the party seeking its relief was prejudiced thereby,[31] and so contended below.[32] He cannot complain that he thus lost his right to three individual challenges to jurors when he did not seek to exercise more than were allowed.[33] When the court of review doubts the propriety of the consolidation, it need not decide the point if it reverses upon other grounds.[34] Where the court has, without objection, treated two causes as consolidated, the omission of a formal order of consolidation is no ground for error.[35]

§ 473. Right to trial by jury. The Federal Constitution ordains: ''The Trial of all Crimes, except in Cases of impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crime shall have been committed, but

27 Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., C. C. A., 95 Fed. 497, 506, per Lawton, J., citing Brevard v. Summar, 2 Heisk. (Tenn.) 97, 105; Lofland v. Coward, 12 Heisk. (Tenn.) 546. But see Ross-Meehan B. S. F. Co. v. So. M. Iron Co., 72 Fed. 957. In Morton Tr. Co. v. Metropolitan St. Ry. Co., 170 Fed. 336, 337; per Lacombe, J.: ''In a situation so complicated as this one, with so many conflicting interests and different suits, the court is not inclined to be over technical as to pleading and practice. If some way can be found in which the equities of all may be substantially secured, it will be adopted, although some novel practice may be thereby pursued.''

28 Butler v. Evening Post Pub. Co., C. C. A., 148 Fed. 821.

29 Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707.

30 See Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U. S. 208, 47 L. ed. 446.

31 United Mine Workers v. Coronado Coal Co., 114 Fed. 829.

32 Ibid.

33 Ibid.

34 Aetna Life Ins. Co. v. Moore, 231 U. S. 543.

35 Gila Reservoir & Irr. Co. Gila Water Co., 202 U. S. 270 L. ed. 1023.

when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[1]

General complaint was made against this section as not sufficiently broad to protect the people's rights.[2] Accordingly the Seventh Amendment was adopted. This ordains: "In Suits at Common Law, where the Value in controversy shall exceed Twenty Dollars, the Right of Trial by Jury shall be preserved; and no Fact tried by a Jury shall be otherwise re-examined in any Court of the United States than according to the Rules of the Common Law."

This Amendment does not apply to Territorial courts nor to the State courts[3] even when these are trying causes of action created by a Federal statute.[4]

The Revised Statutes provide that the trial of issues of fact in actions at common law in the Circuit and District Courts shall be by jury.[5] It has been said that this section has no application to the District Courts as now organized.[6]

The Revised Statutes expressly authorize the parties to waive a jury by stipulation in writing signed by them or their attorneys of record and filed with the clerk.[7] An oral waiver in open court binds the parties.[8] The parties are presumed to have waived a jury even in the absence of a formal stipulation, whenever it appears that they were present at the trial in person or by counsel and made no demand for the jury.[9] When a motion to dismiss because the citizenship of the parties is not as alleged by plaintiff is determined by the court without a demand for a jury, the plaintiff waives his right to

§ 473. [1] Article III, Section 3.

[2] See Foster's Commentaries on the Constitution, Chapter, I.

[3] Minn. & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211.

[4] Ibid.

[5] U. S. R. S., §§ 566, 648.

[6] Wm. Edwards Co. v. LaDow, C. C. A., 230 Fed. 378, 382, 383 *per* Knappen, J.

[7] U. S. R. S., §§ 649, 700. See *infra*, § 474.

[8] Dundee Mortgage & Trust Inc. Co. v. Hughes, 124 U. S. 157, 160, 8 Sup. Ct. 377, 31 L. ed. 357.

[9] Kearney v. Case, 12 Wall 275, 283, 20 L. ed. 395p Gilman v. Ill. & Miss. Tel. Co., 91 U. S. 603, 614, 23 L. ed. 405; U. S. v. Harris, 106 U. S. 629, 635, 1 Sup. Ct. 601, 27 L. ed. 900; Perego v. Dodge, 163 U. S. 160, 166, 16 Sup. Ct. 971, 41 L. ed. 113.

insist upon a formal plea of abatement and a trial by jury of the issues this raised.[10]

Upon a motion to enter satisfaction of a judgment by reason of its payment or discharge, made as a substitute for a writ of *audita querela*, the trial of the issues arising under such motion should be tried by a jury.[11]

Where the defendant defaults, there is no trial of any issue, and if the State practice permits, the court may itself, in cases not specified in the Revised Statutes of the United States, assess the damages,[12] or it may refer their assessment to an auditor.[13] It has been held that, when the plaintiff fails to appear upon the trial, the proper practice is to impanel a jury and direct a verdict for the defendant.[14]

§ 473a. Continuances and adjournments. The Revised Statutes provide: "In all suits brought to recover the forfeiture annexed to any article of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." [1]

Such a request is too late when made after a reference to an auditor by mutual consent.[2]

"When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the

10 Parkerson v. Borst, C. C. A., 251 Fed. 242.

11 Lillie v. Dennert, C. C. A., 232 Fed. 104.

12 Midland Contracting Co. v. Toledo Foundry & Machine Co., C. C. A., 154 Fed. 797.

13 Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272.

14 Patting v. Spring & C. Co., 93 Fed. 98; Schultz v. Mut. L. Ins. Co., U. S. C. C., S. D. N. Y., 1881, per Shipman, J. in which the author was counsel.

§ 473a. 1 U. S. R. S., § 961.

2 Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272.

defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum,* or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided.''[3]

''In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Post-Office Department, which has been submitted to and disallowed by the Sixth Auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term.''[4]

''In all suits for the recovery of money upon debentures issued by the collector of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice, in which case, and not otherwise, a continuance until the next term may be granted.''[5]

''When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court

[3] U. S. R. S., § 957.
[4] U. S. R. S., § 958.
[5] U. S. R. S., § 959.

to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice."[6]

No State statute in regard to adjournments or continuances can affect the practice in the Federal courts.[7]

An application for an adjournment or continuance should regularly be in writing supported by affidavit, but the courts often grant them upon the oral statement of counsel.[8]

A continuance or adjournment of a trial because of the absence of a witness should not be granted unless the moving party shows that he exercised due diligence in seeking to procure his attendance or testimony and that his attendance can probably be secured at the subsequent term.[9]

When it is not shown that there is illness on the part of the counsel or the party seeking the postponement of the trial, or an engagement of counsel in a trial or in attendance before an appellate court, or illness of a material witness or that there has been inability to subpoena such a witness;[10] it is the proper practice to impose as a condition that the applicant pay the expenses made and incurred by his opponent in bringing witnesses to the place of trial and the latter's own traveling expenses. The absence of witnesses who can testify to character only is ordinarily no ground for an adjournment.[11]

When there had been a conviction upon several counts of an indictment, any of which justified the sentence imposed, ex-

6 U. S. R. S., § 960.

7 Texas & P. Ry. Co. v. Nelson, 50 Fed. 814.

8 Warren v. U. S., C. C. A., 250 Fed. 89.

9 St. Louis Stave & Lumber Co. v. U. S., C. C. A., 177 Fed. 178; Armour & Co. v. Kollmeyer, C. C. A., 161 Fed. 78.

10 Younge v. U. S., C. C. A., 223 Fed. 941.

11 Warren v. U. S., C. C. A., 250 Fed. 89.

ception to the denial of a continuance because of the absence of a witness to a single count was disregarded.[12]

A continuance or postponement of a trial is ordinarily within the discretion of the judge and his denial will not be reviewed [13] unless such discretion has been grossly abused.[14] Should he grant a postponement without any justification, his order might be reviewed by an application for the writ of mandamus.[15]

§ 473b. Selection of jury. "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned." [1] This relieves talesmen from any disability imposed by the Fourteenth Amendment.[2]

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service on account of race, color or previous condition of servitude." [3] It has been said that the word "qualifications" refers to the Juror personally and may relate to his age, property, citizenship, or anything else belonging to his personal standing; [4] but does not refer to special reasons which do not exclude the juror from the panel but would exclude him only from acting in the particular case.[5]

"All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge

12 Young v. U. S., C. C. A., 249 Fed. 935.

13 Isaacs v. U. S., 159 U. S. 487, 489, Warren v. U. S., C. C. A., 250 Fed. 89.

14 Younge v. U. S., C. C. A., 223 Fed. 941.

15 See *supra*, § 457.

§ 473b. 1 Jud. Code, § 275, 36, St. at L. 1164, Comp. St. § 1252.

2 Re Carnes, 31 Fed. 397.

3 Jud. Code, § 278, ch. 231, § 278, 36 St. at L. 1165, Comp. St., § 1258.

4 U. S. v. Collins, 1 Woods, 499, Fed. cas. No. 14,837.

5 U. S. v. Williams, 1 Dillon, 485, Fed. cas. No. 16,716.

senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.''[6]

''Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.''[7]

''When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.''[8]

''When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States.''[9]

The cases construing these statutes are considered in the subsequent Chapter upon Criminal practice.[10]

A State law regulating challenges of jurors as to the favor or to the array pertains to their qualifications and exemptions and is followed by the Federal court which is there held.[11] The right to peremptory challenges is not affected by the State laws nor by the statutes previously quoted.[12]

6 Jud. Code, § 276, ch. 27, 36 St. at L. 1164, Comp. St., § 1253.

7 Ibid, § 277, 36 St. at L. 1164, Comp. St., § 1254.

8 Ibid, § 280, 36 St. at L. 1165, Comp. St., § 1257.

9 Ibid, § 281. 36 St. at L. 1165, Comp. St., § 1258.

10 *Infra*, § 508, 509.

11 U. S. v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; U. S. v. Tallman, 10 Blatchf. 21 Fed. Cas. No. 16,429; U. S. v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550.

12 Detroit M. & T. S. L. Ry. v. Kimball, C. C. A., 211 Fed. 633.

"In civil suits each party shall be entitled to three peremptory challenges, and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section." [13] The rule where cases have been consolidated is previously explained.[14] A party who has not exhausted the number of peremptory challenges to which he is entitled, cannot complain because his adversary was allowed more than the statutory number.[15] He cannot complain that he was denied the right to the full number allowed him by the statute unless he has made the number so authorized and requested the court to permit him more.[16] He cannot object that a challenge for cause was improperly over-ruled when he went to trial before he had peremptorily challenged three jurors.[17]

The discharge of a juror because of a challenge which was subsequently over-ruled does not prevent his re-call.[18]

"All challenges whether to the array or panel, or to individual jurors for cause of favor, shall be tried by the court without the aid of triers." [19]

The decision of the trial judge upon such a hearing will rarely be reviewed.[20]

In an action against a manufacturing corporation to recover for the death of an employe, it is not error for the court in the exercise of its discretion to permit plaintiff's counsel, in the examination of jurors on their voir dire, to ask each separately whether he had ever been in the insurance business, and whether he had ever been agent for a particular liability insurance company.[21]

Where a juror on his examination states that he would act on his own judgment of the value of real property, but in reply to

13 Jud. Code, § 287, 36 St. at L. 1166, Comp. St., § 1264, 526 Brewer v. Jacobs, 22 Fed. 217; *Ex parte* Farley, 40 Fed. 66; Walker v. Collins, 50 Fed. 737; *supra*, § 526.

14 See § 472 *supra*.

15 Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208, 47 L. ed. 446.

16 United Mine Workers v. Coronado Coal Co., 258 Fed. 829.

17 Papernow v. Standard Oil Co. of N. Y., 228 Fed. 399.

18 Detroit M. & T. S. L. Ry. v. Kimball, C. C. A., 211 Fed. 633.

19 Jud. Code, § 287, 36 St. at L. 1166, Comp. St., § 1264.

20 Pearson v. Rocky Mountain Fuel Co., 219 Fed. 496.

21 New Aetna Portland Cement Co. v. Hatt, C. C. A., 231 Fed. 612.

the court says he would take the evidence of the witnesses as to the facts, the overruling of a challenge for cause is no error.[22]

§ 473c. Effect of State statutes on procedure at a jury trial. No State statute[1] or constitutional[2] provision regulating the manner of the trial,[3] or applications for postponements or continuances,[4] or form of a verdict,[5] for example, a direction that exemplary damages must be separately assessed,[6] or that special questions be submitted to the jury;[7] or to the custody of the jury;[8] or providing for the trial of a class of cases before a judge without a jury,[9] or for compulsory references in a special class of cases, such as an action on an account;[10] or limiting the powers of the judge to comment on the facts in his charge to the jury,[11] or directing that such charge be in writing;[12] or providing that papers read in evidence may be taken into the jury-room,[13] or forbidding the separation of a jury between the

22 Baddeps Clothing Co. v. Burnham-Munger-Root Dry Goods Co., C. C. A., 228 Fed. 470.

§ 473c. 1 Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

2 St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360, 30 L. ed. 1161.

3 Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257; St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360, 30 L. ed. 1161.

4 Texas & R. Ry. Co. v. Nelson, 50 Fed. 814, *supra*, § 473a.

5 Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 30 L. ed. 1161; Abbott v. Curtis & Co. Mfg. Co., 25 Fed. 402; U. S. Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 33 L. ed. 60; McElwee v. Metropolitan Lumber Co., C. C. A., 69 Fed. 302, 319, 16 C. C. A. 232. See *supra*, § 473k.

6 Times Pub. Co. v. Carlisle, C. C. A., 94 Fed. 762.

7 Toledo, St. L. & W. R. Co. v. Reardon, C. C. A., 159 Fed. 366, holding that a judge may refuse to submit special interrogatories to the jury because they were not filed until the summing up.

8 Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co., C. C. A., 133 Fed. 713.

9 Klever v. Seawell, 65 Fed. 393.

10 Howe Mach. Co. v. Edwards, 15 Blatchf. 402; U. S. v. Rathbone, 2 Paine, 578; Sulzer v. Watson, 39 Fed. 414.

11 Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257; St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360, 30 L. ed. 1161; U. S. v. Phila. & R. R. Co., 123 U. S. 113, 31 L. ed. 138; Rucker v. Wheeler, 127 U. S. 85, 93, 32 L. ed. 102, 105; Lovejoy v. U. S., 128 U. S. 171, 32 L. ed. 389.

12 Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286.

13 Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286.

charge and the verdict:[14] has any influence upon the practice in the Federal courts. These matters except the requirements as to when a case must be tried before a judge[15] or referee[16] are in the discretion of the court.[17]

But it has been said that the sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, are matters in which the courts of the United States are governed by the practice of the courts of the State in which they are held.[18]

The Federal court will follow a State statute authorizing a voluntary nonsuit.[19] A State statute authorizing a motion for judgment *non obstante veredicto* has been followed.[20] The State practice in the withdrawal of jurors may in a proper case be followed.[21]

§ 473d. Introduction of evidence before jury. The general principles which control the admission of evidence in the Federal courts have been previously considered.[1] The power of the courts of the United States to make rules regulating the taking of testimony in actions at common law, has been denied.[2]

It is the general rule of the Federal courts, that the cross-examination of a witness shall be limited to the subjects of his direct examination.[3] But this does not limit the cross-examina-

14 Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co., C. C. A., 133 Fed. 713, 716, 66 C. C. A. 543.

15 *Infra*, § 474.

16 *Infra*, § 475.

17 Liverpool & L. & T. Ins. Co. v. N. & M. Friedman Co., C. C. A., 133 Fed. 713, 716, 66 C. C. A., 543; Guardian Fire Ins. Co. v. Central Glass Co., C. C. A., 194 Fed. 851.

18 Gray, J., in Glenn v. Sumner, 132 U. S. 152, 156, 33 L. ed. 301. See Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835; and § 360.

19 Aetna Life Ins. Co. v. Lakin, C. C. A., 59 Fed. 982; Chicago M. & St. P. Ry. Co. v. Metal Staff, C. C. A., 101 Fed. 769; Francisco Chicago & A. R. Co., C. C. A., 149 Fed. 354; Meyer v. National Biscuit Co., C. C. A., 168 Fed. 906. *Infra*, § 473g.

20 Silsby v. Foote, 14 How. 218, 220, 14 L. ed. 394, 395.

21 Goehrig v. Stryker, 174 Fed. 897; Smith v. Jones, 181 Fed. 819. But see Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

§ 473d. 1 Chapter XXI.

2 Randall v. Venable, 17 Fed. 163; Flint v. Board of Com'rs, 5 Dill. 481; McLennon v. Kansas City, St. J. & C. B. R. Co., 22 Fed. 198. *Contra*, Warren v. Younger, 18 Fed. 859.

3 Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668. The trial court may, in its discretion, allow a more extended examination. California Fruit Can-

tion to the specific details inquired of upon the direction.[4] It permits full inquiry into the subject matter as to which inquiry has been made,[5] the scope being largely within the discretion of the trial judge.[6] Where a witness for the plaintiff has disclosed, upon his direct examination, part of a conversation or transaction, the fact that the entire conversation or transaction constitutes an affirmative defense is no bar to its disclosure upon cross-examination.[7] Where a witness testified to a partnership and to various transactions and conversations with the defendant in relation thereto it was competent on cross-examination to interrogate him as to other transactions and conversations with third parties tending to disprove the existence of a partnership.[8]

The extent of a redirect examination[9] and the recall of witnesses are largely in the discretion of the trial judge.[10]

The test of a "leading question" is whether it suggests or indicates the particular answer desired, and it does not necessarily make a question leading that it may be answered "Yes" or "No."[11]

The trial judge may allow a witness to give testimony in a narrative form; and if such a witness states irrelevant or incompetent matter it is the duty of the injured party to arrest the narrative and move to have the irrelevant matter stricken out.[12] Objections to the admission of evidence, which state no ground for its exclusion, cannot support valid exceptions, unless

ners' Ass'n v. Lilly, C. C. A., 184 Fed. 570. The trial judge should not interfere in the cross-examination of a witness by question or comment on his testimony. Klauder-Weldon Dyeing Mach. Co. v. Gagnon, C. C. A., 183 Fed. 962, 965; but, except in an extraordinary case, a judgment will not be reversed for that reason, Ibid.

4 Commercial State Bank v. Moore, C. C. A., 227 Fed. 19.

5 Ibid.

6 California Fruit Canners' Ass'n v. Lilly, C. C. A., 184 Fed. 370; Nashville Interurban Ry. v. Barnum, C. C. A., 212 Fed. 634. For a case where it was held not improper to refuse to strike out from a deposition an answer which was not responsive to a question on cross-examination, see Partridge v. Boston & M. R. Co., C. C. A., 184 Fed. 211.

7 Resurrection Gold Min. Co. v. Fortune G. Min. Co., C. C. A., 129 Fed. 668.

8 Commercial State Bank v. Moore, C. C. A., 227 Fed. 19.

9 Dinet v. Rapid City, C. C. A., 222 Fed. 497.

10 Hauck v. Frey, 228 Fed. 779.

11 De Witt v. Skinner, C. C. A., 232 Fed. 443.

12 N. Pac. R. Co. v. Charles, C. C. A., 51 Fed. 562, 571.

the defects could not have been cured upon the trial.[13] Where there is no objection to testimony when it is given the proper remedy is a motion to strike it out.[14]

Defendant cannot complain on a motion for a new trial that evidence to which he objected was admitted for a limited purpose, instead of generally.[15] The Federal courts cannot favor an objection to the introduction of evidence on the ground that the plaintiff's pleading fails to state a cause of action.[16] The State practice in that respect was not followed.[17]

The determination as to whether a witness is competent to testify as an expert rests largely in the discretion of the trial judge and will rarely be a ground for a reversal upon writ of error.[18] Experts may be asked hypothetical questions, based upon the view of the facts in evidence taken by the counsel for the interrogator, although the facts are in dispute; and upon cross-examination, such witnesses may be asked hypothetical questions, based on different facts which the cross-examiner claims have been proved.[19]

A non-expert who testifies as to the value of property may give his estimate in a gross sum or in separate items.[20] Ordinarily, a party who calls witnesses, although not bound by their testimony, cannot insist that they are unworthy of belief, and, unless self-contradicted or inherently improbable, they cannot be disregarded.[21] Where a party has been surprised

13 Sigafus v. Porter, C. C. A., 84 Fed. 430, 435, 28 C. C. A. 443; Rush v. French, 1 Ariz. 99, 123; Grandison v. Robertson, C. C. A., 231 Fed. 786; Greer v. United States, C. C. A., 240 Fed. 320; Kawin & Co. v. American Colortype Co., C. C. A., 243 Fed. 317.

14 Dinet v. Rapid City, C. C. A., 222 Fed. 497.

15 United States v. Fischer, 245 Fed. 477.

16 Pennsylvania Mining Co. v. Jarnigan, C. C. A., 222 Fed. 819; United Kansas Portland Cement Co. v. Harvey, C. C. A., 216 Fed. 316.

17 United Kansas Portland Cement Co. v. Harvey, C. C. A., 216 Fed. 316.

18 Montana Ry. Co. v. Warren, 137 U. S. 348, 353, 34 L. ed. 681, 683; Stillwell Mfg. Co. v. Phelps, 130 U. S. 520, 32 L. ed. 1035.

19 Assets Realization Co. v. Wellington, C. C. A., 194 Fed. 87.

20 Chicago & E. R. Co. v. Ohio City Lumber Co., C. C. A., 214 Fed. 751; St. Louis I. M. & S. Ry. Co. v. Reed, C. C. A., 216 Fed. 741. See Detroit M. & T. S. L. Ry. v. Kimball, C. C. A., 211 Fed. 633, 636.

21 U. S. v. Barber Lumber Co., 173 Fed. 948; United States Drainage Co. v. Manahan, 236 Fed. 144.

by the testimony of his own witness, the court has discretionary power to allow him to offer evidence that before the trial the witness made a contradictory statement.[22] Where the previous statement is in writing, he is permitted to call the attention of the witness to the parts which contradict the testimony.[23] It is an abuse of discretion to exclude the entire statement when offered by the other side for the purpose of impeachment.[24]

Upon the exclusion of a competent question which admits of an answer tending to prove a fact relevant to the issues an exception is sufficient to bring the error before the court of review[25] and no offer of proof is necessary.[26]

When an offer of relevant and competent evidence was made, considered and rejected; the court of errors held that the objector was estopped from claiming that the record or bill of exceptions did not show the evidence thus offered.[27] Ordinarily it is improper for the court to withhold rulings upon various objections to questions in depositions until after the answers have been read to the jury.[28] Upon the proof of titles to land where it must be done step by step it is permissible to allow the steps to be taken out of the order of time and to admit documents bearing directly or collaterally upon the chain of title with the understanding, expressed or implied, that if they are connected they will be considered and if not connected they will be treated as immaterial.[29]

When before the submission of a case to the jury, irrelevant evidence previously admitted was withdrawn and the jury instructed to disregard it, an exception to its admis-

22 Griffin Wheel Co. v. Smith, C. C. A., 173 Fed. 245; *contra* Murray v. Third Nat. Bank, C. C. A., 234 Fed. 481.

23 Griffin Wheel Co. v. Smith, C. C. A., 173 Fed. 245; Murray v. Third Nat. Bank, C. C. A., 6 Ct., 234 Fed. 481; George Brown & Co. v. O'Connor, C. C. A., 238 Fed. 552.

24 Griffin Wheel Co. v. Smith, C. C. A., 173 Fed. 245.

25 Himrod v. Ft. Pitt Mining & Milling Co., C. C. A., 202 Fed. 724.

26 Ibid.

27 Union Pac. Ry. Co. v. Harris, C. C. A., 63 Fed. 800, 804; Maxey v. U. S., C. C. A., 207 Fed. 327; Boatmen's Bank of St. Louis, Mo. v. Fritzlen, C. C. A., 221 Fed. 145.

28 State of Missouri v. Hencken, C. C. A., 174 Fed. 624. See Chicago M. & St. P. Ry. Co. v. Newsome, C. C. A., 174 Fed. 394.

29 Calaf v. Fernandez, C. C. A., 239 Fed. 795.

sion will not be sustained;[30] unless it appears to have been irremediably prejudicial.[31]

It has been held that when a party inspects a paper produced by his adversary at his request upon the trial and then fails to offer it in evidence, it may be put in evidence by his opponent.[32]

The jury may be allowed, under the custody of an officer, to leave the court-room and inspect a machine or place.[33] It has been held: that where the plaintiff in an action for a personal injury exhibits to the jury the part of his body that has been injured, the defendant may require him to submit the same to a surgical examination;[34] and that where articles are produced by a party upon the trial, the court may permit the application of chemical tests to them;[35] although there is no State statute upon the subject.

The permission to a party to offer further evidence after he has rested his case, lies within the discretion of the court.[36]

A judgment may be reversed for an erroneous ruling as to the order of the examination of witnesses.[37]

§ 473e. Discharge of jury and withdrawal of juror. In the discharge of a jury and the withdrawal of a juror the State practice is usually followed.[1]

Even in a criminal case, where, after a trial is begun, it is discovered that a juror is disqualified, the court may, under proper circumstances, discharge the jury and order a new

30 Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; State of Missouri v. Hencken, C. C. A., 174 Fed. 624. See Chicago, M. & St. P. Ry. Co. v. Newsome, C. C. A., 174 Fed. 394. It was held that in the absence of a request so to charge there was no error in failing to do so. Co-Operative Raw Fur Co. v. American Credit Indem. Co., C. C. A., 240 Fed. 67.

31 Order of United Commercial Travelers v. Young, C. C. A., 212 Fed. 132.

32 Edison El. Light Co. v. U. S. El. Lighting Co., 45 Fed. 55.

33 Owens v. Mo. Pac. Ry. Co., 38 Fed. 571.

34 Chicago & N. W. Ry. Co. v. Kendall, C. C. A., 167 Fed. 62.

35 Lundberg v. Albany & R. I. & S. Co., 32 Fed. 501; Johnson S. S. R. Co. v. N. B. S. Co., 48 Fed. 191, 194, 195.

36 Missouri Pac. Ry. Co. v. Oleson, C. C. A., 329.

37 O'Connell v. Pennsylvania Co., C. C. A., 118 Fed. 989.

§ 473e. 1 Silsby v. Foote, 14 How. 278, 14 L. ed. 394, 395.

trial against the defendant's objections.[2] When the plaintiff is surprised by a new defense set up by the defendant in the trial, he may have a juror withdrawn,[3] at least when the State courts permit such a practice.

§ 473f. Election by plaintiff. When the plaintiff joins two inconsistent counts or causes of action, the court may suggest that he elect between them [1] or in a proper case it seems that it may compel him to do so.[2] A motion for the direction of a verdict against him is not the proper remedy in such a case.[3]

§ 473g. Non-suits and dismissals. In the absence of a State statute or practice giving such authority, the trial judge has no power to order a compulsory non-suit; [1] but he may do so [2] or dismiss the complaint [3] if the State practice permits this to be done. Even then the better practice is to direct a verdict for defendant.[4] It has been said that the difference between the entry of a compulsory non-suit, and the direction of a verdict is in form only.[5]

The plaintiff may consent to a non-suit; [6] but not after the commencement of the trial without the leave of the court,[7]

2 Thompson v. U. S., 155 U. S. 271, 39 L. ed. 146.

3 Cowen Co. v. Houck Mfg. Co., C. C. A., 249 Fed. 285.

§ 473f. 1 Tomljanovich v. Victor American Fuel Company, C. C. A., 232 Fed. 662.

2 See California Fruit Canners' Ass'n v. Lilly, C. C. A., 184 Fed. 570. *Cf.* § 185b.

3 Copper River & N. W. Ry. Co. v. Heney, C. C. A., 211 Fed. 459.

§ 473g. 1 Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224; D'Wolfe v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Crane v. Morris, 6 Pet. 598, 8 L. ed. 514; Silsby v. Foote, 14 How. 218, 14 L. ed. 394; Castle v. Bullard, 23 How. 172, 16 L. ed. 424; Board of Com'rs v. Home Sav. Bank, C. C. A., 200 Fed. 28. See Moss v. City of Pittsburg, C. C. A., 184 Fed. 325.

2 Russo-Chinese Bank v. Nat. Bank of Commerce, C. C. A., 187 Fed. 80; Board of Com'rs v. Home Sav. Bank, C. C. A., 200 Fed. 28. But see Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

3 Central Transp. Co. v. Pullman's P. C. Co., 139 U. S. 24, 38-40, 35 L. ed. 55, 60, 61; Paul v. Delaware L. & W. R. Co., 130 Fed. 951; Shank *v.* Great Shoshone & Twin Falls Water Power Co., C. C. A., 205 Fed. 833.

4 Hotel Woodward Co. v. Ford Motor Co., C. C. A., 258 Fed. 302.

5 Dominion Trust Co. v. National Surety Co., 221 Fed. 618.

6 Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224. See Worthington v. McGough, C. C. A., 192 Fed. 512. An "involuntary nonsuit" ordered at the plaintiff's request is equivalent to a voluntary nonsuit. Duffy v. Glucose Sugar Refining Co., 141 Fed. 206.

7 Johnson v. Bailey, 59 Fed. 670.

unless a State statute gives him an absolute right so to do.[8]

A State statute regulating the time when a voluntary non-suit may be taken is followed.[9]

A voluntary non-suit cannot be taken after a verdict has been directed for the defendant,[10] unless the State practice so permits,[11] when this may be done by the plaintiff.[12] The court may compel the plaintiff to elect whether he will take a non-suit before a motion for the direction of a verdict is decided.[13] It has even been held to be too late to take a non-suit after a motion to direct a verdict has been made but not decided;[14] although by the State practice the plaintiff had a right to do so.[15] But after a verdict and judgment in his favor, a plaintiff was allowed, pending a motion for a new trial, to have the suit discontinued against one of two joint tort feasors who were defendants.[16]

§ 473h. Direction of verdict. The trial judge may direct a verdict for either party in a case where the evidence is such as to make it proper to set aside a verdict in favor of the other.[1]

The court may submit to the jury preliminary questions of fact, and after their verdict thereupon, either submit the

8 Aetna Life Ins. Co. v. Lakin, C. C. A., 59 Fed. 989; Francisco v. Chicago & A. R. Co., C. C. A., 149 Fed. 354; Meyer v. National Biscuit Co., C. C. A., 168 Fed. 906.

9 Connecticut Fire Ins. Co. v. Manning, C. C. A., 177 Fed. 893; Whitted v. S. W. Tel. & Tel. Co., 217 Fed. 835, where the directed verdict had been signed; Pannill v. Roanoke Times Co., 257 Fed. 910; Alsop v. McCombs, C. C. A., 253 Fed. 949.

10 Parks v. Southern Ry. Co., C. C. A., 143 Fed. 276; Huntt v. McNamee, C. C. A., 141 Fed. 293.

11 Pannill v. Roanoke Times Co., 252 Fed. 910.

12 Chicago, M. & St. P. Ry. Co. v. Metalstaff, C. C. A., 101 Fed. 769, where the State practice permitted it, after the judge had announced his intention to direct a verdict for the defendant but no such verdict had been made.

13 Pannill v. Roanoke Times Co., 252 Fed. 910.

14 Cogdill v. Whiting Mfg. Co., C. C. A., 212 Fed. 658, 660.

15 Ibid.

16 Texas & P. Ry. Co. v. Sheftall, C. C. A., 133 Fed. 722.

§ 473h. 1 Anglo-South Amer. Bank v. McCleary, Wallin & Crouse, C. C. A., 210 Fed. 891; Randall v. B. & O. R. Co., 109 U. S. 478, 27 L. ed. 1003; Bunt v. Sierra Butte G. Min. Co., 138 U. S. 483, 34 L. ed. 1031; Hathaway v. East Tenn., V. & G. R. Co., 29 Fed. 89; Hodges v. Kimball, C. C. A., 104 Fed. 745; Journal Pub. Co. v. Drake, C. C. A., 190 Fed. 572.

whole case to them or direct a verdict upon all the issues, as the circumstances require.[2]

A verdict has been directed after the summing up had begun[3] and after the jury had announced their disagreement.[4] A verdict should be directed in two classes of cases: where the evidence is undisputed,[5] and where, although there may be a slight conflict it is so conclusive in favor of one party that the court would feel obliged to set aside a verdict against him.[6] A mere preponderance of evidence is insufficient to support a direction although it might justify an order for a new trial.[7] A verdict can only be directed when no recovery could be had by the party against whom the verdict is given, upon any view which could properly be taken of the facts.[8] Upon such a motion every doubtful question of fact must be decided against the moving party.[9] When the evidence shows conclusively that either party is entitled to a verdict the proper means of bringing that point to the attention of the court is a motion for a direction of a verdict.[10]

The inconsistency between the plaintiff's testimony and that given by him upon a former trial, was held to be in itself a sufficient reason for a direction of a verdict in favor of the defendant.[11]

A judgment was not reversed because the court refused to direct a verdict, when the only justification of such a direction

2 Elizabeth v. Fitzgerald, C. C. A., 114 Fed. 547.

3 La Crosse Plow Co. v. Pagenstecher, C. C. A., 253 Fed. 46.

4 Texas & P. Ry. Co. v. Sheftall, C. C. A., 133 Fed. 722; Elizabeth v. Fitzgerald, C. C. A., 114 Fed. 547.

5 Brothers v. Lidgerwood Mfg.Co., U. S. D. C., S. D. N. Y., Feb., 1914, N. Y. L. J., March 5, 1914. But see Grace v. Louisville & N. R. Co., C. C. A., 255 Fed. 843.

6 Missouri Pac. Ry. Co. v. Oleson, C. C. A., 213 Fed. 329; Chicago, St. P., M. & O. Ry. Co. v. Kroloff, 217 Fed. 525; Fricke v. International Harvester Co., C. C. A., 247 Fed. 869.

7 McIntyre v. Modern Woodman, C. C. A., 200 Fed. 1.

8 Washington Tr. R. Co. v. McDade, 135 U. S. 554, 571, 34 L. ed. 235, 241; Dunlap v. N. E. R. Co., 130 U. S. 649, 32 L. ed. 1058; Kane v. N. Central Ry. Co., 128 U. S. 91; Louisville & N. R. Co. v. Woodson, 134 U. S. 614, 621, 33 L. ed. 1032, 1034.

9 McIntyre v. Modern Woodmen, C. C. A., 200 Fed. 1.

10 Lewis v. Bloede, C. C. A., 202 Fed. 7; U. S. v. De Bolt, 50 Fed. 78.

11 Smith v. Boston Elevated Ry. Co., C. C. A., 184 Fed. 387.

was a failure to prove a fact, such as a failure to take out letters of administration, the existence of which had been assumed on the trial,[12] and when it involved a ruling in direct conflict with the theory upon which both parties tried the case.[13]

Upon a motion to direct a verdict, the grounds of the motion should be stated.[14]

It has been said to be the better practice for the court to hear the argument and decide the motion in the absence of the jury; but the presence of the jury at comments upon the evidence, when made by the judge, is no ground for a new trial.[15] Such a motion cannot be granted if made before all the evidence of both parties is closed.[16] Where, after such a motion made at the close of the plaintiff's case has been denied, the defendant offers evidence on his own behalf, any error in denying the motion is cured.[17]

12 Choctaw, O. & G. R. Co. v. Jackson, C. C. A., 192 Fed. 792, 798.

13 Louisville & N. R. Co. v. Womack, C. C. A., 173 Fed. 752, 97 C. C. A., 566.

14 N. Y. & T. S. S. Co. v. Anderson, C. C. A., 50 Fed. 462; U. S. v. Bank of Metropolis, 15 Pac. 377, 10 L. ed. 774.

In the Fifth Circuit, Pensacola State Bank v. Merchants' & Farmers' Bank, 180 Fed. 504, and in the Seventh Circuit, Adam v. Shirk, C. C. A., 104 Fed. 54, it has been held to be no error to deny a motion for the direction of a verdict for the defendant where no statement of the point as to which there is contended to be a lack of evidence, was specified on the motion. See Victor American Fuel Co. v. Tomljanovich, C. C. A., 2nd Ct. 232 Fed. 662.

In the First, O'Halloran v. McGuirk, C. C. A., 167 Fed. 493, 93 C. C. A. 129, and in the Sixth Circuit, Erie R. Co. v. Schultz, C. C. A., 173 Fed. 759, a different rule prevails. And the Eighth Circuit McDowell v. U. S., C. C. A., 257 Fed. 298. See Atlantic Terra Cotta Co. v. Masons' Supply Co., C. C. A., 180 Fed. 332.

15 Illinois Cent. R. Co. v. Griffin, C. C. A., 80 Fed. 278.

16 Walker v. Windsor Nat. Bank, C. C. A., 56 Fed. 76.

17 Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 204, 36 L. ed. 405; Northern Pac. R. Co. v. Charles, C. C. A., 51 Fed. 562, 572; Southern Pac. Co. v. Hamilton, C. C. A., 54 Fed. 468; U. S. Fidelity & G. Co. v. Board of Com'rs, C. C. A., 145 Fed. 144; Fidelity & Casualty Co. of New York v. Thompson, C. C. A., 11 L.R.A. (N. S.) 1069, 154 Fed. 484; Leyer v. U. S., C. C. A., 183 Fed. 102; Bell v. Union Pac. R. Co., C. C. A., 194 Fed. 366; Harmon v. Flintham, C. C. A., 196 Fed. 635; Atlantic Coast Line R. Co. v. Connor, C. C. A., 194 Fed. 409.

Alaska Fishermen's Packing Co. v. Chin Quong, C. C. A., 202 Fed. 707; McIntyre v. Modern Woodmen of America, C. C. A., 200 Fed. 1;

When both parties move for a direction of a verdict, that is a submission of the facts to the court for decision and its finding is conclusive, unless there is no evidence as to a fact essential to support the judgment;[18] but not where a party moved in the alternative either for a verdict in his favor, or, in case that were denied, that he might have leave to go to the jury.[19] After such a motion has been decided, it is too late for the unsuccessful party whose motion for a direction has been denied to ask leave to go to the jury.[20] The court is not bound to direct a verdict, although both sides move for a direction.[21]

The sufficiency of the evidence to justify the verdict will not be reviewed on writ of error unless a motion for the direction of a verdict was made by the plaintiff in error at the conclusion of the evidence[22] and an exception to its denial

Victor-American Fuel Co. v. Peccarich, C. C. A., 209 Fed. 568; Chicago, R. I. & Ry. Co. v. Stephens, C. C. A., 218 Fed. 535; Courtnay v. King, C. C. A., 220 Fed. 112; Fruth v. Benassi, C. C. A., 219 Fed. 549; Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401.

18 City of Defiance v. McGonigale, C. C. A., 150 Fed. 689; Anderson v. Messenger, C. C. A., 158 Fed. 250; Sena v. Am. Turquoise Co., 220 U. S. 497, 55 L. ed. 559; Interstate Life Assur. Co. v. Dalton, C. C. A., 165 Fed. 176; Melton v. Pensacola Bank & Tr. Co., C. C. A., 190 Fed. 126; City of Camden v. Armstrong Cork Co., C. C. A., 210 Fed. 818; Allegheny Valley Brick Co. v. C. W. Raymond Co., C. C. A., 219 Fed. 477; City of New York v. Third Nat. Bank, C. C. A., 221 Fed. 175; Buckbee v. P. Hohenadel, Jr., Co., C. C. A., 224 Fed. 14; City of Colorado v. Harrison, C. C. A., 228 Fed. 894; Williams v. Vreeland, C. C. A., 244 Fed. 346; Sampliner v. Motion Picture Patents Co., C. C. A., 255 Fed. 242.

19 Charlotte Nat. Bank v. Southern Ry. Co., C. C. A., 179 Fed. 769, where a request at the same time for peremptory instructions and for special charges relating to conflicting evidence to be given in case the former were refused, were held not to be a waiver of the right to go to the jury upon a disputed question of fact; Pensacola State Bank v. Merchants' & Farmers' Bank, 180 Fed. 504, holding that in such a case, the moving party must specifically point out the facts upon which he relies as undisputed. Breakwater Co. v. Donovan, C. C. A., 218 Fed. 340; Southern Pac. Co. v. U. S., C. C. A., 222 Fed. 26.

20 Insurance Co. of North America v. Wisconsin Cent. Ry. Co., C. C. A., 134 Fed. 794; Brothers v. Lidgerwood Mfg. Co., U. S. D. C., S. D. N. Y., Feb., 1914, N. Y. L. J. March 5, 1914.

21 Ewert v. Fullerton, C. C. A., 225 Fed. 758.

22 German Ins. Co. of Freeport, Ill. v. Frederick, C. C. A., 58 Fed. 144; Joplin & P. Ry. Co. v. Payne, C. C. A., 194 Fed. 387; Atlantic Coast Line R. Co. v. Thompson, C.

duly taken.[23] The courts of review incline towards leaving the direction of a verdict to the discretion of the trial judge and not to reverse because he has denied such a motion except in a very clear case.[24] Where the parties stipulated upon a motion for a new trial that however the motion should be decided all questions presented by the evidence should be considered on the appeal, such stipulation did not supply the want of an exception at the trial before the verdict.[25] Where a verdict was directed upon the disagreement of the jury while the counsel for both sides were absent under an agreement that the clerk might take the verdict, the successful party was estopped from objecting that the other had not excepted to such direction.[26]

§ 473i. Arguments of counsel. When a statement of a fact which cannot properly be admitted in evidence is made by counsel in the presence of the jury at any time during the trial [1] or in the closing arguments to the jury a statement is made of a fact not in evidence: upon objection by the other side, it is the duty of the court to direct its withdrawal and immediately instruct the jury to disregard it.[2] When the mischief done is likely to be incurable, the court should direct the withdrawal of a juror or otherwise discharge the jury and declare a mistrial.[3] For a refusal to do this, the judgment may be reversed provided that the objection, exception and request are made and taken immediately after the offensive language.[4] Otherwise not.[5] Where such remarks are

C. A., 211 Fed. 889; Victor American Fuel Co. v. Tomljanovich, C. C. A., 232 Fed. 662.

23 Maxwell v. Abrast Realty Co., C. C. A., 1218 Fed. 457; Wear v. Imperial Window Glass Co., C. C. A., 224 Fed. 60.

24 Patton v. Texas & Pac. Ry., 179 U. S., 658, 21 Sup. Ct., 275, 45 L. ed., 361; Norfolk & W. Ry. v. Hauser, 211 Fed. 567.

25 Maxwell v. Abrast Realty Co., C. C. A., 218 Fed. 457.

26 Union Pac. R. Co. v. U. S., 219 Fed. 427; Grace v. Louisville & N. R. Co., C. C. A., 255 Fed. 843.

§ 473i. 1 Quinette v. Pullman Co., 229 Fed. 333.

2 Ibid. Johnson v. C. C. A., 215 Fed. 679; Paquin v. C. C. A., 251 Fed. 519; Manuel v. U. S., C. C. A., 254 Fed. 272.

3 Latham v. C. C. A., 226 Fed. 420; *infra*, § 530; McKibben v. Philadelphia & R. Ry. Co., C. C. A., 251 Fed. 577.

4 Quinette v. Pullman Co., 229 Fed. 333. Ibid. Johnson v. C. C. A., 215 Fed. 679; Manuel v. U. S., C. C. A., 254 Fed. 272; Paquin v. C. C. A., 251 Fed. 519.

5 Toledo, St. L. & W. R. Co. v. Howe, C. C. A., 191 Fed. 776; Car-

withdrawn and the jury instructed to ignore the same, a judgment will not ordinarily be reversed because the court overruled an objection thereto when first made.[6]

A statement by counsel as to the former verdicts in the case is considered to be incurable.[7] In the Districts of Pennsylvania in the Third Circuit counsel are obliged to follow the State practice and are not permitted to state in the presence of the jury the amount demanded in the complaint.[8]

In some districts it is the custom to have arguments upon questions of law arising upon motions to dismiss or for the direction of verdicts or upon important questions of evidence, or otherwise, made in the absence of the jury. In other districts this is not usual, although often done.[9] There is no error in permitting the argument to take place in the presence of the jury,[10] nor in permitting counsel in the course of such an argument to read to the court in the presence of the jury the opinions of other courts in similar cases.[11]

lisle v. U. S., C. C. A., 194 Fed. 827; Odell Mfg. Co. v. Tibbetts, C. C. A., 212 Fed. 652; Akalitis v. Philadelphia & Reading Coal & Iron Co., C. C. A., 239 Fed. 299.

6 St. Louis & S. F. R. Co. v. Rose, C. C. A., 159 Fed. 129.

7 McKibben v. Philadelphia & R. Ry. Co., C. C. A., 625 Fed. 577.

8 Vaughan v. Magee, C. C. A., 218 Fed. 630.

9 Konda v. U. S., C. C. A., 166 Fed. 91, 22 L.R.A. (N. S.) 304, *infra*, § 527.

10 Hastings v. Northern Pac. R. Co., 53 Fed. 224, 225, 226, per Hanford: "Counsel for the defendant objected to the reading of said decision in the hearing of the jury, and asserted that the purpose of the attorney for the plaintiff in reading it was to produce an effect upon the minds of the jurors, rather than to enlighten the court. The objection was overruled, and an exception was taken and allowed. The ruling of the court upon said objection constitutes the alleged error assigned as one of the grounds for the present motion.

"I do not commend the reading of decisions upon the trial of a negligence case, but in this instance the court merely permitted the attorney in his argument to pursue the usual course. All that was read and said was pertinent to the questions at issue, and it would have been tyrannical for the court to have assumed to control counsel in the use of whether original or borrowed expressions or phrases or in the selection of authorities, to establish the propositions of law which he relied upon. I find no reason for admitting that an error was committed in the failure of the court to mold the style of the arguments."

For the right of the plaintiff to read before the jury parts of a publication which are not libelous. See Mann v. Dempster, C. C. A., 181 Fed. 76.

11 Hastings v. Northern Pac. R. Co., 53 Fed. 224.

It has been held that a judgment will not be reversed because a party was denied the right to open and close to the jury.[12]

§ 473j. Charge to jury. The judge may comment upon the facts, provided that, when the evidence is conflicting, he makes it clear to the jury that they are not bound by his opinion.[1]

[12] Hall v. Weare, 92 U. S. 728, 23 L. ed. 500; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Lancaster v. Collins, 115 U. S. 222, 129 L. ed. 373.

§ 473j. [1] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257; St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360, 30 L. ed. 1161; U. S. v. Phila. & R. R. Co., 123 U. S. 113, 31 L. ed. 138; Rucker v. Wheeler, 127 U. S. 85, 93, 32 L. ed. 102, 105; Lovejoy v. U. S., 128 U. S. 171, 32 L. ed. 389, *infra*, § 479; Young v. Corrigan, C. C. A., 210 Fed. 442; Smith v. St. Louis, I. M. & S. R. Co., C. C. A., 214 Fed. 737; Beyer v. U. S., C. C. A., 257 Fed. 39; In United Mine Workers of America v. Coronado Coal Co., C. C. A., 258 Fed. 829, 849.

The Circuit Court of Appeals refused to direct a new trial because of the following language in the charge:

"I want to say to you that the court has no thought at all of discharging you. You were sworn upon your oaths to do your duty as jurors. In the opinion of the court there is no reason on earth why reasonable men, with a due regard for right, and each having due respect and consideration for the other's opinion, should not arrive at a conclusion in this case. What would be a fortune to either of you, or (to me), has already been spent and a failure to render justice in this and other (cases) is what brings the courts into contempt. * * * And you are advised that this court is of the opinion that the facts in this case justify you in the conclusion overwhelmingly that it was the policy, and therefore the agreement, for years of this national organization to prevent mining of nonunion coal for the unlawful purposes named in this complaint that it might not come into competition with union-mined coal; that there is no question in this court's mind but that that strike was ordered down there for that purpose to prevent the mining of nonunion coal in these plaintiff's mines; that the strike was called by those who were the instrumentality of the greater organization, the general organization, the defendants and their act was its act, and that they put into motion the force that destroyed this property. * * * Why, this court has not a thought that there would ever have been any trouble there if it had not been for the prevention of the mining of nonunion coal. Now, that is the judgment of this court, and if it were my duty to decide it I would decide it here. Now, you are not bound by my opinion, I have a right to give you my judgment; however, you are the sole and exclusive judges of the facts, and it is for you to determine these issues of fact independent of my judgment. * * * If there is any question about the law or the responsibility for this, responsibility

It is improper for him to criticize a rule of law which he charges to the jury.[2]

It is usually in the discretion of the court whether or not to permit the jury to consider the pleadings.[3] Where the defendants filed separate answers with separate defenses it was held to be a fatal error for the court to read to the jury one of these which contained allegations affecting the liability of another defendant.[4] In the Third Circuit, in the Districts of Pennsylvania the Federal Courts follow the State practice making it error for the court to state or to permit counsel to state in the presence of the jury the amount of damages claimed by the plaintiff.[5] This practice is not followed in another circuit although the cause of action arose in Pennsylvania.[6]

of the greater organization, that is for the higher court to say; but you cannot reach it until you have done your duty—you are the stumbling block in the way and this whole time is wasted. Now, after I have said what I have, I am going to say that I have no thought of discharging you; you must return a verdict in this case.'' There was also some question as to the sufficiency of the exceptions.

But see Starr v. U. S., 153 U. S. 614, 625, 38 L. ed. 841; Fuller v. N. Y. Life Ins. Co., C. C. A., 199 Fed. 897.

2 Bergen Point Iron Works v. Shaw, C. C. A., 249 Fed. 466.

3 Chicago & E. R. Co. v. Ohio City Lumber Co., C. C. A., 214 Fed. 751.

4 Nupen v. Pearce, C. C. A., 235 Fed. 497.

5 Vaughan v. Magee, C. C. A., 218 Fed. 630.

6 Philadelphia & R. Ry. Co. v. Skerman, C. C. A., 247 Fed. 269; Allis v. U. S., 155 U. S. 117, 39 L. ed. 91.

The following charges have been approved in Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. ed. 528. ''That in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, * * * if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.''

In Boston & M. R. R. v. Stewart, C. C. A., 254 Fed. 17, after the jury had been out for eighteen hours without agreement the following charges were made and subsequently approved by the Circuit Court of Appeals: ''That those in the minority should not unreasonably

The court may recall a jury which has retired and give new instructions,[7] even under extraordinary circumstances in the absence of counsel,[8] although usually, it should not, in the absence of counsel, give further instructions, as to the correctness of which there can be any question.[9] Counsel should be notified by telephone or otherwise that additional instructions are to be given when this is practicable.[10] If given in their absence, the supplemental charge should be made in the court room,[11] where it is the safer practice to wait while the jury are out, in order to provide for such a contingency.

The absence of counsel from the court room when instructions are given to the jury after they have retired cannot excuse the failure to except thereto.[12] Where the attorneys had agreed to leave the court room and stipulated that the clerk might take the verdict in their absence, the successful party was estopped from objecting that the exception taken by the other to a direc-

stand upon their own opinions, but should be admonished by the fact that the majority of their associates were assembled with them for the same purpose, and with the same responsibility. * * * The logic of that does not mean that a juror should lightly surrender an opinion which he conscientiously finds himself holding, but it does admonish the juror or jurors in minority to stop and consider whether it is probably that he who is here under oath to help decide this case, and finds himself confronted by men of equal intelligence and responsibility in the minority against him, is more likely to be surely right than they upon this highly disputed question about which no man can be absolutely certain anyway. Is it probably, I am right or that the majority are right? * * * Absolute certainty cannot be attained, and is hardly to be expected in the majority of civil causes; and while no juror is required to yield his honest and well-settled convictions to the judgment of others for the sake of reaching a verdict, it is the duty of a juror, when he finds himself differing with the majority of his fellowmen, equally honest and capable as himself of judging of the weight of evidence, to examine thoroughly and carefully the ground of his own opinion.'' To the same effect are Commonwealth v. Tuey, 8 Cush. (Mass.) 1; Ahearn v. Mann, 60 N. H. 472.

7 Allis v. U. S., 155 U. S. 117, 39 L. ed. 91.

8 Fournier v. Pike, 128 Fed. 991; Yates v. Whyel Coke Co., C. C. A., 221 Fed. 603.

9 Fournier v. Pike, 128 Fed. 991.

10 Fillippon v. Albion Vein Slate Co., 250 U. S. 76; reversing C. C. A., 242 Fed. 258. See Yates v. Whyel Coke Co., 221 Fed. 603.

11 Ibid.

12 Yates v. Whyel Coke Co., C. C. A., 221 Fed. 603.

tion made in their absence was too late.[13] By giving at the request of the jury such a supplemental charge the court does not reopen the case for argument nor for the submission by counsel of additional requests which are not modifications of the supplemental charge then given.[14]

Exceptions to a charge or to a refusal to charge must be noted before the jury retire.[15] The function of the exception is to direct the mind of the trial judge to the point in question so that he may reconsider and change his ruling if convinced that it is erroneous.[16] It has been held that an exception is too late when taken after the jury has retired, although this is done at the request of the trial judge.[17] An exception may be taken to the court's direction that the exceptions to its charge be taken after the retirement of the jury.[18] The court may refuse a request as made too late, when delayed until after the jury was sworn, although before their retirement.[19] Rules of court are valid, which require, that requests to charge must be presented to the court and the opposing counsel at the close of the evidence and before the argument; that they be plainly written and so framed that the answer thereto, by a simple affirmation or negation, will be full, direct and explicit.[20]

In the Southern District of New York it is the custom to receive and consider requests after the charge has been delivered but since requests at that time cannot receive the careful attention they would receive if presented at the close of the evidence, the trial judge is not to be held to the same degree of accountability for erroneously refusing a request then presented as for one presented at a more appropriate time.[21] Lengthy

13 Grace v. Louisville & N. R. Co., C. C. A., 255 Fed. 843; § 479, *infra*.

14 Flexilis Werke, Spezial Tiegel Stahlgiesserei, Gesellschaft Mit Beschrankter Haftung v. Hess, C. C. A., 205 Fed. 850.

15 Phelps v. Mayer, 15 How. 160, 14 L. ed. 643; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 52 L. ed. 606.

16 Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 81.

17 Mann v. Dempster, C. C. A., 181 Fed. 76.

18 Mann v. Dempster, C. C. A., 179 Fed. 837.

19 Astruc v. Star Co. v. 182 Fed. 705.

20 Keystone Bank v. Safety Banking & Tr. Co., 179 Fed. 727; Baltimore & O. R. Co. v. Wood, C. C. A., 228 Fed. 625.

21 Linn v. U. S., C. C. A., 251 Fed. 476.

requests are disapproved.[22] Failure of the trial judge to read special instructions to the jury before handing same to them cannot be assigned as error, where no objection was made at the time by either party.[23] An exception to a charge must be sufficiently distinct and specific to call the attention of the court to the particular vice or error of which complaint is made so that it may see whether the objection is well founded and have an opportunity before the jury retires to make the necessary correction.[24] A general exception to the whole charge is insufficient.[25]

22 Hamburg - American Steam Packet Co. v. United States, C. C. A., 250 Fed. 747.

23 Gladden v. Gabbert, 219 Fed. 855.

24 U. S. v. Hammond, 226 Fed. 849; McClendon v. U. S., C. C. A., 229 Fed. 523; Morse v. Tillotson & Wolcott Co., C. C. A., 255 Fed. 340. In an action by the United States for the conversion of timber on public lands, the court charged on the measure of damages both as for a willful and for an innocent taking. The defendant's counsel said: "We except as to the measure suggested by the court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your honor's instructions add to it another element." It was held that this was not sufficiently specific to call the court's attention to error in its charge as on an innocent taking, urged on motion for new trial, since: (1) The charge covered two alternative propositions, there being nothing in the language of the exception to indicate whether it referred to the first rule stated, regarding the willful taking, or the second, regarding the innocent taking; while (2) if the exception sufficiently indicated its application to the charge on an innocent taking, it gave no suggestion of the defects which defendant claimed. U. S. v. Hammond, 226 Fed. 849. In the same case the court charged that in fixing the verdict the jury should include interest on the value of any lumber converted, from the date of such conversion to the present, at the legal rate of 7 per cent. Defendant's counsel said: "I except to your honor's instructions with regard to interest." It was held that this was not sufficiently specific to call the court's attention to the criticism that the allowance of interest should have been left to the discretionary judgment of the jury to entitle defendant to rely thereon on his motion for new trial, since the charge embraced two propositions, the right of the plaintiff to interest, and, second, the rate, while the exception was not of a nature to indicate whether the exception was aimed at the discretion fixed in the jury to award interest, or the rate at which they should compute it.

25 Anthony v. Louisville & N. R. Co., 132 U. S. 172, 33 L. ed. 301; Gandia v. Pettingill, 222 U. S. 452; Star Co. v. Maddon, C. C. A., 188

The court has sustained an exception noted to each and every other instruction given by the court and to the refusal of the court to give each and every of the instructions requested by the defendant.[26] An exception to the action of the court "in giving all the instructions asked by plaintiffs" was not.[27] An isolated phrase in a charge is not a reversible error when no separate exception is taken thereto.[28] An exception to the submission of a specified theory was held not to authorize the review of the charge as unauthorized by the evidence.[29] An exception to a failure to charge specifically as to a theory of the case is ineffective when there was no preliminary request for such an instruction.[30] A refusal to grant a request to withdraw from the jury one of several specific allegations of negligence may be a reversible error when there is no substantial evidence to sustain it.[31]

A judge is not required to charge the law on hypothetical questions which do not affect the case on trial.[32] There is no error in refusing an instruction so drafted that it might mislead the jury.[33] It was held to be no error to deny a request for an instruction that specified acts did not constitute negligence when the negligence charged was a combination of such acts with others.[34] Whether instructions could have misled the jury is not to be determined from isolated statements in

Fed. 910; Brent v. Chas. H. Lilly, 202 Fed. 335; Douglas Trading Co., C. C. A., 183 Fed. 93; McDonald v. U. S., 63 Fed. 426; Copper River & N. W. Ry. Co. v. Henry, C. C. A., 211 Fed. 459; Barnes & Tucker Coal Co. v. Vozar, C. C. A., 227 Fed. 25; Alverson v. Oregon-Washington R. & Nav. Co., 236 Fed. 331; Miller & Lux v. Petrocelli, C. C. A., 236 Fed. 846; Lohman v. Stockyards Loan Co., C. C. A., 243 Fed. 517; Hunnicutt et al. v. U. S., C. C. A., 253 Fed. 556; Heard v. U. S., C. C. A., 228 Fed. 503; Amer. Issue Pub. Co. v. Sloan, C. C. A., 246 Fed. 251.

26 Sam Yick v. U. S., C. C. A., 240 Fed. 60.

27 Guerini Stone Co. v. Carlin Constr. Co., 248 U. S. 334, 340.

28 Southern Railway-Carolina Division v. Bennett, Administratrix, 233 U. S. 80; Barnes & Tucker Coal Co. v. Vozar, C. C. A., 227 Fed. 25.

29 Eaton v. Clabaugh, C. C. A., 251 Fed. 575.

30 Keystone Coal & Coke Co. v. Fekete, C. C. A., 232 Fed. 73.

31 Erie R. Co. v. Gallagher, C. C. A., 255 Fed. 814.

32 Etting v. Bank of U. S., 11 Wheat. 59, 6 L. ed. 419.

33 Guerini Stone Co. v. Carlin Constr. Co., 240 U. S. 264.

34 Boston Elevated Ry. Co. v. Teele, C. C. A., 248 Fed. 424.

the charge but by a consideration of all the instructions given and the tendencies of proof in the case to which they could possibly be applied.[35]

The meaning of correspondence which constitutes a contract should not be submitted to the jury.[36]

When a party fails to call a witness who is under his control it is proper and sufficient to charge that the jury may draw such inferences as they see fit from his failure to call such witnesses to the stand.[37]

When an improper statement of a fact which might influence a jury is made by counsel in his summing up or at any time during the trial it is the duty of the court, when requested to caution the jury to pay no attention thereto.[38] But unless the court is asked to do this, the objection is waived.[39]

§ 473k. Verdicts. A verdict may be general or special.

The Federal courts are not bound to follow the State practice concerning the form of verdicts[1] such as, a direction that exemplary damages must be separately assessed.[2] The court has power under the common law to submit to the jury special interrogatories which are to be answered together with a general verdict,[3] and the answers thereto should control when the general verdict is clearly inconsistent therewith.[4] This

35 Seaboard Air Line v. Padgett, 236 U. S. 668.

36 Akalitis v. Phila. R. Coal & Iron Co., C. C. A., 239 Fed. 299.

37 New York & Philadelphia Coal & Coke Co. v. Meyersdale Coal Co., C. C. A., 236 Fed. 536.

38 Crumpton v. U. S., 138 U. S. 361, 364, 34 L. ed. 958, 959; Wilson v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. ed. 650; *supra*, § 471i; *infra*, § 530.

39 Crumpton v. U. S., 138 U. S. 361, 364, 34 L. ed. 958, 959; Dunlop v. U. S., 165 U. S. 486, 498, 41 L. ed. 799, 803; Sawyer v. U. S., 202 U. S. 150, 50 L. ed. 972; Cudahy Packing Co. v. Shoumal, C. C. A., 125 Fed. 470.

§ 473k. 1 Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 30 L. ed. 1161; Abbott v. Curtis & Co. Mfg. Co., 25 Fed. 402; U. S. Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 33 L. ed. 60; Spokane & I. E. R. Co. v. Campbell, C. C. A., 217 Fed. 518, 523.

2 Times Pub. Co. v. Carlisle, C. C. A., 94 Fed. 762; McElwee v. Metropolitan Lumber Co., C. C. A., 69 Fed. 302, 319, 16 C. C. A., 232; Toledo, St. L. & W. R. Co. v. Reardon, C. C. A., 159 Fed. 366.

3 Victor-American Fuel Co. v. Peccarich, C. C. A., 209 Fed. 568; Erie R. R. Co. v. Downs, C. C. A., 250 Fed. 415.

4 Ibid. Spokane & I. E. R. Co. v. Campbell, 217 Fed. 518.

can only be done where the special verdict has been found respecting every material issue.[5] It was held that a verdict: "We the jury in the above case sustain the validity of the contract sued upon, and fix the damages at ten dollars;" was fatally defective and insufficient to sustain a judgment.[6] The direction to the jury to make special findings is within the discretion of the court.[7] It has been held that a judgment will not be reversed when the court has requested the jury to find upon particular questions of fact, because the jury failed to answer an interrogatory, improvidently submitted, concerning a fact which was not disputed.[8]

Where an issue of fact concerning jurisdictional allegations, such as difference of citizenship, is raised with other issues, all the issues are tried together, in the absence of any State practice to the contrary; but the jury should be requested to make a separate finding as to the jurisdictional allegations, independent from their general verdict.[9] It has been held to be improper to submit to the same jury the question whether a release was obtained by fraud and the question whether the defendant was liable for the cause of action covered by the case;[10] but the soundness of this authority may be doubted.

After a jury which had rendered a general verdict had been discharged it was held to be too late to recall them in order that they might make special findings.[11]

The proceedings upon a motion to set aside a general verdict and render judgment upon the special findings of the jury are pursued and determined by the common law and not by the State practice.[12]

5 Spokane & I. E. R. Co. v. Campbell, 217 Fed. 518.

6 Pressed Steel Car Co. v. Steel Car Forge Co., C. C. A., 149 Fed. 182.

7 Victor-American Fuel Co. v. Peccarich, C. C. A., 209 Fed. 568; Parsons v. Trowbridge, C. C. A., 226 Fed. 15.

8 Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534.

9 Roberts v. Langenbach, C. C. A., 119 Fed. 349.

10 Union Pac. R. Co. v. Syas, C. C. A., 246 Fed. 561. The selection by the court of the juror to sign the directors' verdict was held not to be prejudicial. Bryan v. Louisville & N. R. Co., C. C. A., 244 Fed. 650.

11 Cheatham Electric Switching D. Co. v. Transit D. Co., 203 Fed. 289.

12 City of Detroit v. Grummond, C. C. A., 216 Fed. 273.

Where the findings in the verdict are inconsistent, they will not support a judgment.[13]

Where two counts are submitted, a general verdict is considered as a verdict upon both of them.[14]

The damages which may be awarded in actions at common law for damages because of the infringement of patents[16] and copyrights[17] are previously described.

The verdict may be written or oral. A sealed verdict is in writing signed by the jurors or by the foreman.[18] It is the better practice for the jury to answer all special questions in writing. In the districts of New York a general verdict is usually oral taken down by the clerk.[19]

The verdict should be returned to the judge in open court;[20] but a stipulation that the clerk may receive the verdict with the same effect as if the court were in session makes a verdict so rendered valid.[21]

In cases of tort the allowance of interest is discretionary with the jury.[22] The court has no power to add interest when the jury has failed to include this in the verdict.[23] When, however, the verdict is for a specified sum "with interest," the court may compute the interest and enter judgment for this in addition to the verdict.[24]

Upon the recall of the jurors after their discharge, they were permitted to alter their verdict so as to allow interest.[25]

13 East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., C. C. A., 249 Fed. 439.

14 Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712.

16 *Supra*, § 389a.

17 *Supra*, § 389h.

18 Myers v. U. S., C. C. A., 223 Fed. 919. Blank forms of verdicts may be given to the jury. Phila. & R. Ry. Co. v. Skerman, C. C. A., 247 Fed. 269.

19 Ibid.

20 Nelson v. Wood, C. C. A., 210 Fed. 18.

21 U. S. v. Bachman, 246 Fed. 1009.

22 Eddy v. La Fayette, 163 U. S. 456, 467, 16 Sup. Ct. 1082, 1086, 41 L. ed. 225, affirming C. C. A., 49 Fed. 807; White v. U. S., C. C. A., 202 Fed. 501; United Mine Workers of America v. Coronado Coal Co., C. C. A., 258 Fed. 829, 846.

23 United Mine Workers of America v. Coronado Coal Co., C. C. A., 258 Fed. 829, 847.

24 Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. ed. 597.

25 Burlingame v. Central R. of Minn., 21 Fed. 706.

26 Elliott v. Gilmore, 145 Fed. 964.

When it appeared by the affidavit by all the jurors that it was their intention to allow interest, the court corrected the verdict accordingly.[26] When the verdict was inconsistent, upon the affidavit of all the jurors it was corrected after their separation.[27] This was also done when a jury returned a verdict against two defendants after they had agreed to find against one and in favor of the other.[28] When a verdict had been rendered in favor of the plaintiff upon two inconsistent counts the court upon the affidavit of plaintiff's counsel that the only evidence offered on the trial was on the part of the plaintiff in support of a single count amended the verdict so as to apply to such count alone and permitted him to enter a *nolle prosequi* upon the other.[29]

A verdict for the plaintiff upon a special cause of action cannot, after the discharge of the jury, be amended so as to show a finding for the defendant on the other causes of action, when the jury were not asked before their discharge what their finding was thereupon.[30]

An order made subsequent to the verdict to strike out evidence *nunc pro tunc* as of the date of the trial will not cure an error in admitting it, even though there was no exception thereto at the time of the trial.[31]

§ 474. Trials by the court. There can be no trial by the court of issues of fact in an action at common law, except by the consent of the parties;[1] even in a case where the State statute permits such a trial.[2]

The Revised Statutes provide: "Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."[3]

27 Cogan v. Ebden, 1 Burr 383.

28 Dalrymple v. Williams, 63 N. Y. 361.

29 Matheson's Admr. v. Grant's Admr., 2 How. 263.

30 Chandler v. Andrews, C. C. A., 192 Fed. 543.

31 Goehrig v. Stryker, 174 Fed. 897.

§ 474. 1 Klever v. Seawell, 65 Fed. 393.

2 Klever v. Seawell, 65 Fed. 393.

3 U. S. R. S., § 649.

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."[4] There is no express provision of law authorizing the review, by writ of error, of any errors committed on the trial of an action in a District Court, tried by a judge by consent without a jury,[5] but, under the Judicial Code, the statute now applies to such a court.[6]

If the stipulation is not in writing the judgment will be valid;[7] but the appellate court cannot reverse it for any error

[4] U. S. R. S., § 700. See Marion Phosphate Co. v. Cummer, 60 Fed. 873; Vera Cruz & P. R. Co. v. Waddell, C. C. A., 155 Fed. 401.

[5] Rogers v. U. S., 141 U. S. 548, 35 L. ed. 853; Campbell v. U. S., 224 U. S. 99, 56 L. ed. 684; U. S. v. St. Louis, I. M. & S. Ry. Co., C. C. A., 169 Fed. 73; Frank v. U. S., C. C. A., 192 Fed. 864.

[6] Jud. Code, § 291, 36 St. at L. 1087; Eastern Oil Co. v. Holcomb, C. C. A., 212 Fed. 126; Nashville Interurban Ry. v. Barnum, C. C. A., 212 Fed. 634.

[7] Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Bond v. Dustin, 112 U. S. 604, 606, 28 L. ed. 835, 836; Talcott v. Friend, C. C. A., 179 Fed. 676. The most appropriate proof of a compliance with the statute is the inclusion of the stipulation in the judgment roll. Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835. A statement in the finding of facts, the record of the judgment entry, or the bill of exceptions, that such a stipulation was made in writing, will be sufficient proof of a compliance with the statute. Kearney v. Case, 12 Wall. 275, 284, 20 L. ed. 395, 397; Dickinson v. Planters' Bank, 16 Wall. 250, 21 L. ed. 278; Bond v. Dustin, 112 U. S. 604, 607, 28 L. ed. 835, 836. It seems that when the court has authority to refer a case, upon consent in writing only, an order that the case be referred, which expressly states that it is made "by consent of the parties," necessarily implies that such consent was in writing. Bond v. Dustin, 112 U. S. 604, 607, 28 L. ed. 835, 836; Boogher v. Insurance Co., 103 U. S. 90, 26 L. ed. 310. A recital in the judgment that both parties announcing "ready for trial" formally waived a jury in open court, is insufficient. Columbus Compress Co. v. U. S. Fidelity & Guaranty Co., C. C. A., 186 Fed. 487. A statement in a bill of exceptions, "that the cause came on for hearing, and a jury having been impaneled and sworn, and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury

in the admission or exclusion of evidence, or because the evidence was insufficient to warrant the finding of the judge, or upon any other question of law growing out of the evidence.[8] The trial is then treated as an arbitration.[9]

The stipulation waives an objection that the suit should have been brought in equity and not in law, or *vice versa*,[10] and any other defect in the form of the action.[11] A stipulation cannot be amended *nunc pro tunc* [12] nor set aside after the case has been submitted,[13] except under very extraordinary circumstances.

The court's findings may be general or special;[14] but they should not be both.[15] They have the same effect as the verdict of a jury.[16] They are conclusive upon the questions of fact re-

was withdrawn, trial to jury waived;'' was held to be insufficient to show that a written stipulation was filed. Cudahy P. Co. v. Sioux Nat. Bank, C. C. A., 69 Fed. 182. A stipulation that the case be marked ''jury waived tentatively'' was held not to be in compliance with the statute. Merrill v. Floyd, C. C. A., 53 Fed. 172. A stipulation, which reserves the right to go to the jury in case of a certain ruling which was not made, is insufficient. Smith v. Weeks, C. C. A., 53 Fed. 758. Where the case was tried before a judge under an order providing, by consent, that it be so tried, and that if it should appear to the judge that there were questions of fact, the same be subsequently submitted to a jury; it was held that the Supreme Court could not consider on appeal rulings of the judge upon the trial. Andes v. Slauson, 130 U. S. 435, 32 L. ed. 989.

8 Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835; Spalding v. Manasse, 131 U. S. 65, 33 L. ed. 86; Andes v. Slauson, 130 U. S. 435, 32 L. ed. 989; Hayden v. Ogden Sav. Bank, C. C. A., 158 Fed. 90; Erkel v. U. S., C. C. A., 169 Fed. 623; Keeley v. Ophir Hill Consol. Min. Co., C. C. A., 169 Fed. 598; Ladd & Tilton Bank v. Lewis A. Hicks Co., C. C. A., 218 Fed. 310; Illinois Surety Co. v. U. S., C. C. A., 229 Fed. 327.

9 Bowers v. Henry Steers, C C. A., 241 Fed. 377.

10 Burton v. Platter, C. C. A., 53 Fed. 901.

11 Fisher v. Knight, C. C. A., 61 Fed. 491.

12 Smith v. Weeks, C. C. A., 53 Fed. 758.

13 Good Pine Lumber Co. v. Duke, C. C. A., 240 Fed. 695.

14 U. S. R. S., § 649; Meath v. Mississippi Levee Com'rs, 109 U. S. 268, 27 L. ed. 930; British Q. Min. Co. v. Baker S. Min. Co., 139 U. S. 222, 35 L. ed. 147.

15 U. S. R. S., § 649; Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; U. S. v. Dawson, 101 U. S. 569, 25 L. ed. 791; O'Reily v. Campbell, 116 U. S. 418, 29 L. ed. 669; Hayden v. Ogden Sav. Bank, C. C. A., 158 Fed. 90; Nat. Surety Co. v. U. S., C. C. A., 200 Fed. 142.

16 Meath v. Mississippi Levee

viewed by the issues[17] and cannot be set aside as against the weight of evidence.[18]

A special finding is controlled by a general finding in favor of one party upon all the issues and no error then can be assigned to the refusal thereof.[19] A statement of facts in an opinion is not a finding.[20] Even, it has been held, when it is referred to in the judgment.[21] A statement of facts in a bill of exceptions is not a finding.[22] Where there is no finding of facts, but merely a stipulation that either party may refer to certain testimony in other suits and rely upon the same; the court of review has no jurisdiction to determine the questions of law thereupon arising.[23]

Com'rs, 109 U. S. 268, 27 L. ed. 930; British Q. Min. Co. v. Baker S. Min. Co., 139 U. S. 222, 35 L. ed. 147; U. S. v. U. S. Fidelity Co., 236 U. S. 512; J. W. Paxson Co. v. Board of Chosen Freeholders, C. C. A., 201 Fed. 656.

17 Los Angeles Gas & Electric Corporation v. Western Gas Const. Co., C. C. A., 205 Fed. 707; Eastern Oil Co. v. Holcomb, C. C. A., 212 Fed. 126; Nashville Interurban Ry. v. Barnum, C. C. A., 212 Fed. 635; Dunsmuir v. Scott, C. C. A., 217 Fed. 200; Ladd & Tilton Bank v. Lewis A. Hicks Co., C. C. A., 218 Fed. 310; National Surety Co. v. Lincoln County, Mont., C. C. A., 238 Fed. 705; Union Pac. R. Co. v. Laughlin, C. C. A., 245 Fed. 544; Turner v. Schaeffer, C. C. A., 249 Fed. 684.

18 Washington & Canonsburg Ry. Co. v. Murray, C. C. A., 211 Fed. 440; Wear v. Imperial Window Glass Co., C. C. A., 224 Fed. 60; Good Pine Lumber Co. v. Duke, C. C. A., 229 Fed. 714; Chautauqua Institution v. Zimmerman, C. C. A., 233 Fed. 371; Security Nat. Bank v. Old Nat. Bank, C. C. A., 241 Fed. 1.

19 Anglo-American Land, Mgr. & Agency Co. v. Lombard, C. C. A., 132 Fed. 721, 735; Webb v. Nat. Bank of Republic, C. C. A., 146 Fed. 717, 719.

20 Lehman v. Dickson, 148 U. S. 71, 37 L. ed. 373; Hayden v. Ogden Sav. Bank, C. C. A., 158 Fed. 90; Pacific Sheet Metal Works v. Californian Canneries Co., C. C. A., 164 Fed. 980; Keeley v. Ophir Hill Consol. Min. Co., C. C. A., 169 Fed. 598; Gibson v. Luther, C. C. A., 196 Fed. 203; Smith & Co. v. Kingfalfa Mills, C. C. A., 237 Fed. 82; First Nat. Bank v. Weitzel, C. C. A., 239 Fed. 497; City of Goldfield, Colo. v. Roger, C. C. A., 249 Fed. 39; Bain et al. v. White, C. C. A., 256 Fed. 428; *Contra*, under the Alaska Code, Lindeberg v. Doverspike, C. C. A., 141 Fed. 59; Schofield v. Baker, W. D. Washington, N. D., 242 Fed. 657.

21 Kentucky L. M. Co. v. Hamilton, 63 Fed. 93; York v. Washburn, C. C. A., 129 Fed. 564.

22 Lehman v. Dickson, 148 U. S. 71, 37 L. ed. 373; Kentucky L. M. Co. v. Hamilton, 63 Fed. 93; York v. Washburn, C. C. A., 129 Fed. 564.

23 Glenn v. Faut, 134 U. S. 398,

It has been held that additional findings cannot be made at a subsequent term.[24] Where special findings are made and they are insufficient to support the judgment, there will be a reversal,[25] and it has been held that no exception is needed to raise this objection.[26]

The findings must be confined to the ultimate facts, upon which the law determines the rights of the parties.[27] A special finding should consist of a concise and special statement of the ultimate facts found without particulars of the evidence or conclusions of the law.[28] A finding upon mixed questions of law and fact is equivalent to a finding of fact and is equally conclusive.[29] A finding as to the construction of a written con-

33 L. ed. 969; Davenport v. Paris, 136 U. S. 580, 34 L. ed. 548.

24 Lang v. Baxter, 69 Fed. 905; Streeter v. Sanitary District of Chicago, C. C. A., 133 Fed. 124; Jackson v. Mutual Life Ins. Co., 186 Fed. 447. Findings may, perhaps, be filed by an order of the judge who tried the case, *nunc pro tunc*, at a term subsequent to the entry of judgment on his decision. Insurance Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. But see Hickman v. Fort Scott, 141 U. S. 415, 35 L. ed. 775.

25 Saltonstall v. Birtwell, 150 U. S. 417, 37 L. ed. 1128; Chicago, R. I. & P. Ry. Co. v. Barrett, C. C. A., 190 Fed. 118; Mason v. Smith, C. C. A., 191 Fed. 502; Guaranty Tr. Co. v. Koehler, 195 Fed. 669. A special finding, which is not contained in the record but appears only in the bill of exceptions, does not qualify one that is general. U. S. v. Cleage, C. C. A., 161 Fed. 85.

26 Webb v. Nat. Bank, C. C. A., 146 Fed. 717; Guaranty Tr. Co. v. Koehler, 195 Fed. 669. *Contra*, Press v. Davis, C. C. A., 54 Fed. 267; Mason v. Smith, C. C. A., 191 Fed. 502; Fellman v. Royal Ins. Co., C. C. A., 185 Fed. 689; Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401.

27 Am. Nat. Bank of Denver v. Watkins, C. C. A., 119 Fed. 545.

28 Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401; W. L. Perkins & Co. v. Van Baumbach, C. C. A., 185 Fed. 265, holding that a judgment cannot be supported upon a finding which merely sets forth the testimony of a witness and that it is true. Continental & Commercial Nat. Bank v. Cobb, C. C. A., 200 Fed. 511. Where the finding by the court of the ultimate facts sustains the judgment and clearly shows that it is based on all the evidence and not alone on evidentiary or other facts it contains, and the latter facts are not necessarily inconsistent with the ultimate facts found; they present no ground for a reversal of the judgment.

29 Rutan v. Johnson & Johnson, C. C. A., 231 Fed. 370. It has been held, that a question of mixed fact and law cannot be reviewed when the question of law has not been reserved by some proper exception. U. S. Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144.

tract is a conclusion of law.[30] A finding that plaintiff has not shown by the preponderance of evidence the facts, the burden to prove which was upon him, although inartificial is sufficient.[31]

A stipulation as to the facts has the effect of a special finding and may be examined to see if it is sufficient to support the judgment.[32] A stipulation that a witness if called would give specified testimony will be disregarded upon writ of error.[33]

Where the pleadings[34] or the agreed facts[35] do not support the judgment, there will be a reversal in any case. Where the court overruled demurrers to several pleas and there were no findings, it was held that there must be a reversal if any one of the pleas was bad.[36] It has been said that the court cannot examine the evidence to see whether a finding of fact is justified;[37] but if the uncontradicted evidence entitles a party to a judgment in his favor, and he duly requests a ruling and finding to that effect, and excepts to a refusal thereof, the judgment will be reversed even if no special findings were made.[38]

30 Roessler & Hasslacher C. Co. v. Standard Silk D. Co., C. C. A., 254 Fed. 777.

31 Nashville Interurban Ry. v. Barnum, C. C. A., 212 Fed. 634.

32 U. S. v. Chicago & A. R. Co., C. C. A., 254 Fed. 101. See *infra*, § 476.

33 New York Life Ins. Co. v. Dunlevy, C. C. A., 214 Fed. 1.

34 Michigan Home Colony Co. v. Tabor, C. C. A., 141 Fed. 332; Miller v. Houston City Ry. Co., C. C. A., 55 Fed. 366.

35 U. S. v. Cleage, C. C. A., 161 Fed. 85; Talcott v. Friend, C. C. A., 179 Fed. 676; U. S. v. Chicago & A. R. Co., C. C. A., 250 Fed. 101; *infra*, § 476.

36 Miller v. Houston City Ry. Co., C. C. A., 55 Fed. 366.

37 Tyng v. Grinnell, 92 U. S. 467, 23 L. ed. 733; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457; Reed v. Stapp, C. C. A., 52 Fed. 641, 644; Syracuse Tp. v. Rollins, C. C. A., 104 Fed. 958; West v. East Coast Cedar Co., C. C. A., 113 Fed. 737; York v. Washburn, C. C. A., 129 Fed. 564; Delaware, L. & W. R. Co. v. Kutter, C. C. A., 147 Fed. 51; Swensen v. Cunningham, C. C. A., 157 Fed. 753; Hall v. Western Union Tel. Co., C. C. A., 162 Fed. 657; Pacific Sheet Metal Works v. Californian Canneries Co., C. C. A., 164 Fed. 980; Marinette Sawmill Co. v. Scofield, C. C. A., 174 Fed. 562; Union County Nat. Bank, Liberty, Ind. v. Ozan Lumber Co., C. C. A., 179 Fed. 710; Meyer v. Everett Pulp & Paper Co., C. C. A., 193 Fed. 857; Bell v. Union Pac. R. Co., C. C. A., 194 Fed. 366; Felker v. First Nat. Bank of Cincinnati, Ohio, C. C. A., 196 Fed. 200.

38 St. Louis v. Western U. Tel. Co., 148 U. S. 92, 37 L. ed. 380; West v. East Coast Cedar Co., C. C. A., 113 Fed. 737, 739; Paul v. Delaware, L. & W. R. Co., 130 Fed. 951; U. S. Fidelity & G. Co. v. Board of

Otherwise the evidence will not be examined by the court of review.[39] The request may be either a general request to find for the requestor,[40] or a request to find or rule that there is no substantial evidence to sustain a finding for his opponent,[41] or a motion for judgment specifying the ground,[42] or separate requests may be made for special findings.[43] There can be no reversal for a refusal unless there is an exception.[44]

Where the court, without any intimation which would enable either party to anticipate such a termination, on its own motion, at the close of plaintiff's case, entered judgment for defendant, dismissing the complaint on the merits, plaintiff may secure a review of the dismissal, though he has made no request for findings of fact or a declaration of law in his favor.[45]

Otherwise it seems that there can be no reversal because of a refusal to make a ruling upon a question of law not arising upon the admission or exclusion of evidence.[46] An exception

Com'rs, 145 Fed. 144; Delaware, L. & W. R. Co. v. Kutter, C. C. A., 147 Fed. 51; U. S. v. Robertson, C. C. A., 183 Fed. 711; Union County Nat. Bank, Liberty, Ind. v. Ozan Lumber Co., C. C. A., 179 Fed. 710; Felker v. First Nat. Bank, C. C. A., 196 Fed. 200. But see Adam v. N. Y. Life Ins. Co., C. C. A., 113 Fed. 303; Berwind-White Coal Min. Co. v. Martin, C. C. A., 124 Fed. 313; National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 145 Fed. 34; Treat v. Farmers' Loan & Tr. Co., C. C. A., 185 Fed. 760; Joline v. Metropolitan Securities Co., 164 Fed. 65.

39 Mason v. U. S., C. C. A., 219 Fed. 547; Garwood v. Scheiber, C. C. A., 246 Fed. 74.

40 Garwood v. Scheiber, C. C. A., 246 Fed. 74.

41 Security Nat. Bank v. Old Nat. Bank, C. C. A., 241 Fed. 1; H. F. Dangberg Land & Live Stock Co. v. Day, C. C. A., 247 Fed. 477; Pederson v. U. S., for the Use of Washington Iron Works, C. C. A., 253 Fed. 65; Raymer v. Netherwood, C. C. A., 257 Fed. 284; Kindred v. Black, C. C. A., 257 Fed. 302.

42 Pennsylvania Casualty Co. v. Whiteway, C. C. A., 210 Fed. 782.

43 Societe Nouvelle d'Armement v. Barnaby, C. C. A., 246 Fed. 68; Garwood v. Scheiber, C. C. A., 246 Fed. 74.

44 National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 145 Fed. 34; White v. Chase, C. C. A., 201 Fed. 896; Phœnix Securities Co. v. Dittmar, C. C. A., 224 Fed. 892; Sierra Land & Live Stock Co. v. Desert Power & Mill Co., C. C. A., 229 Fed. 982; Calaf v. Fernandez, C. C. A., 239 Fed. 795.

45 Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., C. C. A., 240 Fed. 381; Meyer & Chapman State Bank v. First Nat. Bank, C. C. A., 248 Fed. 679.

46 Insurance Co. v. Folsom, 18 Wall. 237, 253, 21 L. ed. 827, 834; Searcy County v. Thompson, C. C.

to a finding raises no question for review.[47] A ruling that on the evidence the facts are too indefinite to authorize a judgment is not a refusal to make a finding on the evidence, but is in itself a finding that the plaintiff has failed to prove that he is entitled to a recovery.[48]

A request for a finding is too late after judgment[49] or it seems when not made until after the judge has announced his decision.[50]

Whether the findings are general or special, there will be a reversal for an error in the admission or exclusion of evidence, which might have affected the decision;[51] provided there is a bill of exceptions;[52] but not for the admission of harmless evidence.[53] Where there is a special finding of fact suffi-

A., 66 Fed. 92, 98; Consolidated Coal Co. v. Polar Wave Ice Co., C. C. A., 106 Fed. 798; Paul v. Delaware, L. & W. R. Co., 130 Fed. 951, 955; Southern Ry. Co. v. St. Louis Hay & Grain Co., C. C. A., 153 Fed. 728. But see Paul v. Delaware, L. & W. R. Co., 130 Fed. 951; U. S. Fidelity & G. Co. v. Board of Com'rs, C. C. A., 145 Fed. 144; Webb v. National Bank of Republic of Chicago, C. C. A., 146 Fed. 717.

47 Easton Oil Co. v. Holcomb, C. C. A., 212 Fed. 126.

48 Bain v. White, C. C. A., 256 Fed. 428.

49 National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 145 Fed. 34; Webb v. National Bank of Republic of Chicago, C. C. A., 146 Fed. 717; Keeley v. Ophir Hill Consol. Min. Co., C. C. A., 169 Fed. 598; Lake Shore & M. S. Ry. Co. v. Eder, C. C. A., 174 Fed. 944; Jackson v. Mutual Life Ins. Co., C. C. A., 186 Fed. 447; Gibson v. Luther, C. C. A., 196 Fed. 203; Hennig v. Richey, C. C. A., 196 Fed. 779.

50 Merrill v. Floyd, C. C. A., 50 Fed. 849, 850, per M. Justice Gray; Calaf v. Fernandez, C. C. A., 239 Fed. 795; Dunsmuir v. Scott, C. C. A., 217 Fed. 200.

51 Michigan Home Colony Co. v. Tabor, C. C. A., 141 Fed. 332; Continental & Commercial Nat. Bank v. Cobb, C. C. A., 200 Fed. 511.

52 Gardner v. Lake, C. C. A., 114 Fed. 306; Paul v. Delaware, L. & W. R. Co., 130 Fed. 951. Where it was agreed between counsel that the court should reserve its rulings upon objections to the evidence, and no exceptions were taken when the rulings were ultimately made, it was held that they could not be reviewed. Gibson v. Luther, C. C. A., 196 Fed. 203.

53 Reed v. Stapp, C. C. A., 52 Fed. 641; City of Key West v. Baer, C. C. A., 65 Fed. 440; Searey County v. Thompson, C. C. A., 66 Fed. 92; Rhodes v. U. S. Nat. Bank, C. C. A., 34 L.R.A. 742, 66 Fed. 512; D. & C. F. Co. v. Gottschalk, 66 Fed. 609. But see Citizens' Bank v. Farwell, C. C. A., 63 Fed. 117, Southern Ry. Co. v. St. Louis Hay & Grain Co., C. C. A., 153 Fed. 730; Atlantic Tr. Co. v. Osgood, 155 Fed. 700.

cient to support the judgment, an error in the admission of evidence not affecting such finding is harmless.[54]

The trial ends when the finding is filed; or, if no finding is previously filed, when the judgment is rendered.[55] An order made by the court after hearing a case without a jury taking the same under advisement, does not work a discontinuance of the suit, although a provision is added that the case is to be decided in vacation.[56]

When the findings are sufficient, or, it seems, whenever the evidence in support of the contention of the plaintiff in error is uncontradicted, the court of review may, instead of awarding a new trial, direct the judgment to be entered below in his favor immediately,[57] or after the assessment of damages by the trial court.[58] When the special findings are imperfect and do not cover all the issues, a reversal must order a new trial.[59]

§ 475. References. A State statute providing for compulsory references in a special class of cases, such as an action on an account, is not binding upon the Federal court.[1]

By consent the issues in an action at common law may be referred to a referee for trial.[2] The description of the referee

54 Ibid.

55 U. S. Fidelity & G'y Co. v. Board of Com'rs, C. C. A., 145 Fed. 144.

56 Abraham v. Levy, C. C. A., 72 Fed. 124.

57 Anglo-American Land, M. & A. Co. v. Lombard, C. C. A., 132 Fed. 721, 735. See the argument of the author as plaintiff's counsel in Fisher v. Newark City Ice Co., C. C. A., 62 Fed. 569.

58 Fisher v. Newark City Ice Co., C. C. A., 62 Fed. 569; s. c., C. C. A., 76 Fed. 427, in which the author was counsel.

59 Anglo-American Land M. & A. Co. v. Lombard, C. C. A., 132 Fed. 721; Webb v. National Bank of Republic of Chicago, C. C. A., 146 Fed. 717; Towle v. First Nat. Bank of Boston, C. C. A., 153 Fed. 566. But see Insurance Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Streeter v. Sanitary District of Chicago, C. C. A., 133 Fed. 124; School District No. 11, Dakota County, Neb. v. Chapman, C. C. A., 152 Fed. 887; Southern Ry. Co. v. St. Louis Hay & Grain Co., C. C. A., 153 Fed. 730; Nashville Interurban Ry. v. Barnum, C. C. A., 212 Fed. 634; Schoenwald v. Bishop, C. C. A., 244 Fed. 715.

§ 475. 1 Howe Mach. Co. v. Edwards, 15 Blatchf. 402; U. S. v. Rathbone, 2 Paine, 578; Sulzer v. Watson, 39 Fed. 414.

2 Newcome v. Wood, 97 U. S. 581, 24 L. ed. 1085; Philadelphia Casualty Co. v. C. C. A., 220 Fed. 401; Wm. Edwards Co. v. La Dow, C. C. A., 230 Fed. 378; Fifth Nat. Bank v. Lyttle, C. C. A., 253, 361, 363.

in the order as a "special master" does not impair the validity of the reference.[3] Attendance before the referee without objection or protest is equivalent to a consent to his appointment.[4] It is the safer practice for a party who has opposed an order of reference to attend before the referee and at the outset of the proceedings before the latter protest against the reference and to demand a trial by jury. When this was done and the objector upon the hearing of exceptions to the referee's report appeared only to protest against the jurisdiction; it was held that his taking part in the trial after his first protest was no waiver or consent.[5]

In the Fourth Circuit where both parties acquiesced in an order referring the case to a special master, authorized to hear the same, and pass upon the issues of fact arising upon the pleadings, and report his findings of fact to the court, the court of its own motion directed a new trial because of the impropriety of the proceedings.[6]

A Federal court at common law has inherent power to appoint an auditor, where the issues or items involved are so numerous or complex as to render a proper understanding of the controversy by a jury impossible until they have been simplified.[7]

It may then direct that the auditor's findings upon disputed items shall, upon a subsequent trial, be taken as *prima facie* correct.[8]

The District Court in Oregon referred to the State Board of Control an action for damages for wrongful diversions of water, where the water rights of numerous parties had to be considered.[9]

In proceedings before the referee the State practice should be followed.[10]

3 Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401.

4 Wm. Edwards Co. v. La Dow, C. C. A., 230 Fed. 378.

5 Ibid.

6 Swift & Co. v. Jones, C. C. A., 145 Fed. 489.

7 *Re* Peterson, 252 U. S., approving Peterson v. Davison, 254 Fed. 625; Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786; Fenno v. Primrose, C. C. A., 119 Fed. 801; Vermeule v. Reilly, 196 Fed. 226; Lincoln v. Virginia Portland Cement Co., C. C. A., 258 Fed. 505.

8 *Re* Peterson, 253 U. S. 300.

9 Amalgamated Sugar Co. v. Hempe, 226 Fed. 1010.

10 Tiernan v. Chicago Lake Ins. Co., C. C. A., 214 Fed. 238.

In the absence of a rule upon the subject,[11] it has been held that when the parties consent that the case be referred to the judge or some one else to try the issues, the only question presented by the writ of error is whether there is any error of law in the judgment upon the facts as found by the referee.[12] The court of error may reverse if the plaintiff's pleading sets forth no cause of action.[13]

It has been said in the Second Circuit that a judgment entered in accordance with the findings and conclusions of a referee may be set aside if these are supported by no evidence[14] or are clearly against the weight of evidence.[15]

It is the safer practice to move before the court to set aside the report and to except to his order thereupon.[16]

The order of the District Court confirming the report was treated as an overruling of the exceptions; and where no exception was taken thereto, it was not reviewed by the Circuit Court of Appeals.[17]

11 A rule of the Circuit Court for the Districts of New York, provided after the findings of the referee's report a motion might be made for a new trial upon a case and exceptions and that a decision denying such motion should have the same effect as a ruling upon the trial by the judge without a jury, 13 Blatchf. 568, 569. *Cf.* Chicago, M. & St. P. Ry. Co. v. Clark, 178 U. S. 353, 364; Robinson v. Mut. Ben. L. I. Co., 16 Blatchf 194, 200; Naefie v. Cheesebrough, 14 Blatchf. 313; Parker v. Ogdenburg, L. & L. C. R. Co., C. C. A., 79 Fed. R. 817. As to the extent to which this rule governs the present District Courts, Alder v. Edenborn, 198 Fed. 928.

12 Paine v. Central Vt. R. Co., 118 U. S. 152, 158, 30 L. ed. 193, 195; Boogher v. Insurance Co., 103 U. S. 90; J. G. White & Co. v. Ball Engineering Co., C. C. A., 223 Fed. 618; Delaware, L. & W. R. Co. v. Caboni, C. C. A., 223 Fed. 631; Grant v. National Bank of Auburn, 221 Fed. 1007. See Dundee M. & Tr. Co. v. Hughes, 124 U. S. 157, 31 L. ed. 357; Tiernan v. Chicago Life Ins. Co., C. C. A., 214 Fed. 238; Paine v. Standard Plunger Elevator Co., C. C. A., 203 Fed. 242.

13 Edenborn v. Sim, C. C. A., 206 Fed. 275.

14 Fifth Nat. Bank v. Lyttle, C. C. A., 250 Fed. 361, 363; U. S. v. United Surety Co., 226 Fed. 985. See Bemis Car Box Co. v. J. G. Briel Co., C. C. A., 200 Fed. 749.

15 Fifth Nat. Bank of City of New York v. Lyttle, C. C. A., 250 Fed. 361.

16 Tiernan v. Chicago Life Ins. Co., C. C. A., 214 Fed. 238; Rutan v. Johnson & Johnson, C. C. A., 231 Fed. 370.

17 Rutan v. Johnson & Johnson, C. C. A., 231 Fed. 370.

By overruling all exceptions of both parties to the report of a referee, and rendering judgment for the exact sum found by him to be due, the court evidences its intention to adopt the findings of the referee as its own; and the court of review may treat them as if made by the District Court.[18]

A general exception to the action of the court in overruling in a mass the exceptions taken to the report of the referee is too indefinite to present any question for review by the appellate court, and if any one of the rulings of the referee excepted to was correct, the exception is bad.[19]

Under the Arbitration Act of July 15, 1913,[20] it has been held that an award is subject to review only upon some ground which affects the jurisdiction.[21]

The court of review has reviewed the decision of the lower court upon a motion to strike out a notice of a termination of the reference, which was decided after the report was filed, and also the decision of a motion to set aside the report because of such a notice.[22]

It was held that a stipulation to refer a case to a special master, and that the rights of the parties shall be the same as though the case were one within the terms of the State statute, neither enlarges nor contracts the rights of the parties with respect to a review by the Circuit Court of Appeals of a judgment on a trial without a jury,[23] and that an oral consent in open court to an order of reference, made pursuant to a State statute of Nebraska, will not enable the Circuit Court of Appeals in the Eighth Circuit to review the action of the Circuit Court on exceptions to the referee's report, where there is no bill of exceptions making that report, or the evidence upon which it was founded, a part of the record.[24] In the absence of a statute or a rule upon the subject, where the issues

18 Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401.

19 Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401.

20 38 St. at L. 107, ch. 6, § 8. See *supra*, § 779.

21 Georgia & F. Ry. Co. v. Brotherhood of Locomotive Engineers, C. C. A., 717 Fed. 755.

22 Parker v. Ogdensburg, L. & L. C. R. Co., C. C. A., 79 Fed. 817.

23 Shipman v. Ohio Coal Exchange, C. C. A., 70 Fed. 652.

24 Dietz v. Lymer, C. C. A., 63 Fed. 758. See also Board of Com'rs of Hamilton County v. Sherwood, C. C. A., 64 Fed. 103.

of fact at common law had been referred to a referee to make findings of fact, it was held that the judge of the court of first instance could not set aside the findings of the referee, unless it appeared that the latter had been guilty of some misconduct or had denied both parties a full and fair hearing;[25] and the judge has no power himself to determine the issues of fact;[26] except, perhaps, to correct a manifest clerical error; but he can only confirm or reject the referee's findings or order,[27] or order new findings,[28] or send the case back to him for further findings;[29] and in case they are set aside, the cause will be sent back to the same referee,[30] or stand for trial as if it had never been referred.[31]

Ordinarily, judgment upon a referee's report may be entered by the clerk without an application to the court.[32] After judgment has been entered on a referee's report, a new trial cannot be granted by the referee or the court;[33] but after the report has been filed and before judgment, possibly the referee may correct a manifest clerical error in the report.[34]

§ 476. Agreed statement of facts. A judgment upon an agreed statement of facts presents nothing but a question of law, which may be reviewed on a writ of error.[1] It resembles a special verdict by a jury, or special findings by the court.[2]

25 United States v. Ramsey, 158 Fed. 488.

26 David Lupton's Sons Co. v. Auto. Club of America, 225 U. S. 489, 56 L. ed. 1177; Boatmen's Bank v. Trower Bros. Co., C. C. A., 181 Fed. 804. *Contra,* Boatmen's Bank v. Trower Bros. Co., 171 Fed. 964; Kilduff v. John A. Roebling's Sons Co., 150 Fed. 240.

27 Boatmen's Bank v. Trower Bros. Co., C. C. A., 181 Fed. 804.

28 Boatmen's Bank v. Trower Bros. Co., C. C. A., 181 Fed. 804. See Paine v. Standard Plunger Elevator Co., 186 Fed. 605.

29 Ibid.

30 Ibid.

31 U. S. v. Ramsey, 158 Fed. 488; Elkin v. Denver Engineering Works Co., C. C. A., 181 Fed. 684.

32 Alder v. Edenborn, 198 Fed. 928.

33 Ibid.

34 Kilduff v. John A. Roebling's Sons Co., 150 Fed. 240.

§ 476. 1 Bonod v. Dustin, 112 U. S. 604, 607; 28 L. ed. 835, 836; Supervisors v. Kennicott, 103 U. S. 554, 26 L. ed. 486; U. S. v. Eliason, 16 Pet. 291, 10 L. ed. 968; Burr v. Des Moines R. & Nav. Co., 1 Wall. 99, 17 L. ed. 561; Campbell v. Boyreau, 21 How. 223, 226, 16 L. ed. 96, 97; Mutual Life Ins. Co. v. Kelly, C. C. A., 114 Fed. 268. But see Glenn v. Flant, 134 U. S. 398, 33 L. ed. 969.

2 Hipple v. Bates County, C. C. A., 223 Fed. 22.

The statement of agreed facts must consist of facts only, and not contain a recapitulation of the evidence,[3] nor should it contain evidential facts, from which an ultimate fact might be, but is not, found.[4] Nothing can be imported therein by inference or deduction.[5] If, however, it states the ultimate facts, it will not be vitiated because it contains the evidential facts as well.[6]

Where the plaintiff in error stipulated that the findings below were correct, they will be considered as an agreed statement of facts.[7]

When a judgment of agreed facts is reversed because the facts stipulated were evidential only, a new trial may be ordered with liberty to each party to offer additional evidence not inconsistent with the stipulation.

Where the agreed facts do not support the judgment there must be a reversal.[8]

The sufficiency of the facts agreed upon may be reviewed[9] by writ of error[10] although there was no request below for a declaration or conclusion of law.[11]

A statement of facts agreed by the parties, that is, a case stated, in an action of law, waives all questions of pleading, or of form of action, which might have been cured by amendment; but formerly it could not enable a court of law to assume the jurisdiction of a court of equity.[12] For example, in a State where the remedy of a mortgagee against one who had covenanted with a mortgagor to pay the mortgage is in equity, a case stated

3 Raimond v. Terrebonne Parish, 132 U. S. 192, 33 L. ed. 309.

4 Wilson v. Merchants' L. & Tr. Co., 183 U. S. 121, 46 L. ed. 113; U. S. Trust Co. v. New Mexico, 183 U. S. 535, 46 L. ed. 315; Burnham v. No. Chicago St. Ry. Co., C. C. A., 88 Fed. 627. See Olcott v. Ennis-Calvert Compress Co., C. C. A., 114 Fed. 907.

5 Ibid.

6 Am. Nat. Bank v. Watkins, C. C. A., 119 Fed. 545; Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401.

7 Burnham v. No. Chicago St. Ry. Co., C. C. A., 88 Fed. 627.

8 U. S. v. Cleage, C. C. A., 161 Fed. 85; Talcott v. Friend, C. C. A., 179 Fed. 676.

9 Northern Commercial Co. v. U. S., C. C. A., 217 Fed. 33.

10 Blair v. U. S., C. C. A., 241 U. S. 217.

11 Hipple v. Bates County, C. C. A., 223 Fed. 22.

12 Willard v. Wood, 135 U. S. 309, 314, 34 L. ed. 210, 213.

could not authorize him to sue at law.[13] But it has been held that a stipulation in an action of assumpsit to submit the case to the court upon an agreed statement of facts, with like effect as though the same had been found by a jury, judgment to be entered for the party whom the court finds to be entitled thereto, authorizes judgment in favor of the plaintiff for a sum of money, although his rights are purely equitable in their nature.[14]

§ 477. Rules of decision at common law. The Revised Statutes provide that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."[1] This rule applies to condemnation proceedings and to all civil proceedings in the Federal courts, except equity and admiralty cases, although they are not strictly according to the common law.[2]

This statute refers only to substantive law and has no application to procedure in Federal courts.[3]

It has been held that this statute does not apply to questions of commercial law, or those which involve the application of principles of the common law which are general throughout the United States, and although settled by the decision of State courts are not regulated by a State statute. Upon questions of this nature, except in the case of a local rule of property, the Federal courts are not bound by the decisions of the State courts;[4] although they lean toward agreement with the latter

[13] Willard v. Wood, 135 U. S. 309, 34 L. ed. 210, *supra*, § 453.

[14] Knight v. Fisher, 58 Fed. 991.

§ 477. [1] U. S. R. S. § 721.

[2] N. Y., N. H. & H. R. of A. v. Cockraft, 49 Fed. 3, 4.

[3] McBride v. Neal, C. C. A., 214 Fed. 966; see *supra* § 453.

[4] Swift v. Tyson, 16 Pet. 1, 10 L. ed. 86; Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, per Bradley, J. Daly v. James, 8 Wheat. 495, 5 L. ed. 670; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Shelby v. Guy, 11 Wheat. 361, 6 L. ed. 495; Jacksin v. Chew, 12 Wheat. 153-108, 6 L. ed. 583-589; Fullerton v. Bank of U. S., 1 Pet. 604, 7 L. ed. 280; Gardiner v. Collins, 2 Pet. 58, 7 L. ed. 347; U. S. v. Morrison, 4 Pet. 124, 7 L. ed. 804; Green v. Neal's Lessee, 6 Pet. 291, 8 L. ed. 402; Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Lane v. Vick, 3 How. 464, 11 L. ed. 681; Howan v. Runnels, 5

when the question under consideration is doubtful,[5] and it has been said should follow them unless strongly convinced of their error.[6]

Such are the laws of insurance;[7] the liability for negligence by employers,[8] common carriers[9] and telegraph compa-

How. 134, 12 L. ed. 85; Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; Nesmith v. Sheldon, 7 How. 812, 12 L. ed. 925; Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; Webster v. Cooper, 14 How. 488, 14 L. ed. 510; Ohio Life Ins. & Tr. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Beauregard v. New Orleans, 18 How. 497, 15 L. ed. 469; Watson v. Tarpley, 18 How. 517, 15 L. ed. 509; Pease v. Peck, 18 How. 595, 15 L. ed. 518; Morgan v. Curtenius, 20 How. 1, 15 L. ed. 823; League v. Egery, 24 How. 264, 16 L. ed. 655; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; s. c., 6 Wall. 736, 18 L. ed. 972; Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Mercer County v. Hucket, 1 Wall. 83, 17 L. ed. 548; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. ed. 520; Seybert v. Pittsburgh, 1 Wall. 272, 17 L. ed. 553; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Thompson v. Lee County, 3 Wall. 327, 18 L. ed. 177; Christy v. Pridgeon, 4 Wall. 196, 18 L. ed. 322; Mitchell v. Burlington, 4 Wall. 270, 18 L. ed. 350; Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160; Butz v. City of Muscatine, 8 Wall. 575, 19 L. ed. 490; City v. Lamson, 9 Wall. 477, 10 L. ed. 725; Olcott v. Supervisors, 16 Wall. 678, 21 L. ed. 382; Supervisors v. U. S., 18 Wall. 71, 21 L. ed. 771; Boyce v. Tabb, 18 Wall. 546, 21 L. ed. 757; Pine Grove v. Talcott, 19 Wall. 666, 22 L. ed. 227; Elmwood v. Marcy, 92 U. S. 289, 23 L. ed. 710; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. ed. 544; Oates v. National Bank, 100 U. S. 239, 25 L. ed. 580; Douglas v. County of Pike, 101 U. S. 677, 25 L. ed. 968; Barrett v. Holmes, 102 U. S. 651, 26 L. ed. 291; Thompson v. Perrine, 103 U. S. 806, 26 L. ed. 612; s. c., 106 U. S. 589, 27 L. ed. 298.

5 Lankford v. Platte Iron Works, 235 U. S. 461; Sim v. Edenborn, 242 U. S. 631, 136; Holden v. Circleville Light & Power Co., 216 Fed. 490; Memorial Hospital Association, 229 Fed. 839; U. S. v. Brewer-Elliott & Gas Co., 249 Fed. 609.

6 Norfolk Bank v. Whipple, 254 Fed. 195.

7 Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044; Hening v. U. S. Ins. Co., 2 Dill. 26. But see Brown v. Pacific Coal Co., 241 U. S. 571; *infra*, § 477b.

8 Hough v. Railway Co., 100 U. S. 213, 226, 25 L. ed. 612, 618; Coyne v. Union Pac. R. Co., 133 U. S. 370, 33 L. ed. 651; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656; Baltimore & O. R. Co. v. Daugh, 149 U. S. 368, 37 L. ed. 772; Gardiner v. Mich. C. R. Co.,

nies;[10] contributory negligence,[11] including, it has been held, the imputation of the contributory negligence of parent to the child;[12] negotiable paper;[13] municipal bonds;[14] bills of lading;[15] contracts by common carriers;[16] as to the power of a railroad com-

150 U. S. 349, 37 L. ed. 1107; Northern Pac. R. Co. v. Peterson, C. C. A., 51 Fed. 182; Newport News & M. V. Co. v. Howe, 52 Fed. 362, 366; s. c., Kinnear Mfg. Co. v. Carlisle, C. C. A., 152 Fed. 933; Union Pac. R. Co. v. Marone, C. C. A., 246 Fed. 916. But see Kerlin v. Chicago & St. L. R. Co., 50 Fed. 185; Atlantic Coast Line R. Co. v. Farmer, C. C. A., 176 Fed. 692.

In the Federal Courts a superior officer is none the less a fellow servant of an employee who is working under him and subject to his orders, unless he is entrusted by the employer with departmental control or has delegated to him a duty of the employer towards the person injured. Ibid. Moss v. Gulf Compress Co., C. C. A., 202 Fed. 657.

When the highest court of the State has held that State statute imposes upon the employer a duty which cannot be delegated and that an employee engaged in the performance of a duty thus imposed is not a fellow servant of the others; the Federal Courts should follow such decision in a case arising under the statute. Brown v. Pacific Coast Coal Co., 241 U. S. 571.

When there is no proof of the law of a foreign country where an accident occurred, the court will apply the law of the forum. Cuba R. Co. v. Crosby, C. C. A., 170 Fed. 369.

9 Myrick v. Michigan Central R. Co., 107 U. S. 102, 109, 27 L. ed. 325, 327; Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627.

10 Western U. Tel. Co. v. Cook, C. C. A., 61 Fed. 624; Western U. Tel. Co. v. Wood, C. C. A., 21 L.R.A. 706, 57 Fed. 471.

11 Railroad Co. v. Gladmon, 15 Wall. 401; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; No. Pac. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296.

12 Berry v. Lake E. & W. R. Co., 70 Fed. 679. But as to this see the *dicta* in Kowalski v. Chicago & G. W. Ry. Co., 84 Fed. 586; s. c. C. C. A., 92 Fed. 310.

13 Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Railroad Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; Watson v. Tarpley, 18 How. 517, 15 L. ed. 509; Tilden v. Blair, 21 Wall. 241, 22 L. ed. 632; *Re* Jarmulowsky, C. C. A., 249 Fed. 319.

14 Olcott v. Supervisors, 16 Wall. 678, 21 L. ed. 382; Pine Grove v. Talcott, 19 Wall. 666, 22 L. ed. 227; Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583; Com'rs of Johnson County v. Thayer, 94 U. S. 631, 24 L. ed. 133; Cromwell v. County of Sac, 96 U. S. 51, 24 L. ed. 681; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Douglass v. Pike County, 101 U. S. 677, 686, 25 L. ed. 968, 971.

15 Myrick v. Michigan Central R. Co., 107 U. S. 102, 109, 27 L. ed. 325, 327; Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998. See the dissent of Field, J., in Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 397, 405, 37 L. ed. 772, 784, 787, 27 Am. Law Reg. 398-402.

16 Railroad Co. v. Lockwood, 17

pany engaged in Interstate Commerce to give special privileges to hackmen and expressmen in the use of its stations;[17] the distribution of assets of insolvents before the bankruptcy law;[18] the liability of stockholders to creditors[19] in the absence of any particular local statute,[20] but not as to the liability of stockholders in a building and loan association for their loans from the same;[21] private international law, or the conflict of laws, so far, at least, as the same applies to the effect to be given to the statutes of another State,[22] or of a foreign country.[23] In the absence of a State statute, the Federal courts are not bound by the State decisions concerning the measure of damages other than interest.[24] It has been held that they are not so bound

Wall. 357, 21 L. ed. 627; Hening v. U. S. Ins. Co., 2 Dill. 26; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 109, 27 L. ed. 325, 327; Fowler v. Pennsylvania R. Co., C. C. A., 229 Fed. 373. But see Eubanks v. Southern Ry. Co., 244 Fed. 891.

17 Skaggs v. Kansas City Terminal Ry. Co., 233 Fed. 827.

18 London & S. F. Ry. Co. v. Williamette S. M. L. & M. Co., 80 Fed. 226. See Rapple v. Dutton, C. C. A., 226 Fed. 430.

19 Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359; Clark v. Bever, 139 U. S. 96, 116, 35 L. ed. 88, 96; Brunswick Terminal Co. v. National Bank of Baltimore, 192 U. S. 386, 48 L. ed. 491; Converse v. Mears, 162 Fed. 767; Thoms & Brenneman v. Goodman, C. C. A., 254 Fed. 39.

20 Sioux City T. R. R. & W. Co. v. Trust Co. of N. A., 173 U. S. 99, 43 L. ed. 628, N. Y. Statute 1; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966; Allen v. Fairbanks, 45 Fed. 455, 447, Missouri Statute; Babbitt v. Read, 215 Fed. 95, N. Y. Statute; Way v. Mortenson, C. C. A., 242 Fed. 903, Minnesota Statute; Second Nat. Bank of Erie v. George, 246 Fed. 517, N. Y. Statute.

21 U. S. Sav. & Loan Co. v. Morris, 113 Fed. 27.

22 Greaves v. Neal, 57 Fed. 816, 817; Dygert v. Vt. L. & Tr. Co., C. C. A., 94 Fed. 913.

23 Evey v. Mex. Cent. R. Co., C. C. A., 38 L.R.A. 387, 81 Fed. 294.

24 Lake S. & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97. Woldson v. Larson, C. C. A., 164 Fed. 548; Power v. City of Augusta, 191 Fed. 647; Clark v. Belt. C. C. A., 223 Fed. 573; Hopkins v. Lee, 6 Wheaton, 109, 118, 5 L. ed. 218.

"The rule is settled in this court that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price, at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor if the article has risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle whether the contract be for the sale of real or

as to the law excusing a plaintiff for failure to return replevied property upon his defect in the action,[25] and even as regards the construction and validity of a bond to secure the payment for labor and materials given by a contractor in accordance with a State statute.[26]

Thus, irrespective of the decisions of the courts of the States where they are held, the Federal courts hold: that in suits for damages by negligence the contributory negligence of the plaintiff is a defense, the burden of proving which rests upon the defendant,[27] and that the plaintiff is not bound as a part of his case to disprove the same.[28] The same rule applies where the attempt to establish such contributory negligence is based upon the record as produced by the plaintiff.[29] It is a misnomer to say that the question as to the burden of proof is merely a matter of State procedure.[30]

This rule as to the burden of proof applies in suits under the Federal Employers' Liability Law,[31] in the State courts, al-

personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference." See Harten v. Loffler, 212 U. S. 397, 29 Sup. Ct. 351, 53 L. ed. 568; Clark v. Belt, C. C. A., 223 Fed. 573, 578.

In an action to recover damages because of a purchase induced by fraud the Federal courts, irrespective of the State's decisions, enforce the rule that the measure of damages shall be the difference between the contract price and the market price of the article purchased together with interest and any other outlay legitimately attributable to defendant's fraudulent conduct. The reasonable market value of the property if it had been fraudulently represented is immaterial. Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. ed. 279; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. ed. 113. Chandler v. Andrews, C. C. A., 192 Fed. 543, 545.

25 Three States Lumber Co. v. Blanks, C. C. A., 69 L.R.A. 283, 133 Fed. 479.

26 Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 Fed. 507. But see *infra*, § 477b.

27 The text is cited with approval by Shelby, J. in Hemingway v. Illinois Cent. R. Co., 114 Fed. 843; it was so held in Railroad Co. v. Gladmon, 15 Wall. 401, 21 L. ed. 114; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Northern Pac. R. Co. v. Mares, 123 U. S 710, 31 L. ed. 296.

28 Bauman v. Black & White Taxis Co., C. C. A., 263 Fed. 554.

29 Ibid.

30 Central Vt. R. R. v. White, 238 U. S. 507, 512.

31 Central Vermont R. R. v. White, 238 U. S. 507.

though the State law requires the plaintiffs to show their own freedom from fault.[32] A pedestrian is not guilty of contributory negligence, as a matter of law, if before crossing a street he looks both ways and sees no approaching vehicle, although he fails to show that he kept looking both ways while attempting to cross, if his eyes and ears were kept open.[33]

A warehouseman is liable only for negligence, the burden of proving which rests on the party alleging it, and is not shifted by proof merely of loss or destruction of property in charge of the warehouseman.[34]

A common carrier cannot by contract relieve himself from liability for negligence.[35] The Federal courts hold: that a bill of lading for goods not received for shipment, although signed by the master of the boat of its shipment, does not bind the vessel or its owner and is void even in the hands of a purchaser in good faith and for value.[36] That one who has received negotiable paper in payment of a pre-existing debtedness is a holder for value,[37] that a purchaser of negotiable paper before maturity in good faith and for value may recover the face value of the same, and not merely his purchase price,[38] that parol evidence of an oral agreement made at the time of the drawing, making, or indorsement of a bill or note cannot be permitted to vary,

32 Bauman v. Black & White Town Taxis Co., C. C. A., 263 Fed. 554.

33 United Metals Selling Co. v. Pryor, C. C. A., 243 Fed. 91.

34 Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Bank of Ky. v. Adams Exp. Co., 93 U. S. 174, 23 L. ed. 872. But see Balt. & O. S. W. Ry. Co. v. Voight, 176 U. S. 498, 44 L. ed. 560.

35 The schooner Freeman v. Buckingham, 18 How. 182, 15 L. ed. 341; Pollard v. Vinton, 105 U. S. 7; *contra*, N. Y., N. H. & H. R. R. Co. v. Schuyler, 34 N. Y. 30; Armour v. Michigan Central I. R. Co., 65 N. L. 111; Wichita Savings Bank v. At. T. & S. F. R. R. Co., 20 Kansas 519; Sioux City Co. v. Nat. Bank, N. A. B., 556.

36 Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Railroad Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61, *contra*, Coggington v. Bay, 20 Johnson (N. Y.), 637; Lawrence v. Clark, 36 N. Y. 628.

37 Cromwell v. County of Sac, 96 U. S. 51, 60, 24 L. ed. 681, 687; Wade v. Chicago, S. & St. L. R. Co., 149 U. S. 327, 343, 37 L. ed. 755, 762.

38 Van Vleet v. Sledge, 45 Fed. 743, 749; Specht v. Howard, 16 Wall. 564, 21 L. ed. 348; Forsythe v. Kimball, 91 U. S. 291, 23 L. ed. 352; White v. National Bank, 102 U. S. 658, 661, 26 L. ed. 250, 252; Martin v. Cole, 104 U. S. 30, 26 L. ed. 647. *Contra*, Chapin v. Dobson, 78 N. Y. 74; Juilliard v. Chaffee, 92 N. Y. 529; Eigimia v. Taylor, 98 N. Y. 288; Dodge v. Zimmer, 116 N. Y. 43.

qualify, or contradict the terms of the written contract.[39] That a contract which is ultra vires whether executed or executory cannot be enforced,[40] that when a party to a contract clearly and positively renounces it the other may immediately sue for damages without awaiting the time for its stipulated performance,[41] that a provision in a note for payment of attorney's fee of a stipulated amount in case of default and the employment of an attorney cannot be enforced.[42] The debtor who does not agree to accept a partial assignment of his debt is not bound to pay such partial assignee.[43] That a partner or two partners who have sold their interests to others while the firm is solvent cannot in a subsequent bankruptcy or insolvency require that the partnership property be devoted to the payment of partnership debts.[44] That an assignment of a policy of life insurance to one with no insurable interest is void.[45] The maritime usages of foreign countries are not respected as authority except in so far as they are consonant with the rules of English and American jurisprudence.[46] In construing a statute adopted from another State or country, the decisions of that State or country may be considered;[47] but they are not conclusive.[48] A State statute for-

39 Pearce v. Madison & H. R. Co., Indianapolis I. R., 21 How. 441, 16 L. ed. 184; Pennsylvania R. Co. v. St. Louis A. & T. H. R. Co., 118 U. S. 290, 30 L. ed. 83; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55. But see Burke Brick Co. v. First Nat. Bank, C. C. A., 249 Fed. 607, *contra*, Bissell v. Michigan Central I. R. Co., 22 N. Y. 258.

40 Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 78, 44 L. ed. 953; Colorado U. Marble Co. v. Collins, C. C. A., 230 Fed. 78, *contra*, Daniels v. Luden, 114 Mass. 530; Stanford v. McGill, 6 North Dakota, 536 C. Elliott Contrast Section 2028.

41 Mechanics'-American Nat. Bank v. Coleman, C. C. A., 204 Fed. 24. But see *infra*, § 477b.

42 Sheatz v. Markley, C. C. A., 249 Fed. 315.

43 Fitzpatrick v. Flannagan, 106 U. S. 648, 654, 1 Sup. Ct. 369, 374, 27 L. ed. 211; Rapple v. Dutton, C. C. A., 226 Fed. 430, *contra*, Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605.

44 Cammack v. Lewis, 15 Wall. 643, 21 L. ed. 244; Warnock v. Davids, 104 U. S. 775; Crotty v. Union Life Ins. Co., 144 U. S. 621, *contra*, St. John v. Am. Life Ins. Co., 13 N. Y. 31; Valton v. National Fund Life Assurance Co., 20 N. Y. 32; Olmstead v. Keyes, 85 N. Y. 593.

45 The Kongsli, 252 Fed. 267.

46 Gates v. Columbia-Knickerbocker Trust Co., C. C. A., 233 Fed. 359.

47 Pennock v. Dialogue, 2 Peters 1, 7 L. ed. 327; McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269.

48 David Lupton's Sons Co. v.

bidding a foreign corporation to sue upon a contract made within a State, until it shall have procured a certificate authorizing it to do business there, does not prevent the maintenance of such an action at common law in a Federal court, unless the statute makes such contracts void.[49] It has been said that a District Court should not hold an act of Congress to be unconstitutional, unless, in a clear case, to prevent irreparable injury to property.[50]

§ 477a. Common law of the United States. The Supreme Court has frequently laid down the doctrine that there is no common law of the United States regulating civil cases[1] or criminal prosecutions.[2] "There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States."[3] "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several States, each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes."[4] "It is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate

Auto Club of America, 225 U. S. 489; Sullivan v. Beck, 79 Fed. 200; Eastern B. & L. Ass'n v. Bedford, 88 Fed. 7; Groton Bridge & Mfg. Co. v. Am. Bridge Co., 151 Fed. 871. See § 87, *supra*. *Contra, Re* Monongahela Distillery Co., 186 Fed. 220.

49 Michie v. N. H. & H. R. Co., 151 Fed. 694. *Contra*, Am. L. & Tr. Co. v. Grand Rivers Co., 159 Fed. 775.

50 U. S. v. Scott, 148 Fed. 431; *Ex parte* Wood, 155 Fed. 190; St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220; Consolidated Gas Co. v. New York, 157 Fed. 849.

§ 477a. 1 Wheaton v. Peters, 8 Peters 591; Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564; Western Union Tel. Co. v. Call Pub. Co., 1 U. S. 92, 47 L. ed. 765. See DuPonuceau on Jurisdiction *passim;* Denver & R. G. R. Co. v. U. S., C. C. A., 211 Fed. 64.

2 U. S. v. Worrall, 2 Dallas, 384, 1 L. ed. 426; U. S. v. Hudson, 7 Cranch. 32, 3 L. ed. 259; U. S. v. Coolidge, 1 Wheaton 415, 4 L. ed. 124; Manchester v. Massachusetts, 139 U. S. 240, 262, 35 L. ed. 159, 166. See *infra*, § 483.

3 Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92, 45 L. ed. 765, per Mr. Justice Brewer.

4 Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564. *Per* Mr. Justice Matthews.

commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.''

''There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject and constitutes a common law, resting on national authority.'' [5]

5 Ibid. Murray v. Chicago & N. W. Ry. Co., 62 Fed. 24, 33, 34, *per* Oliver P. Shiris J.; ''The meaning to be given to this last sentence quoted from the opinion of Mr. Justice Matthews is not at all clear. If it be true that the Supreme Court, in construing the provisions of the Constitution, and the laws and treaties made in pursuance thereof, has the right to adopt, as the basis of its construction, so much of the common law as may be implied in the subject, which proposition seems to be affirmed, then is it not true that the principles of the common law, so far as applicable to the subject-matter, are recognized as in force touching matters of national control? It is evident that it was present to the mind of the learned justice whose opinion we are considering that it would not do to hold that the failure of Congress to legislate touching the duties and obligations of common carriers engaged in interstate commerce left the public without any law for its protection, and therefore the suggestion is made that: 'The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law.' The rules prevailing in the different states may be variant or antagonistic. A delivery of goods may be made to a common carrier in California, for transportation to New York. Do the legal relations, duties and obligations existing between the shippers and carrier vary and change as the shipment passes state boundaries, so as to accord with the local law of each State through which the carrier may choose to take them? Upon such a theory, what becomes of the principle that the exclusive control of foreign and interstate commerce was committed to congress in order to secure a uniform rule touching the same? I would amend the statement of Mr. Justice Matthews so that it should read: 'The failure of congress to legislate can be construed only as an intention not to disturb what already exists; and as, at the time of the adoption of the constitution,

"The failure of Congress to legislate can be construed only as an intention not to distrub what already exists; and as, at the time of the adoption of the Constitution, common carriers, under the principles of the common law, were subject to certain duties and obligations, the failure on the part of Congress to legislate thereon evinces the legislative intent to leave the rules and principles of the common law in force, as controlling and defining the relations, duties, and obligations of common carriers engaged in interstate commerce.[6]

common carriers, under the principles of the common law, were subject to certain duties and obligations, the failure on the part of congress to legislate thereon evinces the legislative intent to leave the rules and principles of the common law in full force, as controlling and defining the relations, duties, and obligations of common carriers engaged in interstate commerce!'" stating the proposition set forth in the text over the following note.

[6] Murray v. Chicago & N. W. Ry. Co., 62 Fed. 24, 34, per Oliver P. Shiras J.

Ibid (p. 27): "It appears when the Constitution of the United States was adopted, the general rules of the common law, in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people, were recognized and were in force in the colonies, and the people thereof were entitled to demand the enforcement thereof through the judicial tribunals then existing. The adoption of the Constitution did not deprive the people of the several colonies of the protection and advantages of the common law. The Constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof." Ibid (32, 36, 38, 39): "To me it seems clear, beyond question, that neither in the Constitution, nor in the statutes enacted by congress, nor in the judgments of the Supreme Court of the United States can there be found any substantial support for the proposition that, since the adoption of the Constitution, the principles of the common law have been wholly abrogated touching such matters as are by that instrument placed within the exclusive control of the national government * * * I cannot concur in the proposition that the principles of the common law have no existence in this country, as applicable to national affairs, or that these principles have only a local existence, due to their adoption by the several states. It is certainly a novel proposition that up to the date of the enactment of the interstate commerce act in 1887, all the foreign and interstate commerce of the country was without the pale of law, and that there were no legal rules or principles which governed or controlled the relations between the shippers or carriers engaged in that business. * * * Perhaps the most

Independently of any statute, Federal courts sustain suits against telegraph companies, railroad companies, or other com-

forcible illustration of the fact that the government of the United States does recognize and enforce the principles of the common law with regard to subjects wholly within national control, and not as part of the municipal law of any state, is found in connection with the organization and proceedings of the court of claims. This court is not a court in and for the district of Columbia nor is it a court of any district or circuit. * * * As to this court thus organized, and clothed with a jurisdiction wholly national in its character, the express ruling of the Supreme Court is to the effect that the general law controlling its action is the common law * * *.

Ibid. (41, 42): "The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the constitution, there was in existence a common law, derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the Constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and state governments provided for in the constitution did not deprive the people who formed the Constitution of the benefits of the common law; that, as to such matters as were by the Constitution committed to the control of the national government, there were applicable thereto the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the Constitution and congress, acting in furtherance of its provisions, have created the Supreme Court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the federal courts, applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States (the Supreme Court being the final arbiter), have the right to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the common law now applicable to matters committed to the control of the national government is based upon the common law of England, as modified by the surroundings of the colonists and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; that the binding force of the principles of this common law, as applied to matters affecting the entire people, and placed under the control of the national government, is not derived from the action of the states, and is no more subject to abrogation or modifica-

mon carriers for unjust discrimination,[7] or excessive charges,[8] for transportation in the course of interstate commerce.

§ 477b. The effect of decisions of State courts establishing Rules of Property. When the decisions of the State courts establish a rule of property, they will be followed by the Federal courts, unless they relate solely to questions of commercial law,[1] or involve the application of principles of the common law which are general throughout the United States.[2] Thus the Federal courts will follow the decisions of the State courts, at least if they were made before the cause of action arose[3] and in the absence of constitutional difficulties.

Water rights,[4] the right to a wharf extending into navigable

tion by state legislation than are the principles of the law of nations or of the law maritime.''

7 Western U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. ed. 765.

8 Murray v. Chicago & N. W. Ry. Co., 62 Fed. 24; *contra*, Swift v. Phila. & R. R. Co., 58 Fed. 858; S. C. 64 Fed. 59, 60; per Grosscup, J.: ''The right to recover from common carriers for unreasonable exactions must be found in some positive law of the land, applicable to the case in hand. Such a prohibition is in fact found in the common law; but it is not applicable to the case in hand, unless there be a common law of the United States, as a distinct sovereignty, because the regulation of the rates upon which the suit is dependent is within the scope of the interstate commerce, and an exclusively national affair, in which the need of uniformity is imperative. There is no common law of the United States, as a distinct sovereignty; and there being no pronouncement of congress upon this subject, either expressly or impliedly, outside of the interstate commerce act, and this action not having been brought under the interstate commerce act, there is no law, either of the United States or the state, applicable to the case in hand, and there can therefore be no recovery.''

As to the liability of a railroad company for damages caused by fire, see Denver & R. G. Co. v. U. S., C. C. A., 241 Fed. 64.

§ 477b. 1 Neves v. Scott, 13 How. 268, 271, 14 L. ed. 140; Gaines v. Fuentes, 92 U. S. 10, 20, 23, L. ed. 524, 528; Lorman v. Clarke, 2 McLean, 568, 577; Nichols v. Eaton, 91 U. S. 716, 729, 23 L. ed. 254, 258; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; Fisher v. Shropshire, 147 U. S. 133, 37 L. ed. 109; St. Louis & S. F. R. v. S. W. Tel. & T. Co., C. C. A., 121 Fed. 276; Alabama Consol. Coal & Iron Co. v. Baltimore Tr. Co., 197 Fed. 347. See *supra*, § 82. Graysonia-Nashville Lumber Co. v. Goldman, C. C. A., 247 Fed. 423; Ramsay v. Crevlin, C. C. A., 254 Fed. 813.

2 *Supra*, § 477.

3 Hart v. Dair, C. C. A., 244 Fed. 897. See other authorities cited in this section, *infra*, section 477c.

4 Chicago, B. & Q. R. Co. v. Board of Sup'rs. of Appanoose

waters, when the acts of Congress are silent upon the subject,[5] the title to land formed by accretion,[6] the rights of riparian owners in the bed of a stream, whether navigable or otherwise,[7] the validity [8] and construction [9] of oil, gas, and mining leases, but not the question whether equity will interfere for their protection,[10] the construction of mortgages,[11] the validity of tax sales,[12] the extent [13] and priority of tax liens,[14] the rights of abutters in streets [15] and sidewalks [16] rights of way,[17] the law as to what constitutes possession of land,[18] and generally all questions affecting real estate,[19] in the absence of constitutional difficulties, depend upon the rule of property.

The decisions of the State courts as to the formalities necessary to a marriage [20] as to the power of married women to make contracts [20a] as to the validity of contracts between husband and

County, Iowa, C. C. A., 182 Fed. 291.

5 The Golden Rod, 197 Fed. 830.

6 Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; St. Louis v. Rutz, 138 U. S. 226, 250, 34 L. ed. 941, 951.

7 Barney v. Keokuk, 94 U. S. 324, 338, 24 L. ed. 224, 228; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819; St. Louis v. Rutz, 138 U. S. 226, 242, 34 L. ed. 941, 947; Trujillo & Mercado v. Succession of Rodriguez, C. C. A., 233 Fed. 208.

8 Lindlay et al. v. Raydure, 239 Fed. 928; Shaffer v. Marks, 241 Fed. 139.

9 Nelson v. Republic Iron & Steel Co., C. C. A., 240 Fed. 285; Downey v. Gooch, 240 Fed. 527.

10 Smith v. Guffey, C. C. A., 202 Fed. 106.

11 *Re* Israelson, 230 Fed. 1000.

12 Lewis v. Monson, 151 U. S. 545, 38 L. ed. 265; Bardon v. Land & R. Imp. Co., 157 U. S. 327, 39 L. ed. 719.

13 Bardon v. Land & R. Imp. Co., 157 U. S. 327, 39 L. ed. 719.

14 Bear River Paper & Bag Co. v. City of Petoskey, C. C. A., 241 Fed. 53.

15 Lobensteine v. Union El. R. Co., 80 Fed. 199. But see Barber v. Pittsburgh, etc., Ry. Co., 69 Fed. 501.

16 Werthner v. Girard Ave. Farmers' Market Co., C. C. A., 218 Fed. 364.

17 Southern Ry. Co. v. Board of Com'rs of Public Works, C. C. A., 246 Fed. 383.

18 Santee R. C. L. Co. v. James, 10 Fed. 360.

19 Case v. Kelly, 133 U. S. 21, 33 L. ed. 513; Thompson v. Sloss-Sheffield Steel & Iron Co., C. C. A., 209 Fed. 840; Schofield v. Baker, 212 Fed. 504; holding that property is real and not personal; Consolidated Arizona Smelting Co. v. Hinchman, C. C. A., 212 Fed. 813 (vendor's lien); an unreported decision. Rowe v. Kidd, 249 Fed. 882.

20 Great Northern Ry. Co. v. Johnson, C. C. A., 254 Fed. 683.

20a Union Trust Co. v. Grosman,

wife,[21] as to the rights of married women in their husband's property,[22] as to their remedies to enforce such rights,[23] and as to how they can be forfeited,[24] as to the custody of infants resident of the State and the relative rights of parents in respect to them,[25] will usually be followed.

Ordinarily the Federal courts will also follow the State decisions as to the powers and duties of a municipality or other public corporation in the State,[26] or as to the liability of municipal corporations for tort;[27] and as to their power to contract;[28] but a municipal fireboat was held liable, in admiralty, for its negligence, in a case where the State law gave no remedy against the city.[29]

The State decisions will usually be followed in determining what constitutes a sale of personal property,[30] an attorney's lien,[31] or banker's lien,[32] and in general all questions concerning the liens upon personal property,[33] including their respective pri-

245 U. S. 412, 38 Sup. Ct. 147; affirming C. C. A., 228 Fed. 610, holding that the law of the domicile which is the forum applies although the contract was made in another jurisdiction. See Meier & Frank Co. v. Bruce, in the Supreme Court of Idaho, October, 1917, 168 Pac. 5; International Harvester Co. v. McAdam, 142 Wis. 114.

21 *Re* Tucker, 148 Fed. 928. .

22 Schnepfe v. Schnepfe, C. C. A., 230 Fed. 781.

23 Ibid.

24 Ibid.

25 Betts, J., in *Re* Barry, 42 Fed. 113, 132; s. c., 136 U. S. 597, 624, 34 L. ed. 512, 514.

26 Board of Com'rs of Kay County v. Pollard-Campbell Dredging Co., C. C. A., 221 Fed. 249.

27 Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260; Edgerton v. Mayor, etc., of N. Y., 27 Fed. 30; Clark v. Atlantic City, 180 Fed. 598.

28 Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470; Norton v. Shelby County, 118 U. S. 425, 440, 340 L. ed. 178; Meriwether v. Muhlenburg Court, 120 U. S. 354, 357, 30 L. ed. 653, 654; Francis v. Howard County, 50 Fed. 44; Thompson v. Searcy County, 57 Fed. 1030; City Water Supply Co. v. Ottumwa, 120 Fed. 309; Sidey v. City of Marceline, Mo., C. C. A., 237 Fed. 168; Vincennes Bridge Co. v. Board of County Com'rs, C. C. A., 248 Fed. 93; Eaton v. Shiawassee County, C. C. A., 218 Fed. 588. But see *supra*, § 477e.

29 Workman v. New York, 179 U. S. 552, 45 L. ed. 314.

30 *Re* Ricketts, C. C. A., 234 Fed. 285.

31 Sun Life Assur. Co. of Canada v. Casanova, C. C. A., 260 Fed. 449. See *supra*, § 422a.

32 *Re* Richheimer, 221 Fed. 16; Am. Surety Co. v. Bellingham Nat. Bank, C. C. A., 254 Fed. 55.

33 Bear River Paper & Bag Co. v. City of Petoskey, C. C. A., 241 Fed. 53.

ority,[34] the extent of the liability of sureties upon statutory bonds.[35]

Federal courts have followed the decisions of the State courts as to what constitutes contributory negligence by a pedestrian at a railroad crossing.[36]

The Federal courts usually follow the decisions of the State courts as to the power of domestic corporations to make contracts[37] and as to whether they are exempt from liability to strangers for the negligence of their employees.[38] The State decisions as to the effect of a judgment of its courts, as *res adjudicata*, will ordinarily be followed;[39] and those concerning the rights of a third person to sue at common law, upon a contract made with another for his benefit;[40] as to the allowance or disallowance of interest upon overdue coupons for interest,[41] or upon damages for a tort;[42] as to the amount of damages recoverable upon a court bond;[43] and as to the rate of interest upon an obligation after it falls due.[44]

A Federal court is not bound to follow a decision of the State court as to the validity or construction of a particular deed,[45] or

34 Columbia Digger Co. v. Sparks, C. C. A., 279 Fed. 780; Am. Surety Co. v. Bellingham Nat. Bank, C. C. A., 254 Fed. 55; Sclarenco v. Chicago Bonding Co., 236 Fed. 592.

35 Philadelphia & R. Ry. Co. v. Skerman, C. C. A., 247 Fed. 269. *Cf.* Toby v. Scranton Ry. Co., 245 Fed. 365.

36 Toby v. Scranton Ry. Co., 245 Fed. 365. *Cf.* O'Dell v. Southern Ry. Co., 248 Fed. 345. But see Dernberg v. Baltimore & O. R. R., C. C. A., 243 Fed. 21.

37 But see Sherard v. Walton, 206 Fed. 562; Barkley v. Hayes, 208 Fed. 319.

38 Paterlini v. Memorial Hospital Ass'n of Monongahela City, Pa., C. C. A., 247 Fed. 639.

39 Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712.

40 Bethlehem Iron Co. v. Hoadley, 152 Fed. 735; Gibson v. Victor Talking Mach. Co., 232 Fed., 225.

41 Holden v. Freedman's S. & Tr. Co., 100 U. S. 72, 25 L. ed. 567; Bolles v. Town of Amboy, 40 Fed. 168.

42 N. Y., L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292.

43 Fidelity & D. Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 47 L. ed. 744.

44 Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531; Mather v. Stokely, C. C. A., 218 Fed. 764.

45 Shepard v. Walton, 206 Fed. 562; Barkley v. Hayes, 208 Fed. 319; Stelle v. Highland Park Mfg. Co., 212 Fed. 972; Knox & Lewis v. Alwood, 228 Fed. 753, 756.

"Upon the question whether the expression of a testator, in his will, of a wish, or recommendation, will

the construction of a particular will,[46] which is not *res adjudicata* between the parties;[47] but should decide such questions in accordance with the law of the State where the deed was executed or the testator died, as the case may be, as evidenced by statute or rules of interpretation adopted by the highest court of the State,[48] in case of doubt leaning towards concurrence with the latest State decision.[49] It has been said that "the United States courts will follow the rules laid down by the highest courts of a State, in the matter of determining whether the *lex loci contractus*, or the *lex fori* shall govern."[50]

Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court.[51] Thus the validity of an agreement, that the lessor, a railway company, should not be responsible to the lessee for damage by fire due to the lessor's negligence, should be determined in accordance with the decisions of the courts of the State.[52] The State decisions as to the validity of a stipulation in a mortgage for an attorney's fee are followed by the Federal courts,[53] unless they fix an arbitrary amount based upon a percentage exclusive of the labor performed by the

create a trust, the decisions of the State courts merely afford a guide in applying the general rule that the intention of the testator is to be effectuated." Russell v. U. S. Trust Co., 127 Fed. 445.

46 Knox & Lewis v. Alwood, 228 Fed. 753, 756; Wells v. Brown, C. C. A., 255 Fed. 857. See Diamond v. Connolly, C. C. A., 251 Fed. 234.

47 Byrd v. Hall, 211 Fed. 182.

48 Wells v. Brown, C. C. A., 255 Fed. 857.

49 Steele v. Highland Park Mfg. Co., 212 Fed. 972. See *supra*, § 477, *infra*, § 477c.

50 Parker v. Moore, C. C. A., 115 Fed. 799, 802.

51 Hartford F. Ins. Co. v. Chicago M. & St. P. Ry. Co., 175 U. S. 91, 100, 44 L. ed. 84, 89, per Mr. Justice Gray.

52 Ibid.

53 Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065; Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501; Gray v. Havemeyer, C. C. A., 53 Fed. 174; Childs v Ferguson, C. C. A., 181 Fed. 795.

attorney.[54] Nor a decision made subsequent to the execution of the contract in suit.[55]

§ 477c. Effect of State statutes creating or regulating rights upon the decisions of the Federal courts. The statute law of a State will always be followed by a Federal court there held, so far as the statutes establish a local rule of property;[1] and nearly always, so far as they create or abolish rights as distinct from remedies.[2] The construction of a statute, by the courts of the State of its enactment, will usually be followed by the Federal courts, and always will be so followed if it was made before the facts occurred, out of which the question for adjudication arises,[3] and provided it is not clearly erroneous[4] even, it has

[54] Mechanics' Am. Nat. Bank v. Coleman, C. C. A., 204 Fed. 24; *supra*, § 477.

[55] Interstate Compress Co. v. Agnew, C. C. A., 255 Fed. 508.

§ 477c. [1] Neves v. Scott, 13 How. 268, 271, 14 L. ed. 140; Gaines v. Fuentes, 92 U. S. 10, 20, 23, L. ed. 524, 528; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; Lorman v. Clarke, 2 McLean, 568; McClaskey v. Barr, 42 Fed. 609, 617. See Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795; Nichols v. Eaton, 91 U. S. 716, 729, 23 L. ed. 254.

[2] D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Mills v. Scott, 99 U. S. 25, 25 L. ed. 294; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. ed. 733; Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795; Percy Summer Club v. Astle, C. C. A., 163 Fed. 1 But see Watson v. Tarpley, 18 How. 517, 15 L. ed. 509; *supra*, §§ 82, 83.

[3] Bell v. Morrison, 1 Pet. 551, 7 L. ed. 174; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. ed. 331; Townsend v. Todd, 91 U. S. 452, 23 L. ed. 413; U. S. v. Fox, 94 U. S. 315, 24 L. ed. 192; Scipio v. Wright, 101 U. S. 665, 25 L. ed. 1037; Burgess v. Seligman, 107 U. S. 20, 34, 27 L. ed. 359, 365; Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795; Bacon v. N. W. Mut. L. Ins. Co., 131 U. S. 258, 33 L. ed. 128; Hawkins v. Glenn, 131 U. S. 319, 331, 33 L. ed. 184, 191; Barnum v. Okolona, 148 U. S. 393, 397, 37 L. ed. 495, 497; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683; Zeiger v. Pennsylvania R. Co., C. C. A., 158 Fed. 809. See Henderson v. Phillips, 178 Fed. 374.

[4] Tootle v. Coleman, C. C. A., 107 Fed. 41, 45; Lauderdale County v. Kittel, C. C. A., 229 Fed. 592; Old Colony Trust Co. v. City of Tacoma, C. C. A., 230 Fed. 389; Turner v. Board of Trade of City of Chicago, C. C. A., 244 Fed. 108; Lud-

been held, when the construction is *obiter dictum*, provided that it appears that the whole State court concurred in the opinion.[5] It has been held that this rule applies to the decisions of a special judiciary commission of the State;[6] and to those of an intermediate court of appeal, which are not in conflict with the law as laid down by the decisions of the supreme court of the State;[7] and to a decision of a divided court;[8] but, ordinarily unless they have become a rule of property, not to the decisions of any but the highest court of a state.[9] The decisions of the State courts as to the interpretation of a Territorial statute in force in such a State are also usually binding on the Federal courts.[10]

A Federal court will usually follow the decision of the highest court of a State construing a State statute, even when made after the cause of action arose; provided that it does not overrule decisions *ante litem motam*.[11] If, pending a writ of error or appeal, the highest court of the State gives to the statute a different interpretation from that which seemed to prevail, when the court below made its decision, the judgment or decree will ordinarily be reversed,[12] although a Federal court of review has previously held otherwise.[13]

A Federal court need not await the decision of the Supreme Court of the State before passing upon the construction of a State statute when the plaintiff is not a party to the State

low v. City of Ludlow, C. C. A., 252 Fed. 559.

5 Kardo Co. v. Adams, C. C. A., 231 Fed. 950

6 Sioux Falls v. Farmers' Loan & Trust Co., C. C. A., 136 Fed. 721 (where the decision was made pending a suit in the Federal court); Ankeny v. Hannon, 147 U. S. 118, 37 L. ed. 105.

7 *Re* Gilligan, C. C. A., 152 Fed. 605.

8 Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047. But see Central R. Co. v. Wright, 164 U. S. 327, 41 L. ed. 454; Skaggs v. Kansas City Terminal Ry. Co., 233 Fed. 827; *Re* F. & D. Co., C. C. A., 256 Fed. 73.

9 U. S. Tel. Co. v. Central Union Tel. Co., C. C. A., 202 Fed. 66; Westerlund v. Black Bear Mining Co., C. C. A., 203 Fed. 599.

10 Ankeny v. Clark, 148 U. S. 345.

11 Eaton v. Shiawassee County, C. C. A., 218 Fed. 588.

12 Tefft v. Stern, C. C. A., 74 Fed. 755; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 475; Metzger Motor Car Company v. Parrott, 233 U. S. 36; Richardson v. Ball, C. C. A., 246 Fed. 824; St. Louis & S. F. R. Co. v. Quinette, C. C. A., 251 Fed. 773.

13 Sioux Remedy Co. v. Cope, 235 U. S. 197; *Re* Floyd & Hayes, 225 Fed. 262; Denver & R. G. R. Co. v. United States, 241 Fed. 614.

litigation.[14] A Federal court is bound to follow the decision of the Supreme Court of the United States concerning the construction of a statute, although the highest court of the State has subsequently given thereto a different construction.[15]

Where the decision was in a suit that was apparently collusive, it will not be followed.[16] If a contract when made is valid by the laws of the State as then construed by its courts, subsequent decisions altering the construction of those laws will not be followed by the Federal courts.[17] This rule does not extend so as to authorize the reversal of a judgment of a State court because it gave a construction to a State statute different from one previously given by it to the same language in another statute.[18] Where the former decisions of the State courts were against the validity of the contract and the latter sustain it, the latter are followed.[19]

Subject to the exceptions previously noted, the Federal courts

14 Foster-Eddy v. Baker, 192 Fed. 624.

15 Adelbert College of Western Reserve University v. Wabash R. Co., C. C. A., 171 Fed. 805. But see Morgan v. Curtenius, 20 How. 1, 15 L. ed. 823; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359.

16 Davis v. Commonwealth Land & Lumber Co., 141 Fed. 711; City of Laredo v. Head, C. C. A., 246 Fed. 825. But see Sioux Falls v. Farmers' Loan & Trust Co., C. C. A., 136 Fed. 721.

17 Ohio L. Ins. & Tr. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Havenmeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Thomson v. Lee County, 3 Wall. 327, 18 L. ed. 177; Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517; Anderson v. Santa Anna, 116 U. S. 356, 29 L. ed. 633; Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642; Moore-Mansfield Co. v. Electrical Co., 234 U. S. 619, 625; Audas v. Highland Land & Building Co., C. C. A., 205 Fed. 862; Smith v. Nelson Land & Cattle Co., C. C. A., 212 Fed. 56; Kobey v. Hoffman, C. C. A., 229 Fed. 486; Clark-Montana Realty Co. v. Butte & Superior Copper Co., 233 Fed. 547; Town of Newbern v. National Bank, C. C. A., 234 Fed. 209. See N. O. W. W. Co. v. Southern B. Co., 36 Fed. 833; Forest Products Co. v. Russell, 161 Fed. 1004; Fleischmann Co. v. Murray, 161 Fed. 162; Meader Furniture Co. v. Commercial Nat. S. D. Co., 192 Fed. 616; Muhlker v. New York & Harlem R., 197 U. S. 544; Oliver Co. v. Louisville Realty Co., December, 1913, 161 S. W. 570.

18 Wood v. Brady, 150 U. S. 18, 37 L. ed. 981. But see Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642; Muhlker v. New York & Harlem R. Co., 197 U. S. 544, 49 L. ed. 872.

19 Wade v. Travis County, 174 U. S. 499, 509, 43 L. ed. 1060, 1064.

should follow the rulings of the State courts as to whether a State statute is repugnant to the State constitution[20] or in harmony therewith.[21] A Federal court should be reluctant to adjudge a State statute to be in conflict with the State constitution before it has been passed on by the State courts, especially when the highest court of the State has rendered a decision on the assumption of its validity, although the direct question was not presented or decided.[22] Whether a State statute has been passed,[23] or repealed,[24] by the legislature; when it took effect;[25] what is conclusive evidence of the contents of a State statute;[26] what are the territorial boundaries of a municipal corporation;[27] and except at least when the jurisdiction of the Federal court is in question,[28] whether a particular corporation is a corporation of that State;[29] are questions as to which the Federal courts will, in general, follow the decisions of the courts of such State. It has been said that they will follow the construction by State courts of a reservation of a right to amend corporate charters.[30]

Federal courts will in actions at common law, on causes of action not created by Federal statutes, follow the statutes of limitations,[31] including statutes of limitations to suits to recover

20 Nichols v. City of Cleveland, C. C. A., 247 Fed. 731.

21 The enforcement by a State court of a statute when its validity has not been disputed does not oblige the Federal courts to hold that it is in accordance with the State Constitution; Johnson v. Wells Fargo & Co., 239 U. S. 234; Des Moines Water Co. v. City of Des Moines, C. C. A., 206 Fed. 657.

22 Joseph R. Foard Co. v. State of Maryland, 219 Fed. 827.

23 Leavenworth County v. Barnes, 94 U. S. 70, 24 L. ed. 63; South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Post v. Supervisors, 105 U. S. 667, 26 L. ed. 1204; *Re* Duncan, 139 U. S. 449, 35 L. ed. 219; Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. 812.

24 Kibbe v. Ditto, 93 U. S. 674, 23 L. ed. 1005; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. ed. 97; Southern Ry. Co. v. N. C. Corp. Commission, 99 Fed. 162.

25 See Nadal v. May, 233 U. S. 447.

26 U. S. v. Andem, 158 Fed. 996.

27 Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095.

28 Thomas v. Board of Trustees of Ohio State University, 195 U. S. 207, 49 L. ed. 160; *supra*, § 47.

29 Hancock v. Louisville & N. R. R., 145 U. S. 409, 36 L. ed. 755; Fitzgerald v. Mo. Pac. R. Co., 45 Fed. 812.

30 People ex rel. Schurz v. Cook, 148 U. S. 397, 411, 37 L. ed. 498, 503.

31 Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. ed. 331; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316; New-

land[32] and against executors and administrators;[33] even though applied to judgments of the courts of the United States;[34] the Statutes of Frauds,[35] negotiable instrument laws,[36] recording acts,[37] statutes regulating chattel mortgages,[38] conditional sales,[39] insolvents' assignments,[40] so far as they are not affected by the bankruptcy law;[41] conveyances by married women;[42] the descent, alienation, and transfer of real property;[43] giving preferences to claims against the estates of decedents which are presented within a certain time;[44] providing that upon the foreclosure of a mortgage given to secure the payment of several notes, the notes shall be paid in the order in which they fall due;[45] State statutes regulating employers'

bery v. Wilkinson, 190 Fed. 62; Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199; *supra*, § 181. The right to issue a writ of *scire facias* under § 955 of the Revised Statutes, where the cause of action is not created by an act of Congress, is barred by the lapse of time prescribed by the State Statute of Limitations. Browne v. Chavez, 181 U. S. 68, 45 L. ed. 752; Butler v. Poole, 44 Fed. 586; Barkler v. Ladd, 3 Saw. 44; Price v. Fates, 19 A. L. J. 295; § 218, *supra*.

32 Ricaud v. American Metal Co., C. C. A., 250 Fed. 852.

33 Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147.

34 Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 861.

35 D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Moses v. Lawrence County Bank, 149 U. S. 298, 303, 37 L. ed. 743, 745; Lowther v. Potter, C. C. A., 221 Fed. 881; Standard Bitulithic Co. v. Curran, C. C. A., 258 Fed. 68.

36 McDonald v. Luckenbacher, 170 Fed. 434; Melton v. Pensacola B. & T. Co., C. C. A, 190 Fed. 126; Smith v. Nelson Land & Cattle Co., 212 Fed. 56.

37 Townsend v. Todd, 91 U. S. 452, 23 L. ed. 413; Jones v. Smith, 40 Fed. 314; Union Pac. Ry. Co. v. Reed, 80 Fed. 234. See *supra*, § 477b.

38 Etheridge v. Sperry, 139 U. S. 266, 277, 35 L. ed. 171, 176; Wilson v. Perrin, C. C. A., 62 Fed. 629; Dugan v. Beckett, C. C. A., 129 Fed. 56; Stratton v. Natural Carbonic Gas Co., 189 Fed. 928; E. I. Du Pont De Nemours Powder Co. v. Jones Bros., 200 Fed. 638; Union Stockyards Bank v. Hamilton, C. C. A., 246 Fed. 580. See *infra*, § 649.

39 *Re* Gilligan, C. C. A., 152 Fed. 605. See *infra*, § 649.

40 Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 34 L. ed. 341; Smith M. P. Co. v. McGroarty, 136 U. S. 237, 34 L. ed. 346; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 34 L. ed. 200.

41 *Infra*, Chapter XXXIII on Bankruptcy.

42 Gillespie v. Pocahontas Coal & Coke Co., C. C. A., 163 Fed. 992.

43 Childs v. Ferguson, C. C. A., 181 Fed. 795.

44 Dodd v. Ghiselin, 27 Fed. 405.

45 N. Y. Security & Tr. Co. v. Lombard, 65 Fed. 271; reversed upon another point, C. C. A., 74

liability,[46] but not in cases to which the Federal statute on the subject applies;[47] the measure of damages,[48] compensation for improvements upon land made in good faith;[49] regulating the sale of land within their jurisdiction by domestic and foreign corporations,[50] making shares of stock in a domestic corporation personal property within the State,[51] regulating the liability of stockholders, who borrow money from building loan associations;[52] statutes giving a cause of action for an injury that has caused a death,[53] and, in so far as they affect rights, the Sun-

Fed. 769. In suits brought in districts of other States than those where the causes of action arose the Federal courts follow the statutes of the latter States which abolished the defenses of contributory negligence and the assumption of risk. Keane Wonder Mining Co. v. Cunningham, C. C. A., 222 Fed. 821. But not a statute providing that the contributory negligence of the crosser of a railroad track when the gates were up must be determined by the jury. Hall v. West Jersey & S. R. Co., C. C. A., 244 Fed. 104.

46 Brown v. Pacific Coast Coal Co., 241 U. S. 571; Peirce v. Van Dusen, C. C. A., 69 L.R.A. 705, 78 Fed. 693; Columbia Box Co. v. Saucier, C. C. A., 213 Fed. 310; Atlas Portland Cement Co. v. Hagen, C. C. A., 233 Fed. 24. In Louisiana, the State doctrine was not followed. Hale v. Kansas City So. Ry. Co., C. C. A., 120 Fed. 735.

47 Central Vermont Ry. v. White, 238 U. S. 507; Osborne v. Gray, 241 U. S. 16.

48 Golden Reward Min. Co. v. Buxton Min. Co., C. C. A., 97 Fed. 413.

49 McClaskey v. Barr, 62 Fed. 209. *Cf.* Santee R. C. L. Co. v. James, 50 Fed. 360.

50 Williams v. Gaylord, C. C. A., 102 Fed. 372; Stearns Coal & Lumber Co. v. Van Winkle, 221 Fed. 590.

51 Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 13, 44 L. ed. 647, 651; Harris v. Egger, C. C. A., 226 Fed. 389.

52 U. S. Sav. & Loan Co. v. Harris, 113 Fed. 27.

53 Railroad Co. v. Barron, 5 Wall. 90, 18 L. ed. 591; Serensen v. N. P. R. Co., 45 Fed. 407; Holland v. Brown, 35 Fed. 43; Holmes v. Railway Co., 5 Fed. 75; s. c., 5 Fed. 523; Maysville St. R. & T. Co. v. Marvin, C. C. A., 59 Fed. 91; Dennick v. Central R. Co., 103 U. S. 11, 26 L. ed. 439; Penoza v. Northern Pac. Ry. Co., 215 Fed. 200; Farley v. Carey Show Print Co., C. C. A., 249 Fed. 476. See § 92, *supra*, § 560, *infra*. Where the decedent was a non-resident, and the only assets in the State were the cause of action for his wrongful death, the Federal court had jurisdiction of an action by his administratrix. Cornell Steamboat Co. v. Fallon, C. C. A., 179 Fed. 293. Such an action may be maintained in a Federal court upon a cause of action which accrued under the statutes of another State, although the latter State, where the suit is brought, forbids such actions where the death was caused outside

day laws;[54] of the State where such courts are held; and the construction given to those statutes by the courts of the State which enacted them, so far as they apply, subject to the exceptions already noted. "Statutory modifications of the common law in regard to the rights of husband and wife, as plaintiffs, in actions at law in the courts of a State, are applicable also in the United States courts held in such State, if not inconsistent with the laws of the United States or with the duties which belong to its judges and courts and the powers with which they are clothed."[55] A State statute giving the right to two trials in an action of ejectment will be followed by the Federal courts.[56] A State statute providing that an assignee of a cause of action by a written instrument may sue in his own name, although the assignor retains an interest therein, will be followed by a Federal court in an action at common law.[57]

Where the Federal court had adopted the State practice in serving process, it was held that the State decisions, holding that the sheriff's return was conclusive, must be followed.[58] A Federal court refused to follow a State statute giving an attorney a lien upon his client's cause of action, so far as it was construed to require the court to go on and try a cause for the

of the State. Lauria v. E. I. Du Pont de Nemours & Co., Inc., 241 Fed. 687; Lebert v. Pacific Mail S. S. Co., C. C. A., 249 Fed. 349.

54 Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795.

55 The Morning Journal Ass'n v. Smith, C. C. A., 56 Fed. 141, *per curiam;* Texas & Pac. Ry. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747.

56 Equator M. & S. Co. v. Hall, 106 U. S. 86, 27 L. ed. 114. But see § 376, *supra.*

57 Dexter, Horton & Co. v. Sayward, 51 Fed. 729, 732. See *supra,* §§ 453, 454. The right of an assignee of a chose in action to sue in his own name depends upon the law of the forum. Joseph Dixon Crucible Co. v. Paul, C. C. A., 167 Fed. 784. The right of a mortgagee to recover the mortgage debt from a purchaser who had agreed with the mortgagor to pay it, although the deed and mortgage were executed in and covered property solely in New York, where the mortgagee might have sued in a common-law action of assumpsit, was held, when the suit was brought in the District of Columbia, to defend upon the *lex fori,* and consequently to be maintainable only in a court of equity. Willard v. Wood, 135 U. S. 309, 34 L. ed. 210. See also North Alabama Development Co. v. Orman, 55 Fed. 18; *supra,* § 82.

58 Joseph v. New Albany St. & R. M. Co., 53 Fed. 180. See *supra,* §§ 163, 167a.

attorney's benefit after it had been settled by the parties without the satisfaction of his claim.[59]

§ 477d. Notice of lis pendens. The authorities as to how far the State law of *lis pendens* will be followed are not harmonious. It is the safer practice to comply with the State statutes.[1] This will be sufficient.

It has been held in the Second,[2] and the Fifth [3] Circuits, that State statutes providing that purchasers without actual notice of a pending suit are not bound by the proceedings therein unless a notice of *lis pendens* has been filed in a designated public office, will be followed by the Federal court there held, which will require notice of the pendency of a suit in such a Federal court to be filed in such office so as to bind consequent purchasers.[4] The rule in the Sixth Circuit seems to be otherwise.[5] An earlier case in the Sixth Circuit held that because of this doctrine of *lis pendens* no injunction would be granted to restrain a conveyance of land *pendente lite* by the defendant to a suit to remove a cloud upon the title thereto, although the complainant had failed to file and record the statutory notice of the pendency of the suit.[6] In New Jersey it has been held that the State statute does not apply to the foreclosure of a mortgage after the mortgagor has been adjudicated a bankrupt [7] and that the District Court of the United States may direct the cancellation of a note of *lis pendens* in its court there filed in a State office.[8]

It has been held that the filing of a creditor's bill against an insolvent corporation, in the Federal court, is constructive notice of *lis pendens* with respect to all property of the corporation in the Federal district; [9] and where the State practice was the

59 Sherry v. Oceanic S. Nav. Co., 72 Fed. 565.

§ 477d. 1 See Jones v. Smith, 40 Fed. 314; Queens Land & Title Co. v. Kings County Trust Co., 255 Fed. 222.

2 Jones v. Smith, 40 Fed. 314, per Lacombe, J., New York Statute.

3 U. S. v. Calcasieu Timber Co., C. C. A., Fifth Ct., 236 Fed. 196.

4 Jones v. Smith, 40 Fed. 314, per Lacombe, J.

5 McCloskey v. Barr, 48 Fed. 130, 132, per Jackson and Sage, JJ.

6 Zander v. Phillips, C. C. A., 213 Fed. 29.

7 *Re* A. J. Ellis, Inc., C. C. A., 252 Fed. 483.

8 Althaus & Schwartz v. White, D. C. N. J., Sept. 9, 1907, in which the author was counsel.

9 Atlas Ry. Supply Co. v. Lake & River Ry. Co., 134 Fed. 503.

same, that the filing of a bill to set aside deeds, as fraudulent, was notice of *lis pendens* to all subsequent purchasers or acquirers of encumbrances upon the property,[10] at least after the subpœnas had been served upon material defendants.

An adjudication of bankruptcy is notice to all the world.[11] So is the seizure of a ship upon the filing of a libel *in rem* in admiralty [12] and the seizure of any other property in a proceeding *in rem*.[13] The custody of receivers is also notice of the pendency of the suit to which they were appointed.[14] The Federal courts will refuse to follow any State statutes or decisions which provide that non-resident citizens of other States who hold negotiable paper or chattels beyond the jurisdiction of the court shall have constructive notice of litigation affecting the title or validity of the same.[15] A *bona fide* holder of negotiable paper is not subject to the general doctrine of *lis pendens*.[16]

§ 478. New Trials. The District courts have power to grant new trials after a trial by jury "for reasons for which new trials have usually been granted in the courts of law." [1]

The power of a Federal court to grant a new trial cannot be enlarged or restricted by a State statute.[2] A State statute authorizing a motion for a new trial to be made after the end of the term is not followed.[3] It has been held that a State statute forbidding a new trial for the insufficiency of damages

10 Barstow v. Becket (E. D. Ga. S. D.), 110 Fed. 826.

11 Manson v. Williams, 213 U. S. 453, 53 L. ed. 869, *supra*, § 186j, *infra*, Chapter XXXIV.

12 *Supra*, § 186g, *infra*, § 565.

13 *Supra*, § 186g, *infra*, § 606.

14 Keith Lumber Co. v. Houston Oil Co., C. C. A., 257 Fed. 11.

15 Enfield v. Jordan, 119 U. S. 680, 693, 30 L. ed. 523, 529.

16 Farmers' L. & Tr. Co. v. Toledo & S. H. R. Co., 54 Fed. 759, 772, per Jackson, J.

§ 478. 1 U. S. R. S., § 726; Clark v. Sohier, 1 W. & M. 368; Milliken v. Ross, 9 Fed. 855.

2 Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085; Fishbrom v. Chicago, M. & St. P. Ry. Co., 137 U. S. 60, 34 L. ed. 585; U. S. v. Mayer, 235 U. S. 55. But see Travelers' Protective Ass'n v. Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269.

3 U. S. v. Mayer, 235 U. S. 55. See Trafton v. U. S., C. C. A., 147 Fed. 513, 514. *Contra* Travelers' Protective Ass'n v. Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269. But see *infra*, § 481.

would be unconstitutional as a violation of the Seventh amendment if applied to a Federal court,[4] but that the right to two or more trials of an action for ejectment may be given[5] or taken away[6] by a State statute, which is constitutional even when applied to actions pending when it was passed,[7] and will be followed by the courts of the United States.[8]

After one trial in ejectment and an order upon plaintiff's motion for a new trial in a State court, it was held that he could not discontinue and sue in the Federal court.[9]

A motion for a new trial must be made or noticed for argument during the term at which the trial took place, or by special leave of the court granted, upon a petition filed within forty-two days after the entry of judgment.[10] It has been held that the filing of a motion for a new trial during the term, without any order or recognition by the court concerning it, will not carry the matter over to the succeeding term, so as to give jurisdiction then to hear and determine it.[11]

In some of the districts the rules shorten[12] or extend[13] the time within which a motion for a new trial may be made. When the time is thus shortened, the entertainment of such a motion after it has expired, but within the term, is not beyond the jurisdiction of the court.[14] An extension of the time to so move, can only be given, if at all, by a rule or order extending the term for that purpose or by consent of counsel. When a rule directed, that during the absence of the presiding judge the clerk be

4 Hughey v. Sullivan, 80 Fed. 72.

5 Equator Co. v. Hall, 106 U. S. 86, 27 L. ed. 114. As to costs, see Shreve v. Cheesman, C. C. A., 69 Fed. 785.

6 Campbell v. Iron-Silver Min. Co., C. C. A., 83 Fed. 643.

7 Ibid.

8 Ibid; Equator Co. v. Hall, 106 U. S. 86, 27 L. ed. 114.

9 Hyatt v. Challiss, 55 Fed. 267. But see *infra* § 554.

10 U. S. R. S., § 987. See *supra*, § 482; Mann v. Dempster, C. C. A., 181 Fed. 76.

11 Klein v. Southern Pac. Co., 140 Fed. 213.

12 In the Southern District of Florida to findings after entry of judgment. Abbott v. Brown, 241 U. S. 606.

13 In the Southern District of New York "for the purpose of taking any action which must be taken within the term of court at which final judgment or decree is entered each term of the court is extended for ninety days from the date of entry of the final judgment or decree." General Rule V. See Hughes v. N. Y. O. & W. R. R., 225 Fed. 568.

14 Abbott v. Brown, 241 U. S. 606.

present for the transaction of business and upon such days as there should be business to be transacted the court be opened and a record thereof be entered upon the minutes; an order, that the court be adjourned in accordance with such rule, did not end the term, and the term continued for the purposes of a motion for a new trial until the day fixed by statute for the next term to begin.[15]

An order granting a new trial may be set aside and the verdict reinstated, at a subsequent term,[16] and at any time before the new trial is begun.[17] This was done where, in an action for conspiracy against two defendants upon a verdict in favor of one and against the other, a new trial against both had been granted because the trial court was of the opinion that one alone could not be liable, and the Circuit Court of Appeals subsequently reversed the judgment, holding that a recovery against one of them could be sustained.[18] After a verdict has been directed in an action at common law and the jury discharged, the trial judge has no jurisdiction, upon a motion for a new trial or otherwise, to admit new evidence, to make new findings on the evidence already given, or to alter the record.[19] The effect of an order granting a new trial is to restore the status of the parties antecedent to the verdict.[20] Consequently, the time allowed by a State statute for the commencement of a new suit begins to run anew.[21]

A Federal court cannot when granting a new trial upon the evidence enter judgment for the defendant *non obstante veredicto*.[22]

If leave to make the motion be granted at the trial term, the motion may be made at a subsequent term; provided, at least, that judgment was not entered by the trial term.[23] It

15 Ibid.

16 Evans v. Freeman, 149 Fed. 1020; Storey v. Storey, 221 Fed. 262; Alwart Bros. Coal Co. v. Royal Colliery Co., C. C. A., 234 Fed. 20.

17 Evans v. Freeman, 149 Fed. 1020.

18 Ibid.

19 Langdman v. Taylor, C. C. A., 180 Fed. 385.

20 Fordham v. Hicks, 224 Fed. 811.

21 Ibid.

22 Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 57 L. ed.

23 Walker v. Moser, C. C. A., 117 Fed. 230.

was held that the United States court, in the Indian Territory, had power to grant a new trial for newly-discovered evidence after the trial and the entry of judgment, while the case was pending in the Supreme Court upon writ of error.[24]

A motion for a new trial upon exceptions, or because the verdict was against the evidence or against the weight of evidence, or because of excessive or insufficient damages, is regularly argued before the judge who tried the case.[25] He may, if he chooses, ask another judge to assist him in rendering his decision;[26] and the latter may then hear the argument;[27] but neither party has the right to demand the participation of another judge in the decision.[28] It has been held that the power to try a case carries with it as an incident the power to hear and decide a motion for a new trial,[29] but an order denying a motion for a new trial is void if signed by a judge after his successor has been appointed and qualified, and notice of this has been given to the judge who signs the order.[30] The power of Congress to authorize such a re-examination of the proceedings upon the trial has been questioned.[31]

"And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon said motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon

24 Fuller v. U. S., 182 U. S. 562, 45 L. ed. 1230.

25 Ives v. Grand Trunk Ry. Co., 35 Fed. 176.

26 Adams v. Spangler, 17 Fed. 133; Ives v. Grand Trunk Ry. Co., 35 Fed. 176.

27 Adams v. Spangler, 17 Fed. 133; Ives v. Grand Trunk Ry. Co., 35 Fed. 176.

28 Ives v. Grand Trunk Ry. Co., 35 Fed. 176.

29 Cheesman v. Hart, 42 Fed. 98, 105.

30 U. S. v. Alexander, 46 Fed. 728.

31 Ives v. Grand Trunk Ry. Co., 35 Fed. 176. *Cf.* Metropolitan R. Co. v. Moore, 121 U. S. 558, 573, 30 L. ed. 1022, 1026.

such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."[32]

Where the trial judge had died pending a motion for a new trial, and there were no stenographer's minutes, nor other record or memoranda, from which his successor could fairly pass upon the motion and settle a bill of exceptions; it was held that his only authority under the statute was to grant a new trial.[33]

Where a stenographer had taken notes of the trial, but the moving party failed to pay for writing them out in order that they might be submitted to the trial judge, the motion was denied.[34]

It may be that a motion for a new trial can be granted because of surprise or mistake, although there is no State statute to that effect;[35] but the more regular practice in such a case is for the injured party to file a bill in equity.[36] A misunderstanding concerning the effect of a stipulation is not such a surprise.[37]

Where a verdict was directed for plaintiff upon one of several special interrogatories submitted without setting aside the answers to others which were against him, and thereafter the verdict so directed was set aside as unsupported by the evidence; since he had lost his right to move to set aside the other findings and to an exception in case a verdict had been directed for the defendant upon one of them, a new trial, instead of a dismissal, was ordered.[38] Instructions to the jury will rarely

[32] U. S. R. S., § 953, as amended by Act of June 5, 1900, c. 717; 32 St. at L. 270. See U. S. v. Meldrum, 146 Fed. 390; § 479, *infra*.

[33] Penn Mut. Life Ins. Co. v. Ashe, C. C. A., 145 Fed. 593.

[34] Thorndyke v. Gunnison, C. C. A., 174 Fed. 137.

[35] See Levy v. Caledonian Ins. Co., 226 Fed. 336.

[36] See § 79, *supra*.

[37] Levy v. Caledonian Ins. Co., 226 Fed. 336.

[38] Johnson v. Cadillac Motor Car Co., 197 Fed. 485.

be reviewed upon a motion for a new trial;[39] but they may be.[40] A new trial should not be granted upon a different theory from that upon which the moving party tried the case.[41] The objection that the plaintiff sues in the wrong capacity cannot be raised for the first time upon a motion for a new trial.[42]

A new trial may be granted because the verdict was against the weight of evidence.[43] When this is the foundation of the motion, the judge is said to sit as a thirteenth juror.[44]

Where the evidence submitted to the jury is such as to render the issue doubtful, a new trial will not be granted, even though the verdict is against the apparent weight of the evidence.[45] When the evidence is conflicting and the witnesses are of good character, the verdict, if not manifestly wrong or improperly obtained, ought not to be set aside. And this rule prevails, even though the court might have rendered a decision different from that of the jury.[46]

A new trial may be granted because the damages awarded are insufficient[47] or excessive.[48] In case of excessive damages the court may direct that a new trial may be awarded unless the plaintiff stipulates to reduce the verdict to a specified amount in case of which stipulation the motion shall be denied.[49] This has been done by Circuit Courts of Appeals,[50] although their authority so to do may be doubted since at common law a court

39 Thorne v. Am. Distributing Co., 117 Fed. 973.

40 See Demarest v. Dutton, 151 Fed. 508.

41 Hauck v. Frey, 228 Fed. 779.

42 St. Louis & S. F. R. Co. v. Herr, C. C. A., 193 Fed. 950.

43 Felton v. Spiro, C. C. A., 78 Fed. 576. See Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, C. C. A., 74 Fed. 463.

44 McBride v. Neal, C. C. A., 214 Fed. 966.

45 Lurton, J. in Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, C. C. A., 74 Fed. 463, 473; Stewart v. Boston & M. R. R., 229 Fed. 862.

46 Pringle v. Guild, 119 Fed. 962, 964, per Simonton, J. To a similar effect are: Pim v. Wait, 32 Fed. 741; Nonce v. Richmond & D. R. Co., 33 Fed. 429; Sargent v. Home Benefit Ass'n, 35 Fed. 711; Plummer v. Granite Mountain Min. Co., 55 Fed. 755, 756.

47 Yurkonis v. Delaware, L. & W. R. Co., 213 Fed. 537.

48 In Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 646; in Arkansas Cattle Co. v. Mann, 130 U. S. 69, 73; Kennon v. Gilmer, 131 U. S. 22, 29.

49 Gila Valley Ry. Co. v. Hall, 232 U. S. 94.

50 Ibid.

has no authority upon a writ of error to review the exercise of discretion.[51] A motion to set aside a verdict for insufficient damages has been denied when any verdict for plaintiff would be against the weight of evidence.[52] The court has no power to reduce a verdict and enter judgment for a less amount without the consent of the plaintiff.[53] It has been held: that when a jury has brought in a general verdict for the plaintiff but failed to assess his damages, although the amount thereof is undisputed, the court may direct a new trial upon the issue of damages alone.[54]

A new trial may be granted because of the misconduct of members of the jury,[55] or an improper interference with their deliberations.[56] Upon an investigation into this subject, the judge may examine witnesses[57] and the State practice is not followed.[58] Illustrations of such misconduct and interference are a visit by some of the jury during a trial to the plaintiff's place of business and the acceptance of cigars from him;[59] the private measurement by a juror of a place described in the testimony;[60] reading articles published in newspapers about the case;[61] deliberating in the presence of an officer of the

51 Baltimore & O. R. Co. v. Smith, C. C. A., 4th Ct. 222, Fed. 667; Kansas City Southern Ry. Co. v. Willsie, C. C. A., 224 Fed. 908. It may be that such power is covered by § 269 of the Judicial Code. amended Feb. 26, 1919, ch. 48, St. at L.

52 Reading v. Texas Pac. Ry. Co., 4 Fed. 134; Olek v. Fern Rock Woolen Mills, 180 Fed. 117. See Vanek v. Chicago Great Western R. Co., 252 Fed. 871.

53 Kennon v. Gilmer, 131 U. S. 22, 29. It has been held by a divided State court that this may be done under the Federal Employers' Liability Act. Saar v. Atchison, T. & S. M. Ry. Co. (Kansas, March, 1916, 155 Pac. 954).

54 Original Sixteen to One Mine v. Twenty-One Mining Co., 254 Fed. 630; *Contra* McKeon v. Central Stamping Co., C. C. A., 264 Fed. 385.

55 Chambers v. U. S., C. C. A., 237 Fed. 513.

56 Ibid.

57 Ibid.

58 McDonald v. Pless, 238 U. S. 264.

59 Platt v. Threadgill, 80 Fed. 192.

60 Ewer's Adm'r v. National Imp. Co., 63 Fed. 562. Nor the public entertainment of the jury by a party after a verdict in his favor. Beach Front Hotel Co. v. Sooy, C. C. A., 197 Fed. 881.

61 Clyde Mattox v. U. S., 146 U. S. 140, 36 L. ed. 917; Meyer v. Cadwalader, 49 Fed. 32; Morse v. Montana Ore P. Co., 105 Fed. 337; McKibben v. Philadelphia & R. Ry. Co., C. C. A., 251 Fed. 577.

United States;[62] receiving with the exhibits the indictment which contained an endorsement of a previous conviction.[63]

When the jury were sent out, the court said that no provision was made by law for furnishing them meals, and asked whether both parties would contribute to the expense of any food that might be needed by the jury during their deliberations. Thereupon the defendant's counsel declined to pay any part of such expense, and the meals of the jury were provided at the plaintiff's expense. It was held that this was a ground for a new trial after a verdict for the plaintiff.[64]

A verdict for the defendant was set aside and a new trial ordered, in an action for slander, because of charges made by him in an "open political crusade against the liquor law of Vermont;" when it appeared that one of the jurors actively sympathized with the defendant in that crusade and took part in the canvass for his nomination for governor in the following election, and that another juror was in the employ of a railroad company while the defendant was its president and manager, and of which the defendant was still a director; but where a party had, through a mistake of fact, failed to challenge and examine a disqualified juror, who had concealed his disqualification, it was held that the verdict should not be disturbed.[65] Non-residence of a juror is not of itself a sufficient reason to compel the grant of a new trial.[66] It is a question of sound discretion whether, under all the facts connected with the case, it should be done.[66a]

A new trial was ordered because of the publication in the

62 But where it was shown that the officer talked with them after they had agreed to convict and merely answered their queries as to the lowest penalty that could be imposed, a new trial was denied. Chambers v. U. S., C. C. A., 237 Fed. 513.

63 Ogden v. U. S., C. C. A., 112 Fed. 523. But see Welsing v. U. S., C. C. A., 218 Fed. 369; Itow v. U. S., C. C. A., 223 Fed. 275; Buckeye Powder Co. v. E. I. Du Pont de Nemours P. Co., C. C. A., 223 Fed. 881, 883; Myers v. U. S., C. C. A., 228 Fed. 819.

64 Johnson v. Hobart, 45 Fed. 542.

65 Morse v. Montana, Ore-Purchasing Co., 105 Fed. 337.

66 Fisher v. Yoder, 53 Fed. 565, per Buffington, J.

66a Ibid.

newspapers during the trial of a fraud order against the defendant to a criminal prosecution.[67]

A new trial was not ordered because one of the jurors read a newspaper report of the case which was not prejudicial to the unsuccessful party;[68] nor because a verdict was obtained by a division by twelve of the sum of each juror's estimate of the damages, in the absence of an antecedent agreement to bring in a quotient verdict;[69] nor because some of the jurors before it was admitted in evidence examined a map hung in the court-room;[70] nor because a juror owned a share of stock in the defendant and failed to say so through inadvertence when they were asked collectively whether they were directly or indirectly interested in the company;[71] nor because of an affidavit that a juror had been discharged for incompetence by a corporation under the same management as defendant when he had testified that he left the employ of his own volition and it did not appear that he had been informed of the reason for his discharge;[72] nor because a juror disobeyed the order of the court forbidding the separation of the jury and went to his office where he remained about twenty minutes, no circumstance being shown to justify an inference of possible injury to the rights of the unsuccessful party.[73] Misconduct or interference is not

67 Harrison v. U. S., C. C. A., 200 Fed. 66. But not a report in the newspaper of the commitment of one of the defendants for misconduct in attempting to corrupt the jury when there was no proof that any juror had read the same and all had been warned not to read reports of the case. U. S. v. Rice, 195 Fed. 171. The refusal of the court to grant a continuance because of the publication, that morning, of an article in a newspaper prejudicial to the defense, is no ground for a new trial, when the jurors selected have testified that they did not read the same. U. S. v. Francis, 144 Fed. 520, 42; U. S. v. Francis, 144 Fed. 520; U. S. v. Marrin, 159 Fed. 767.

68 U. S. v. Marrin, 159 Fed. 767.

69 McDonald v. Pless, C. C. A., 238 U. S. 264; Consol. Ice Mach. Co. v. Trenton Hygeian Ice Co., 57 Fed. 898. Consent that the judge may permit a compromise verdict to be returned is a waiver of the right to a new trial for that reason. Stitzer v. Horsham Tp., 180 Fed. 591. See Shelton v. Southern Railway Co., 255 Fed. 182.

70 Hartwell v. Delaware, L. & W. R. Co., 234 Fed. 112.

71 Memphis St. Ry. Co. v. Illinois Cent. R. Co., C. C. A., 242 Fed. 617.

72 Smith v. Puget Sound Electric Ry., 211 Fed. 765.

73 Elder v. U. S., C. C. A., 243 Fed. 84.

usually a ground for a new trial when known by the injured party before the verdict but not called to the court's attention until the verdict has been announced.[74]

A new trial may be ordered when the court has improperly coerced the jury;[75] provided that an exception to such judicial misconduct was duly taken.[76] There is no impropriety in directing a jury to reconsider the case after they have announced their inability to agree.[77]

A new trial may also be granted because of newly discovered evidence.[78] Such evidence must be material not merely cumulative.[79] It must be so strong as to raise a reasonable presumption that the result of the second trial would be different from the first.[80] It has been said that evidence that is merely contradictory of evidence offered by the successful party upon the former trial is insufficient.[81] The evidence must have been discovered since the former trial.[82] Where a physical opportunity to obtain the new witnesses[83] and to inquire of them concerning the matters of issue[84] existed before[85] or during the former trial[86] and no satisfactory excuse, other than lack of time,[87] for not doing so is presented; the motion will be denied.

As a general rule, on a motion for a new trial affidavits of jurors may be received to support but not to impeach the verdict.[88] "A juryman may testify as to any facts bearing upon

74 Bowers v. U. S., C. C. A., 244 Fed. 641.

75 Peterson v. U. S., C. C. A., 213 Fed. 920. See *infra*, § 527c.

76 Campbell v. U. S., C. C. A., 221 Fed. 286.

77 Ibid.

78 Usher v. Scranton Ry. Co., 132 Fed. 405.

79 Stewart v. Boston & M. R. R., 229 Fed. 862; Shelton v. Southern Ry. Co., 255 Fed. 182.

80 Ibid.

81 Ibid.

82 Skerman v. Philadelphia & R. Ry. Co., 225 Fed. 85; Tomljanovich v. Victor-American Fuel Co., 230 Fed. 467.

83 Skerman v. Philadelphia & R. Ry. Co., 225 Fed. 851.

84 Tomljanovich v. Victor-American Fuel Co., 230 Fed. 467.

85 Skerman v. Philadelphia & R. Ry. Co., 225 Fed. 85.

86 Tomljanovich v. Victor-American Fuel Co., 230 Fed. 467.

87 Skerman v. Philadelphia & R. Ry. Co., 225 Fed. 85.

88 Hyman v. Eames, 41 Fed. 676, 677; Chandler v. Thompson, 30 Fed. 38, 45; Glaspell v. N. Pac. R. Co., 43 Fed. 903, 909; Fuller v. Fletcher, 44 Fed. 34, 39; Biggs v. Barry, 2 Curtis, 259; Ewer's Adm'r v. National Imp. Co., 63 Fed. 562; Consol. Ice Mach. Co. v. Trenton

the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."[89] Affidavits of jurors stating that a certain paper was not shown to nor read by them,[90] and that reading a newspaper report did not influence their verdict,[91] were admitted to support a verdict. Affidavits of jurors stating that they were not influenced by erroneous instructions as to the measure of damages;[92] that in the course of their deliberation references were made to the facts improperly referred to upon the trial: that the defendant had taken out insurance against liability for accidents and would not be required to pay any damages awarded;"[93] that during the deliberations of the jury, one of them procured from the bailiff a copy of the statutes;[94] and that affidavits of jurors explaining the grounds of their verdict will not be considered.[95] Affidavits of jurors showing statements by a juror in the jury room as to his incompetency,[96] as to his knowledge of the value of property,[97] and showing the presence of an officer and his statements and the reading of a newspaper report and comments on the case during the deliberations of the jury[98] were admitted to impeach the verdict.

The right to a new trial may be waived.[99] Such a waiver is made by proceeding in a cause after a party has discovered the facts which are the foundation of his motion without immediately calling the court's attention to them, asking relief and

Hygeian Ice Co., 57 Fed. 898; Shelton v. Southern Ry. Co. 255 Fed. 182. Such affidavits were considered in Mattox v. U. S., 146 U. S. 141, 151, 13 Sup. Ct. 50, 36 L. ed. 917; Stevenson v. Tennessee Copper Co., 193 Fed. 268. And other cases cited *infra*.

89 Mr. Justice Gray in Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49; approved in Clyde Mattox v. U. S., 146 U. S. 140, 149, 36 L. ed. 917.

90 Fuller v. Fletcher, 44 Fed. 34, 39.

91 U. S. v. Reid, 12 How. 361, 366, 13 L. ed. 1023, 1025.

92 Glaspell v. N. Pac. R. Co., 43 Fed. 903, 909.

93 Ruckle v. Am. Car & Foundry Co., 194 Fed. 459.

94 Colt v. U. S., C. C. A., 190 Fed. 305.

95 Chandler v. Thompson, 30 Fed. 38, 45.

96 Hyman v. Eames, 41 Fed. 676, 677.

97 Stevenson v. Tennessee Copper Co., 193 Fed. 268.

98 Clyde Mattox v. U. S., 146 U. S. 140, 36 L. ed. 917; U. S. v. Rice, 195 Fed. 171.

99 U. S. v. Marrin, 159 Fed. 767; Nelson v. Wood, C. C. A., 210 Fed. 18.

taking an exception to a denial thereof.[100] It was so held when a party proceeded in the trial without a request for the withdrawal of a juror, after clear information that prejudicial newspaper articles had been read by jurors.[101] But where, after information to a party of prejudice on behalf of one of the jurors, his counsel stated that fact to the court and to counsel for the other side, in the absence of the jury, and action thereupon was postponed by the direction of the court; it was held that he had not waived his right to a new trial.[102] Lack of due diligence in discovering the facts was also a ground for the denial of such a motion after a delay of several months after the verdict.[103]

An order granting[104] or denying[105] a motion for a new trial cannot be reviewed upon a writ of error thereto; but it might be reviewed upon a writ of error to the final judgment[106] and a refusal to consider affidavits offered in support of a motion for a new trial may be a ground for a reversal when an exception was duly taken to their exclusion.[107] So, it was held, may be a refusal to consider a motion for a new trial, because the verdict was against the weight of evidence;[108] and where uncontradicted affidavits, which the inferior court refused to consider, proved that a new trial must be granted, one was ordered by the Circuit Court of Appeals.[109] So may be a plainly prejudicial error concerning the disqualification of a juror.[110]

100 U. S. v. Marrin, 159 Fed. 767.

101 Ibid.

102 Wilson v. Clement, 126 Fed. 808.

103 Nelson v. Wood, C. C. A., 210 Fed. 18.

104 Farrell v. First Nat. Bank of Philadelphia, C. C. A., 254 Fed. 801.

105 Missouri Pac. Ry. Co. v. Chicago & A. R. Co., 132 U. S. 191, 33 L. ed. 309; Beaupré v. Noyes, 138 U. S. 397, 34 L. ed. 991; Linn v. U. S., C. C. A., 251 Fed. 476; Spokane & I. E. R. Co. v. Campbell, 217 Fed. 518; Chicago, M. & St. P. Ry. Co. v. Chamberlain, C. C. A., 253 Fed. 429. But see McIntyre v. Modern Woodmen of America, C. C. A., 200 Fed. 1; Odell Mfg. Co. v. Tibbetts, C. C. A., 212 Fed. 652.

106 Farrell v. First Nat. Bank of Philadelphia, C. C. A., 254 Fed. 801.

107 Clyde Mattox v. U. S., 146 U. S. 140, 147, 36 L. ed. 917, 920. But see Smith v. U. S., C. C. A., 231 Fed. 25. See Stewart v. Boston & M. R. R., 229 Fed. 862, 863.

108 Felton v. Spiro, C. C. A., 78 Fed. 576.

109 Ogden v. U. S., 112 Fed. 523.

110 Memphis St. Ry. Co. v. Illinois Cent. R. Co., C. C. A., 242 Fed. 617.

§ 479. Bills of exceptions. A bill of exceptions is a written paper authenticated by the signature of the trial judge which contains a statement of the errors committed upon a trial and in the course of other proceedings in a cause, not apparent upon the record, which the plaintiff in error wishes to bring to the attention of the court of review.[1] It was not allowed by the common law but was authorized by the Statute of Westminster, enacted in 1385.[2]

The entries on the judge's minutes upon the trial, which usually state the exceptions then taken and allowed, unless signed by him, are not bills of exceptions, but evidence of the party's rights.[3] The entry by the clerk of exceptions into the record [4] or into the journal [5] does not make them reviewable. The bill of exceptions is no part of the record.[6] It cannot be considered when the judgment is attacked collaterally.[7] A bill of exceptions properly authenticated cannot be impeached by evidence outside the record,[8] although if indisputably incorrect the judge might be compelled by mandamus to correct it.[9] Where the bill contained all the evidence as to authority of an agent of the defendant it was held that a recital therein that he was superintendent and general manager in charge of the defend-

§ 479. 1 See Linn v. U. S., C. C. A., 251 Fed. 476.

2 Buessel v. U. S., C. C. A., 258 Fed. 811, 815.

3 13 Edw. 1, ch. 31, English, St. at L. Vol. I, p. 99: "When one that is impleaded before any of the Justices doth allege an Exception, praying that the Justices will allow it, which if they will not allow it, if he that alleges the Exception do write the same Exception, and require that the Justices will put to their Seals for a Witness the Justices shall so do; and if one will not, another of the Company shall. (2) And if the King, upon Complaint made of the Justices, cause the Record to come before him, and the same Exception be not found in the Roll, and the Plaintiff shew the Exception written, with the Seal of a Justice put to, the Justice shall be commanded that he appear at a Certain Day, whether to confess or deny his Seal. (3) And if the Justice cannot deny his Seal, they shall proceed to Judgment according to the same Exception, as it ought to be allowed or disallowed."

4 Young v. Martin, 8 Wall. 354, 19 L. ed. 418.

5 Chicago Great Western R. Co. v. Le Valley, C. C. A., 233 Fed. 384.

6 U. S. v. Taylor, 147 U. S. 695, 700, 37 L. ed. 335, 337; *Re* Haskell, 52 Fed. 795, 798.

7 *Re* Haskell, 52 Fed. 795, 798.

8 Moss v. Gulf Compress Co., C. C. A., 202 Fed. 657.

9 See *supra*, § 457.

ant's mill and its operations added nothing to what was shown by the evidence.[10]

A judgment cannot be reversed for an error committed upon the trial, either in the judge's charge,[11] or his rulings upon the admission or exclusion of evidence[12] or in his charge to the jury[13] or in other conduct by him[14] unless these are included in the bill of exceptions. An affidavit used upon a motion for continuance[15] or for another purpose[16] cannot be considered unless thus included. Neither, it has been held, an order for judgment *non obstante veredicto*,[17] nor the decision of a motion based upon a matter dehors the record.[18]

The record in a court of first instance ordinarily consists only of the process, pleadings, orders, findings, or verdict and judgment.[19] Errors apparent upon the face of the record, exclusive of the bill of exceptions may be considered in the court of review, although there is no bill of exceptions[20] and even when there has been no exception taken to them.[21] Such are errors in ruling upon a demurrer to an indictment,[22] or to a complaint or other pleading by the plaintiff,[23] or to a defense

10 Boultbee v. International Paper Co., C. C. A., 229 Fed. 951.

11 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall, 502, 594, 17 L. ed. 638.

12 Duluth St. Ry. Co. v. Speaks, C. C. A., 204 Fed. 573; Linn v. U. S., C. C. A., 251 Fed. 476.

13 Hanna v. Maas, 122 U. S. 24, 30 L. ed. 1117; Thurston v. U. S. C. C. A., 244 Fed. 33.

14 Ana Maria Sugar Co. v. Quinones, C. C. A., 251 Fed. 499, 504; Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 963.

15 Evans v. Stettnisch, 149 U. S. 605, 37 L. ed. 866.

16 Stewart v. Wyoming C. R. Co., 128 U. S. 383, 32 L. ed. 439.

17 Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23.

18 Eldorado Coal & Min. Co. v. Mariotto, C. C. A., 215 Fed. 51. See Griggs v. Nadeau, C. C. A., 250 Fed. 181.

19 U. S. v. Taylor, 147 U. S. 695, 37 L. ed. 335; Eldorado Coal & Min. Co. v. Mariotto, C. C. A., 215 Fed. 51; Brend v. U. S., C. C. A., 258 Fed. 16.

20 Nalle v. Oyster, 230 U. S. 165; Board of County Commissioners of Denver v. Home Savings Bank, 236 U. S. 101; Eldorado Coal Min. Co. v. Mariotto, C. C. A., 215 Fed. 51; Ana Maria Sugar Co. v. Quinones, C. C. A., 251 Fed. 499, 504.

21 Board of County Commissioners of Denver v. Home Savings Bank, 236 U. S. 101.

22 Buessel v. U. S., C. C. A., 258 Fed. 811.

23 Nalle v. Oyster, 230 U. S. 165; Mitsui v. St. Paul Fire & Marine Ins. Co., C. C. A., 202 Fed. 26; Snowden v. Ft. Lyon Canal Co., C. C. A., 238 Fed. 495.

or any pleading by the defendant,[24] or to the overruling of a plea of abatement to an indictment,[25] or a defect in the jurisdiction of the court of first instance which appears upon the face of the pleadings,[26] and cannot be waived by general appearance.[27] The same rule applies when the pleading of the plaintiff fails to state a cause of action,[28] or the pleading of the defendant fails to show a defense either affirmative or negative,[29] or the verdict [30] or findings by the court [31] are insufficient to support the judgment.

Where the evidence is all documentary and is annexed to the pleadings or otherwise incorporated in the record,[33] or there is a demurrer to evidence, and the record shows the evidence;[34] it has been held that when the record shows an error in granting a motion for a voluntary non-suit.[35]

The time and manner of taking exceptions and filing bills of exceptions are also matters as to which the Federal courts act independently of the State practice.[36]

No bill of exceptions is granted in a case in equity except as to proceedings upon a feigned issue,[37] or which is there required

24 Board of County Commissioners v. Home Savings Bank, 236 U. S. 101; reversing, C. C. A., 200 Fed. 28.

25 Dunn v. U. S., C. C. A., 238 Fed. 508.

26 Illinois Cent. R. Co. v. Rogers, C. C. A., 221 Fed. 52.

27 Eldorado Coal & Min. Co. v. Mariotto, C. C. A., 215 Fed. 51.

28 Ana Maria Sugar Co. v. Quinones, C. C. A., 251 Fed. 499, 504.

29 Board of County Commissioner of Denver v. Home Savings Bank, 236 U. S. 101.

30 Patterson v. Robinson Bros. Co., C. C. A., 180 Fed. 668; Bennett v. Butterworth, 11 How. 669, 13 L. ed. 859; Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169.

31 Webb v. Nat. Bank, C. C. A., 146 Fed. 717; St. Joseph Stockyards Co. v. U. S., C. C. A., 187 Fed. 104. *Contra,* Press v. Davis, C. C. A., 54 Fed. 267. See §§ 473, 478, *supra.*

33 Clinton v. Mo. Pac. Ry. Co., 122 U. S. 469, 474, 30 L. ed. 1214, 1215; Moline Plow Co. v. Webb, 141 U. S. 616, 623, 35 L. ed. 879, 881.

34 Baltimore & P. R. Co. v. Trustees of Sixth Pres. Church, 91 U. S. 127, 23 L. ed. 260.

35 Worthington v. McGough, C. C. A., 192 Fed. 512; or of the sufficiency of a verdict.

36 Chateaugay Ore & Iron Co., 128 U. S. 544, 32 L. ed. 508; Fishburn v. Chicago, M. & St. P. Ry. Co., 137 U. S. 60, 34 L. ed. 585; Richmond & D. R. Co. v. McGee, C. C. A., 50 Fed. 906; Philadelphia & R. Ry. Co. v. Maryland, C. C. A., 639 Fed. 1.

37 Southern Building & Loan Ass'n v Carey, 117 Fed. 325, 329, 333; U. S. v. Great Northern Ry. Co., C. C. A., 256 Fed. 522.

on appeal is a condensed statement of the evidence approved by the court or judge in accordance with the equity rule.[38] The statute providing that a party shall not be prejudiced when he has taken an appeal in a case where he should have sued out a writ of error,[39] and the act of February 26, 1919, directing the court of review to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties,"[40] do not, it has been held, by a divided court entitle him in such a case to a review of errors not apparent upon the record unless they are included in a bill of exceptions duly settled and signed in accordance with the practice at the common law.[41] It is the practice in the First,[42] Second,[43] Third,[44] and Fourth[45] Circuits to have a single bill of exceptions containing all the exceptions taken upon the trial, and upon which the plaintiff in error relies. That is sufficient.[46] In the western circuits, several bills of exceptions are often prepared and presented.[47]

The Revised Statutes as amended provide that "a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and

38 Equity Rule 75. See *infra*, § 704.

39 39 St. at L. 727, ch. 448, § 4; Comp. St., § 1649a. See *infra*, § 687.

40 Act of Feb. 26, 1919, 41 St. at L. Comp. St. 1919, § 1246.

41 Buessel v. U. S., C. C. A., 258 Fed. 811. But see the dissenting opinion of Ward, J. *Cf. Re* Ana Maria Sugar Co. Quinones, C. C. A., 251 Fed. 499.

42 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 592, 601, 17 L. ed. 638, 641.

43 Ibid; Simons v. Cromwell, C. C. A., 262 Fed. 680, in which the author was counsel.

44 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 593, 601, 17 L. ed. 638, 641; Fisher v. Newark City Ice Co., C. C. A., 62 Fed. 569, in which the author was counsel.

45 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 592, 17 L. ed. 638.

46 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 592, 598, 17 L. ed. 638, 640.

47 Ibid.

allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."[48] This statute applies to the judge of the District Court of the United States for Porto Rico.[49]

The resignation[50] or acceptance of an appointment to another court[51] is such a disability. Absence from the district is not.[52] The judge who signs, when not the trial judge, should state in his certificate why he does so.[53]

The signature of the judge without a seal is sufficient.[54] His initials are the equivalent of his signature.[55] In former times, it was customary for the judge to sign and seal each separate exception; but a single seal and signature at the end of the bill

48 U. S. R. S., § 953, as amended by 31 St. at L. 270.

49 Guardian Assur. Co. of London v. Quintana, 227 U. S. 100, 57 L. ed. —.

50 McIntyre v. Modern Woodmen of America, C. C. A., 200 Fed. 1; Brent v. Chas. H. Lilly Co., 202 Fed. 335.

51 Sanborn v. Bay, C. C. A., 194 Fed. 37.

52 Ulmer v. U. S., C. C. A., 266 Fed. 176.

53 Ibid.

54 Hanna v. Maas, 122 U. S. 24, 30 L. ed. 1117; Copper River & N. W. Ry. Co. v. Reeder, C. C. A., 211 Fed. 111.

55 Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846, 31 L. ed. 743; Kinney v. U. S. Fidelity & Guaranty Co., 222 U. S. 283. It was held that a paper signed by the plaintiff was not a bill of exceptions, although it was styled "Exceptions to charge of jury" and purported to be initialed by the trial judge. Kinney v. U. S. Fidelity & Guaranty Co., 222 U. S. 283.

is sufficient.[56] If the paper is neither signed nor sealed, it will be disregarded upon a writ of error.[57]

The signature by the judge to an order settling and allowing a bill of exceptions thereto attached, is insufficient when the bill itself is not signed nor sealed,[58] although the order states that the bill was signed.[59]

Exceptions contained in the minutes of the trial included in the transcript but not signed by the judge will not be considered by the appellate court,[60] even, it has been said, when stipulated to have been taken.[61] A paper in the record, entitled

56 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 592, 17 L. ed. 638.

57 Mussina v. Cayazos, 6 Wall. 355, 18 L. ed. 810; Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368.

58 Whitaker v. U. S., C. C. A., 220 Fed. 114; Brown v. Cumberland Telegraph & Telephone Co., C. C. A., 221 Fed. 261; Duluth St. Ry. Co. v. Speaks, C. C. A., 204 Fed. 573; Oxford Coast Line R. Co. v. Union Bank, C. C. A., 153 Fed. 723, 726; Dalton v. Hazelet, C. C. A., 182 Fed. 561, 568.

59 Oxford Coast Line R. Co. v. Union Bank, C. C. A., 153 Fed. 723, 726.

60 Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 592, 598, 17 L. ed. 638, 640; Thompson v. Riggs, 5 Wall. 663, 18 L. ed. 704; Young v. Martin, 8 Wall. 354, 19 L. ed. 418; Insurance Co. v. Lanier, 95 U. S. 171, 24 L. ed. 383; Hanna v. Maas, 122 U. S. 24, 26, 30 L. ed. 1117, 1118; Lee Won Jeong v. U. S., C. C. A., 145 Fed. 512; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., C. C. A., 151 Fed. 466. A bill of exceptions which states that the parties respectively introduced evidence as shown in an exhibit annexed and marked A., which exhibit consists of the stenographer's report of the trial, containing oral exceptions then taken, is not a good bill of exceptions, and may be disregarded by the appellate court. Hanna v. Maas, 122 U. S. 24, 30 L. ed. 1117; Marion Phosphate Co. v. Cummer, C. C. A., 60 Fed. 873. But see Norfolk & W. Ry. Co. v. Holbrook, C. C. A., 215 Fed. 687; where the evidence was embodied in a bill of exceptions, duly allowed and certified by the trial judge, the fact that the testimony was taken down by a stenographer employed by one of the parties, and not by order of the court or by consent, was held to be immaterial. St. Louis Southwestern Ry. Co. v. Purcell, C. C. A., 135 Fed. 499. The record of a former trial of a case, which is made a part of an agreed statement of facts upon a second trial, it has been said, cannot be considered upon a writ of error by the court of review, unless it is incorporated in a bill of exceptions. Oxford & Coast Line R. Co. v. Union Bank, C. C. A., 153 Fed. 723, except perhaps when it is incorporated into the record; Ibid. A reference thereto in the bill of exceptions is not sufficient; James v. Clement, C. C. A., 211 Fed. 972.

61 Metropolitan R. R. Co. v. Dis-

"case and exceptions," is a sufficient bill of exceptions, if it has all the requisites of a bill, except the name.[62]

An exception must be noted when taken,[63] but, in the absence of a rule or order restricting or enlarging the time, may be signed at any time during the term.[64] A bill of exceptions must be signed at the term at which the judgment was rendered, not necessarily at the term at which the trial was had.[65] A bill of exceptions filed subsequently to the term at which judgment is entered will be disregarded by the court of review,[66] even though an order of the trial court has permitted it to be filed *nunc pro tunc*,[67] unless before the time expired it was enlarged by order[68] or consent;[69] or it has been said when

trict of Columbia, 195 U. S. 322, 49 L. ed. 219. A stipulation in aid of a writ of error, that the papers mentioned therein should "constitute the record" on the writ of error, to which was attached the certificate of the clerk that such papers were a true and faithful copy of the original papers and proceedings in the case as per the stipulations of counsel, was held to be a sufficient substitute for a bill of exceptions. *Re* Grove, C. C. A., 180 Fed. 62.

62 Herbert v. Butler, 97 Fed. 319.

63 Hunnicutt v. Peyton, 102 U. S. 333, 354, 26 L. ed. 113, 116.

It has been held that an exception to an order for judgment *non obstante veredicto*, is too late when not signed until a term subsequent to the entry of judgment thereupon. McCord v. Baltimore & O. R. Co., C. C. A., 187 Fed. 743.

64 Hunnicutt v. Peyton, 102 U. S., 333, 354, 26 L. ed. 113, 116; Jennings v. Phil., Balt. & Wash. Ry. Co., 218 U. S. 255, 54 L. ed. 1031; Reader v. Haggin, C. C. A., 160 Fed. 909; Dalton v. Hazelet, C. C. A., 182 Fed. 561; Wyss-Thalman v. Maryland Casualty Co. of Baltimore, C. C. A., 193 Fed. 53.

65 Walton v. U. S., 9 Wheat. 651, 6 L. ed. 182; Muller v. Ehlers, 91 U. S. 249, 23 L. ed. 319; Preble v. Bates, 40 Fed. 745; Minahan v. Grand Trunk Western Ry. Co., C. C. A., 138 Fed. 37.

66 Morse v. Anderson, 150 U. S. 156, 37 L. ed. 1037; Miller v. Morgan, C. C. A., 67 Fed. 82; U. S. v. Thibodeaux, C. C. A., 232 Fed. 91; Proctor Coal Co. v. U. S. Fidelity & G. Co., C. C. A., 236 Fed. 910.

67 Muller v. Ehlers, 91 U. S. 249, 23 L. ed. 319; Whalen v. Sheridan, 10 Fed. 661; Herbert v. Butler, 14 Blatchf. 357.

68 Harrison v. German American F. Ins. Co., C. C. A., 90 Fed. 758; So. Pac. Co. v. Hamilton, C. C. A., 54 Fed. 468, 474.

69 Davis v. Patrick, 122 U. S. 138, 30 L. ed. 1090; Chateaugay Ore & Iron Co., 128 U. S. 544, 32 L. ed. 508; Richmond & D. R. Co. v. McGee, C. C. A., 50 Fed. 906; Kellow P. L. Co. v. Chapman, C. C. A., 74 Fed. 444; U. S. v. Jones, 149 U. S. 262, 37 L. ed. 726; Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195; Minahan v. Grand Trunk Western Ry. Co., C. C. A., 138 Fed. 37, 41. An order of the court allowing "such

enlarged by consent after the expiration of the time;[70] except perhaps in districts where a special local rule or practice prevails,[71] or under extraordinary circumstances.[72] It has been held that this doctrine does not apply to proceedings in bankruptcy.[73] The inability of the trial judge to settle a bill of exceptions dur-

time as counsel should want to prepare a bill of exceptions'' is sufficient to justify its signature after the term. Koewing v. Wilder, C. C. A., 126 Fed. 472. It is not void for indefiniteness, but should be construed as limited to the time allowed by law for suing out a writ of error. Koewing v. Wilder, C. C. A., 126 Fed. 472. When an order was made allowing four months within which to prepare and file, for allowance, a bill of exceptions, and the paper was filed within the time, it was held that it might be subsequently signed. Sutherland v. Pearce, C. C. A., 186 Fed. 783.

It has been held that an order extending the time for the preparation and filing of the transcript does not extend the time for signing and filing the bill of exceptions. Reliable L. & B. Co. v. Stahl, C. C. A., 102 Fed. 590; Chateaugay Ore & Iron Co., 128 U. S. 544, 32 L. ed. 508; Waldron v. Waldron, 156 U. S. 361, 378, 15 Sup. Ct. 383, 39 L. ed. 453. For what does not constitute consent, see Jennings v. Phil., Balt. & Wash. Ry. Co., 218 U. S. 255, 54 L. ed. 1031.

70 Blisse v. U. S., C. C. A., 263 Fed. 961, 966; Exporters of Manufacturers' Products v. Butterworth-Judson Corp., D. C. S. D. N. Y. March, 1920. *Cf.* E. I. DuPont de Nemours & Co. v. Smith, C. C. A., 249 Fed. 403. *Contra* Ulmer v. U. S., C. C. A., 266 Fed. 176. An endorsement upon the bill, ''we agree upon the above the foregoing bill of exceptions,'' signed by counsel after an extension by an insufficient order, was held to be a waiver of any objections to the order. Gulf, C. & S. F. Ry. Co. v. Jackson, 64 Fed. 70.

71 Chateaugay Ore & Iron Co., 128 U. S. 544, 32 L. ed. 508; Woods v. Lindvall, 48 Fed. 73; Morse v. Anderson, 150 U. S. 156, 37 L. ed. 1037. For the practice in the First Circuit, see N. Y. & N. E. R. Co. v. Hyde, C. C. A., 56 Fed. 188. In the Southern District of New York, by Rule 5, ''For the purpose of making and filing bills of exceptions and making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be, and hereby is, extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered, or judgment or decree entered.'' After the expiration of the extended time, the court has no power to sign the bill, Glickstein v. U. S., C. C. A., 215 Fed. 90; except under extraordinary circumstances, U. S. v. Waite, 193 Fed. 258. See Russo-Chinese Bank v. Nat. Bank of Commerce, C. C. A., 187 Fed. 80.

72 Western Dredging & Imp. Co. v. Heldmaier, C. C. A., 116 Fed. 179; Roberts v. Bennett, C. C. A., 135 Fed. 748; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., C. C. A., 151 Fed. 466.

73 See *infra*, § 614.

ing the term, when caused by his illness,[74] or death,[75] or by his absence from the district,[76] or by his appointment and qualification as judge of a higher court,[77] and the loss of exhibits without the fault or negligence of the plaintiff in error, when they were not found until after the expiration of the term,[78] the delay of the court stenographer in furnishing a copy of the minutes which was duly ordered,[79] have been held to justify the signing of the bill after the term. A misunderstanding by counsel as to the practice is not such an extraordinary circumstance.[80]

Where the term has been extended by consent, the court has power to grant an extension of time for the settlement of a bill of exceptions.[81] Where the order of extension was duly signed, a delay of two days in its entry was held not to make it ineffective.[82] Otherwise, the court has no power to sign a bill of exceptions after the trial term and all extensions thereof have expired.[83] An extension granted during the vacation before the term succeeding the judgment was held to be insufficient.[84] It has been held in the Sixth [85] and the Seventh [86] in the Eighth [87]

74 Roberts v. Bennett, C. C. A., 135 Fed. 748.

75 Guardian Assur. Co. of London v. Quintana, 227 U. S. 100, 57 L. ed. —, where the delay was caused by doubt as to whether the Revised Statutes applied in Porto Rico.

76 Western Dredging & Imp. Co. v. Heldmaier, C. C. A., 116 Fed. 179.

77 See Sanborn v. Bay, C. C. A., 194 Fed. 37.

78 Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., C. C. A., 151 Fed. 466.

79 Where a court rule provided that the bill of exceptions must be signed within a specified time an extension subsequent to a default was allowed where the court stenographer had been too busy to furnish a copy of the testimony on the trial which was duly ordered. U. S. v. Waite, 193 Fed. 258.

80 Susquehanna Coal Co. v. Casualty Co. of America, 247 Fed. 137.

81 Exporters of Manufacturers' Products v. Butterworth-Judson Corp., 265 Fed. 907.

82 Camden Iron Works Co. v. Sater, C. C. A., 233 Fed. 611.

83 Ibid.

84 Missouri, K. & T. Ry. Co. v. Russell, 60 Fed. 501.

85 Kentucky Distillers & Warehouse Co. v. Lillard, C. C. A., 160 Fed. 34; Mahoning Valley Ry. Co. v. O'Hara, C. C. A., 196 Fed. 945.

86 Tullis v. L. E. & W. R. Co, C. C. A., 105 Fed. 554.

87 In the Eighth Circuit it is the practice to enter judgment immediately after the verdict; and the motion for a new trial may subsequently be made. In that Circuit bills of exceptions are allowed and filed at the term at which the motion for a new trial is determined,

and the Ninth [88] Circuit that the pendency of a motion for a new trial or to set aside the judgment extends the time to have the bill of exceptions signed and filed, and that the court when denying the motion may extend the time even at a subsequent term, and in the Ninth Circuit, that this rule does not apply to a motion to vacate the judgment.[89]

The making of the court, subsequent to judgment, of supplemental findings, at the request of the defendant, was held not to extend the time after the entry of the judgment in which a bill of exceptions must be filed and approved, where the findings contained in the original judgment roll were sufficient to supply the judgment.[90] Where the bill is signed subsequent to the term it should recite any extension that has been given whether by consent or order,[91] or any other excuse for the delay.[92] It has been held that affidavits cannot be used to prove such a consent when disputed nor under ordinary circumstances to establish any fact justifying the extension.[92a]

It has been held that a statement in the bill of exceptions that the time to file the same had been extended by previous orders is insufficient, unless the orders are contained there or elsewhere in the record.[93]

If the time prescribed by the rules is enlarged by order, it is the safer practice to date the bill of exceptions at a day within the time originally limited, and to insert in the order a provision that the bill of exceptions be signed, sealed, and filed, *nunc pro tunc*.[94]

although subsequent to the term at which judgment is entered. Lindvall v. Woods, 44 Fed. 855; City of Harper v. Daniels, C. C. A., 211 Fed. 57, 60.

88 Camden Iron Works v. Sater, C. C. A., 221 Fed. 611.

89 Dalton v. Hazelet, C. C. A., 182 Fed. 561.

90 Dalton v. Hazelet, C. C. A., 182 Fed. 561.

91 Reliable Incubator & Brooder Co. v. Stahl, C. C. A., 102 Fed. 590; Blisse v. U. S., C. C. A., 263 Fed. 961.

92 Where a bill of exceptions, not filed nor served within the proper time, was duly settled and certified by the court, it was presumed, upon appeal, that the court had relaxed the rule for some good reason, and a motion to strike out the bill was denied. City of Seattle v. Board of Home Missions of Methodist Protestant Church, C. C. A., 138 Fed. 307. *Contra*, Sena v. U. S., C. C. A., 195 Fed. 244.

92a Reliable Incubator and Brooder Co. v. Stahl, C. C. A., 102 Fed. 590.

93 Oxford & Coast Line R. Co. v. Union Bank, C. C. A., 153 Fed. 723.

94 Hunnicutt v. Peyton, 102 U. S.

A bill of exceptions if otherwise in time may be signed after a writ of error has been sued out,[95] or an appeal allowed and citation issued,[96] or a supersedeas bond filed and approved;[97] but not, it has been held, after the writ of error has been filed in the court of review.[98]

Even after a writ of error, a bill of exceptions duly allowed may be amended by the trial court at the same term;[99] but not by the court of review.[100] A new exception cannot be added by amendment after the time to file a bill has expired;[101] and the bill cannot be otherwise amended at a subsequent term to supply an omission due to the neglect or oversight of the plaintiff in error.[102]

The rules of the District Courts usually regulate the manner of settling bills of exceptions. When they are silent, the old English practice is followed.[103] It is customary for the plaintiff in error to serve a copy upon his opponent's attorney with a notice of the time and place when the original will be presented for settlement and signature. Sufficient time for the preparation of amendments should be allowed in the notice. It is the better practice to number each line of the pages of the bill; to annex to each proposed amendment a reference to the page and line to which it applies and for the amendments to be served a sufficient time before the settlement to give the plaintiff in error an opportunity to save the court labor by marking upon the copy submitted those which he allows, and for the plaintiff in error to furnish the court with a copy of the stenographer's

333, 357, 26 L. ed. 113, 117; Walton v. U. S., 9 Wheat. 651, 6 L. ed. 182.

95 Hunnicutt v. Peyton, 102 U. S. 333, 357, 26 L. ed. 113, 117; Davis v. Patrick, 122 U. S. 138, 30 L. ed. 1090.

96 Cook v. Klonos, C. C. A., 164 Fed. 529.

97 Ibid.

98 Ulmer v. U. S., C. C. A., 266 Fed. 176.

99 Whiting v. Equitable L. A. Soc., 60 Fed. 197.

100 Stimpson v. Westchester R. Co., 3 How. 553, 11 L. ed. 722; Case v. Hall, C. C. A., 94 Fed. 300.

101 Sutherland v. Round, C. C. A., 57 Fed. 467.

102 Adams v. Shirk, C. C. A., 121 Fed. 823; Franklin County v. Fury, C. C. A., 144 Fed. 663; Ulmer v. U. S., C. C. A., 266 Fed. 176. See Bidwell v. Amsinck, C. C. A., 166 Fed. 752.

103 Chateaugay Ore & Iron Co., 128 U. S. 544, 555, 32 L. ed. 508, 512; Pomeroy's Lessee v. State Bank of Indiana, 1 Wall. 592, 598, 17 L. ed. 638, 640.

minutes of the trial.[104] Where the attorneys informally submitted to the court their dispute concerning one of the exhibits it was held that the bill was then presented for settlement.[105] Where there is nothing in the record to the contrary, it will be presumed that notice of the settlement was given to the attorney for the defendant in error.[106]

Theoretically, exhibits marked upon the trial are left with the clerk, although in practice they are usually returned to and kept by the party who offers them.[107] It has been held that they are a part of the record and must be included in the transcript by the clerk.[108] But when a paper, which is to constitute a part of the bill of exceptions, is not incorporated into the body of the bill, it must be annexed thereto, or so marked by letter, number, or other means of identification therein mentioned, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions. Otherwise it may be disregarded.[109] Where the bill states that a paper was produced and marked for identification without any further reference thereto it shows affirmatively that it was not offered in evidence.[110] Where the record contained, so-called minutes of the trial, which included motions for a non-suit and for the direction of a verdict, followed by the usual form and introduction to a bill of exceptions which preceded a transcript of the testimony, so described and followed by a proper certificate that it was a bill of exceptions; these motions were not considered to be a part of the bill.[111]

The court refused to consider an affidavit in support of a motion for a continuance,[112] and affidavits in support of a motion

104 Lee v. Kansas City Southern Ry. Co., C. C. A., 220 Fed. 863.

105 *Re* Federal Life Ins. Co., 248 Fed. 908.

106 Kentucky Distillers & Warehouse Co. v. Lillard, C. C. A., 160 Fed. 34.

107 Hobbs v. Nat. Bank of Commerce, C. C. A., 93 Fed. 615.

108 Hobbs v. Nat. Bank of Commerce, C. C. A., 93 Fed. 615; Dalton v. Moore, C. C. A., 141 Fed. 311.

109 Ibid.

110 Leftwitch v. Lecanu, 4 Wall. 187, 18 L. ed. 388. See also Alaska Commercial Co. v. Dinkelspiel, C. C. A., 126 Fed. 164; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., C. C. A., 151 Fed. 466, 468.

111 Copper River & N. W. Ry. Co. v. Reeder, C. C. A., 211 Fed. 280.

112 Evans v. Stettnisch, 149 U. S. 605, 37 L. ed. 866.

for a new trial,[113] which were included in the transcript but not referred to in the bill of exceptions.[114] The evidence will not be considered unless contained in the bill of exceptions.[115]

The bill of exceptions should not consist of a transcript of the stenographer's minutes of the trial signed and certified by the judge as a correct description of what then took place.[116] Such a paper may be disregarded by the court of review,[117] or stricken from the record or transcript.[118] A stipulation that the testimony and rulings which appear in the transcript are correct cannot take the place of a bill of exceptions,[119] although an agreed statement of facts may be brought before the court of review without a bill of exceptions.[120] A rule of the Circuit Court of Appeals for the Sixth Circuit requires that the testimony be stated in narrative form except that "if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness."[121] The same practice is usually enforced in the settlement of bills of exceptions in other circuits.[122] Good practice requires where a reproduction of question and answer is made that the bill contain a statement that this was done by the direction of the court or at the request of either party.[123] Otherwise the plaintiff in error may be penalized in respect to costs,[124] provided that the defendant in error has objected upon the record to the

113 Stewart v. Wyoming C. R. Co., 128 U. S. 383, 32 L. ed. 439.

114 Hickman v. Jones, 9 Wall. 197, 19 L. ed. 551. See Marion Phosphate Co. v. Cummer, C. C. A., 60 Fed. 873.

115 *Re* Grove, C. C. A., 180 Fed. 62. This rule applies in criminal cases. Ibid.

116 Inglee v. Coolidge, 2 Wheaton 363, 4 L. ed. 261; Suydam v. Williamson, 20 How. 427, 437, 15 L. ed. 978; Wheeling Terminal Ry. Co. v. Russell, C. C. A., 209 Fed. 795. But see Long v. Atlantic Coast Line R. Co., C. C. A., 238 Fed. 919.

117 Ibid.

118 See Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, C. C. A., 208 Fed. 989.

119 Buessel v. U. S., 258 Fed. 811, 817; Ulmer v. U. S., C. C. A., 266 Fed. 176. But see *Re* Grove, C. C. A., 180 Fed. 62, cited *supra* note.

120 U. S. v. Eliason, 16 Peters 291, 299, 300, 10 L. ed. 968.

121 202 Fed. vii, 118 C. C. A., ix.

122 *Re* Southern Pac. Co., 155 Fed. 1001, 1011. See C. C. A. Rule in Fourth Circuit, 193 Fed. 795.

123 Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, C. C. A., 208 Fed. 989, 990.

124 Ibid; Chesbrough v. Woodworth, C. C. A., 195 Fed. 875.

inclusion of testimony or a departure from the narrative form which is deemed by him unnecessary.[125]

The bill of exceptions must contain enough of the evidence to show the materiality of the exceptions,[126] and it must show the relation, to the issues involved, of the matters that are the subject of the exceptions.[127] A ruling upon the admission or exclusion of evidence will not usually be reversed for a different reason than that assigned in the trial court to sustain the objection.[128] It has been said that, when a question is excluded, the bill of exceptions must show the answer that was expected.[129] Where separate bills were signed, it was held that the court could not consider evidence stated in one of them when deciding an exception taken in another bill upon the same writ of error.[129a]

It is the safer practice to include in the bill of exceptions a statement that it contains all the evidence affecting the matter to which the exceptions relate.[130] Otherwise, the court of

125 Chesbrough v. Woodworth, C. C. A., 195 Fed. 875.

126 Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 606, 36 L. ed. 829, 833; Atchison, T. & S. F. R. Co. v. Myers, C. C. A., 63 Fed. 793; U. S. v. Wingate, 44 Fed. 129, 141; Worthington v. Mason, 101 U. S. 149, 25 L. ed. 848; Newport News & Old Point Ry. & El. Co. v. Yount, C. C. A., 136 Fed. 589.

127 Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., C. C. A., 151 Fed. 466.

128 Lilly v. Hamilton Bank, C. C. A., 178 Fed. 53.

129 Sun Pub. Co. v. Lake Erie Asphalt Block Co., C. C. A., 157 Fed. 80; McCurley v. National Savings & Trust Co., C. C. A., 258 Fed. 154. But see § 711 *infra*.

129a S. W. Va. Imp. Co. v. Frari, C. C. A., 58 Fed. 171.

130 Ibid.; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 606, 36 L. ed. 829, 833; Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 L. ed. 811; U. S. v. Wingate, 44 Fed. 129; Kingory v. U. S., 44 Fed. 669; U. S. v. Norris, 44 Fed. 740; S. W. Va. Imp. Co. v. Frari, C. C. A., 58 Fed. 171; City of Chicago v. Troy Laundry Machinery Co., C. C. A., 162 Fed. 678; Johnson v. Willapa Lumber Co., C. C. A., 173 Fed. 488; Bolen-Darnall Coal Co. v. Hicks, C. C. A., 190 Fed. 717; Meyer v. Everett Pulp & Paper Co., C. C. A., 193 Fed. 857; Guardian Fire Ins. Co. v. Central Glass Co., C. C. A., 194 Fed. 851; Journal Pub. Co. v. Drake, C. C. A., 199 Fed. 572. Where the statement of claim contained a large number of counts and a compulsory non-suit was directed because the evidence was thought to be insufficient to sustain a verdict on any count, the court of review refused to reverse where the record was in such a condition that it was unable to determine what evidence applied to any par-

review will not presume that it contains all the evidence and may, on that account, decline to review a direction of [131] or refusal to direct a verdict,[132] or a refusal to give a requested charge;[133] unless it otherwise shows that all the evidence is included.[134] A statement that the bill of exceptions contains the substance of all of the testimony given on the trial is sufficient.[135]

If it is claimed that the jury refused to follow an instruction of the court, the bill of exceptions must show affirmatively that they did so.[136] The court of review cannot consider the contention that the appellant or plaintiff in error was not afforded a proper hearing in the court below, when the record does not show that fact, nor any formal exception to a ruling upon the subject.[137] It has been held, that if the bill of exceptions shows that an offer of evidence was made and refused admission, and there is nothing in the record to indicate bad faith, the appellate court must assume that the proof could have been made, and govern itself accordingly.[138]

ticular count. U. S. v. Baltimore & O. R. Co., C. C. A., 185 Fed. 486. Where the bill of exceptions stated that a party "gave evidence tending to show" certain facts, it was held: that the court could not review the question whether the evidence was sufficient to warrant the verdict. Union Pac. Ry. Co. v. Harris, C. C. A., 63 Fed. 300; but that it might pass upon the right of the plaintiff in error to a charge requested and denied. Cincinnati Traction Co. v. Reebusch, C. C. A., 192 Fed. 520.

131 U. S. v. Baltimore & O. R. Co., C. C. A., 185 Fed. 486.

132 Atchison, T. & S. F. R. Co. v. Myers, C. C. A., 63 Fed. 793; U. S. v. Copper Queen Min. Co., 185 U. S. 495, 46 L. ed. 1008; Copper River & N. W. Ry. Co. v. Reeder, C. C. A., 211 Fed. 280.

133 Mercantile Trust Co. v. Hensey, 205 U. S. 298, 305, 51 L. ed. 811, 814; Pacific Mail S. S. Co. v. Balderach, C. C. A., 229 Fed. 562.

134 Gunnison County v. Rollins, 173 U. S. 255, 43 L. ed. 689; Clyatt v. U. S., 197 U. S. 207, 49 L. ed. 726; Cincinnati, H. & D. R. Co. v. Thiebaud, C. C. A., 114 Fed. 918. When the only exception is the refusal of a single charge, it is improper to set forth in the bill of exceptions a complete transcript of the testimony. Cincinnati Traction Co. v. Reebusch, C. C. A., 192 Fed. 520.

135 First Nat. Bank of Council Bluffs, Iowa v. Moore, C. C. A., 148 Fed. 953.

136 Harper & Reynolds Co. v. Wilgus, C. C. A., 56 Fed. 587.

137 Gonzales v. Buist, 224 U. S. 126, 56 L. ed. 693.

138 Scotland County v. Hill, 112 U. S. 183, 186, 28 L. ed. 692, 693. Where it was claimed that certain acts that occurred during the trial,

The rules of the Supreme Court and of the Circuit Courts of Appeal provide that "the judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court."[139] A general exception to the whole charge,[140] or to the whole

with reference to the extent of plaintiff's injuries, unduly influenced the sympathies of the jury, and a motion for a new trial had been denied without a specific finding that there had been undue influence; it was held that the bill of exceptions should be construed to mean that, while the facts were as therein stated, the jury were not unduly influenced thereby. Illinois Cent. R. Co. v. Warren, C. C. A., 149 Fed. 658.

139 S. C. Rule 4; C. C. A. Rule 10.

140 Anthony v. Louisville & N. R. Co., 132 U. S. 172, 33 L. ed. 301; Lincoln v. Claflin, 7 Wall. 132, 139, 19 L. ed. 106, 109; Cooper v. Schlesinger, 111 U. S. 148, 151, 28 L. ed. 382, 383; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 596, 28 L. ed. 527, 531; Burton v. West Jersey F. Co., 114 U. S. 474, 476, 29 L. ed. 215, 216; Lautz v. Glenn, 183 Fed. 666. Except perhaps where the charge consists of a single proposition of law. Fisher v. U. S., C. C. A., 266 Fed. 667, 670. So is an exception to a charge because it did not give more full instructions upon a subject as to which no specific requests to charge were made, Cincinnati Traction Co. v. Leach, C. C. A., 169 Fed. 549; or to a charge "as far as the instructions given were inconsistent with the requests for rulings," Partridge v. Boston & M. R. Co., C. C. A., 184 Fed. 211; or to a general exception to the court's refusal to give a number of charges, which were requested, any-one of which was good, Ibid. But where the instruction of the court on a particular subject was specific and stated a single legal proposition, a general exception to the charge upon that subject was held to be sufficient. Humes v. U. S., C. C. A., 182 Fed. 485; Pritchett v. Sullivan, C. C. A., 182 Fed. 480. A general exception to all of the charge upon a certain subject is usually insufficient. Winfrey v. Missouri, K. & T. Ry. Co., C. C. A., 194 Fed. 808. So was a general exception to a charge on the ground that it erroneously submitted the case under a Federal statute, which was not applicable to the case made by the pleadings. Erie R. Co. v. Kennedy, C. C. A., 191 Fed. 332. An exception to the direction of a verdict and to the final judgment was insufficient to review the court's failure to require the actual return and entry of a verdict in accordance with the direction. Bowman v. Atchison, T. & S. F. Ry. Co., C. C. A., 184 Fed. 697. As to the waiver of an

charge "and to each and every part thereof,"[141] is of no effect where the charge contains distinct propositions, and any of them is free from objection. So is an exception to "a theory announced throughout" a charge, or throughout an instruction in the same.[142] An exception to the refusal of the court to instruct the jury in language prayed for by counsel is of no avail, if the refusal be followed by instructions in the general charge in different language, but substantially to the same effect.[143]

An exception to a charge or to a refusal to charge is of no avail unless the bill of exceptions shows that it was taken before the jury retired.[144] It is too late to take it subsequently

exception, see Winfrey v. Missouri, K. & T. Ry. Co., C. C. A., 194 Fed. 808. It has been held that where the exception to an instruction was based upon a specific ground, the court of review could not consider whether the instruction was erroneous for a different reason. Beiseker v. Moore, C. C. A., 174 Fed. 368. See Horn v. U. S., C. C. A., 182 Fed. 721.

141 Price v. Parkhurst, C. C. A., 53 Fed. 312.

142 Bogk v. Gasser, 149 U. S. 17, 26, 37 L. ed. 631, 635. So was an exception to so much of a paragraph of the charge as assumed a certain state of facts without calling attention to any fact that was omitted from the statement or to any want of proof of a fact therein assumed. U. S. Coal Co. v. Pinkerton, C. C. A., 169 Fed. 536.

143 Anthony v. Louisville & N. R. Co., 132 U. S. 172, 33 L. ed. 301.

144 Phelps v. Mayer, 15 How. 160, 14 L. ed. 643; Pacific Express Co. v. Malin, 132 U. S. 531, 33 L. ed. 450; Gandia v. Pettingill, 222 U. S. 452; Star Co. v. Maddon, C. C. A., 188 Fed. 910; Brent v. Chas. H. Lilly Co., 202 Fed. 335; Copper River & N. W. Ry. Co. v. Heney, C. C. A., 211 Fed. 459; Barnes & Tucker Coal Co. v. Vozar, C. C. A., 227 Fed. 25; Alverson v. Oregon-Washington R. & Nav. Co., C. C. A., 236 Fed. 331; Miller & Lux, Inc. v. Petrocelli, C. C. A., 236 Fed. 846, 847; Lohman v. Stockyards Loan Co., C. C. A., 243 Fed. 5; Hunnicut v. United States, C. C. A., 253 Fed. 556. An exception to the direction of a verdict is too late after the verdict has been returned. Bidwell v. George B. Douglas Trading Co., C. C. A., 183 Fed. 93. Although the bill of exceptions states that exceptions to a charge were taken when it was given, they are bad when the bill discloses that they were not taken till afterwards. MacDonald v. U. S., C. C. A., 63 Fed. 426. When the bill of exceptions showed the course of the trial in progressive recitals, immediately following the charge appeared a colloquy, in which the court inquired about exceptions, and in response counsel for the defense stated that he took an exception to a specified part of the charge; further along the record recited that "thereupon the jury, after retiring, returned a

by consent of both parties and the court,[145] and even when so taken at the court's request.[146] An exception may be taken to the court's direction that the exceptions to its charge be taken after the retirement of the jury.[147] When a charge is given in the absence of counsel at the jury's request for further instructions is too late for him to except thereto after the verdict; provided at least that the charge was given in the court-room after such reasonable notice to counsel as is practicable under the circumstances.[148] But an exception will lie to a direction by the court that the jury retire before the plaintiff has had an opportunity to take his exceptions to the charge.[149] Where the counsel for the unsuccessful party was absent by agreement with his adversary after the jury had retired, it was held that the latter was estopped from objecting that no exception to the supplemental charge was duly taken.[150]

A statement, that the party who requested the instruction upon its refusal "then and there excepted" is sufficient.[151] It has been held that the statement "to which defendant excepted," when following a ruling in what purports to be a narrative report of the trial, is sufficient.[152]

The material facts or proofs on which the charges to which exceptions were taken rest,[153] and enough of the evidence to show that they were erroneous,[154] should be inserted before the charge, in order that the court may see if the points arose

verdict of guilty," it was held: that it sufficiently appeared that the exception in question was taken at the trial, and while the jury were still in the box. Heard v. U. S., C. C. A., 228 Fed. 503.

145 Mann v. Dempster, C. C. A., 181 Fed. 76.

146 Minahan v. Grand Trunk Western Ry. Co., C. C. A., 138 Fed. 37; Dalton v. Moore, C. C. A., 141 Fed. 311; Mann v. Dempster, C. C. A., 181 Fed. 76; Star Co. v. Madden, C. C. A., 188 Fed. 910.

147 Mann v. Dempster, C. C. A., 179 Fed. 837.

148 Stewart v. Wyoming C. R. Co., 128 U. S. 383, 32 L. ed. 439.

149 Fillippon v. Albion Vein Slate Co., 249 U. S. 76; reversing C. C. A., 242 Fed. 258, see *supra*, § 473g.

150 Grace v. Louisville & N. R. Co., C. C. A., 255 Fed. 843.

151 Kellogg v. Forsyth, 2 Black, 571, 17 L. ed. 256.

152 New Orleans & N. E. Ry. Co. v. Jopes, 142 U. S. 18, 35 L. ed. 919.

153 Baltimore & P. R. Co. v. Trustees of Sixth Pres. Church, 91 U. S. 127, 23 L. ed. 260.

154 Young v. Martin, 8 Wall. 354, 19 L. ed. 418.

on which they were given and as to which exception was taken. The part of the charge to which the exception was taken must be inserted in full,[155] with enough of the rest to show that it was not qualified.[156] In a civil case, the omission of the court to charge on a material question of law is not the subject of an exception when no request for such charge was made on the trial.[157]

If the party asking the charge is dissatisfied with the court's refusal, he may except thereto, which exception will avail him if he shows that the request was warranted by the testimony, and that the charge he asked ought to have been given.[158] If the judge proceeds to state the law, and states it erroneously, an exception will lie to his ruling, and if it could have had any influence on the jury, the verdict will be set aside.[159]

Where a party, after an exception, instead of standing upon it, by an amendment or otherwise withdraws from the position that the court held to be erroneous, it may be held that he has waived his right to review the question upon a writ of error.[160] Where a defendant, after an exception to a refusal to direct a verdict in his favor at the end of the plaintiff's case, offers evidence in support of his defense, he waives such prior exception.[161]

§ 480. Judgments. It has been held in actions for joint torts, that judgments may be entered in favor of some and against others, if the jury so find in their verdict,[1] but separate judgments for different amounts cannot be entered against different defendants [2] except by consent.[3]

155 Stimpson v. West Chester R. Co., 3 How. 553, 11 L. ed. 722.

156 Hicks v. U. S., 150 U. S. 443, 453, 37 L. ed. 1137, 1142.

157 Texas & P. Ry. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78.

158 Etting v. Bank of U. S., 11 Wheat. 59, 75, 6 L. ed. 419, 422, *Cf.* Hudson v. Charleston, C. & C. R. Co., 55 Fed. 252.

159 Etting v. Bank of U. S., 11 Wheat. 59, 75, 6 L. ed. 419, 422.

160 Campbell v. Haberhill, 155 U. S. 610, 612, 39 L. ed. 280, 281.

161 Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266; Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740.

§ 480. 1 Chaffee & Co. v. U. S., 18 Wall. 516, 21 L. ed. 908; Sawin v. Kenney, 93 U. S. 289, 23 L. ed. 926; Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596; Insurance Co. v. Boykin, 12 Wall. 433, 20 L. ed. 442; Chils v. Gronlund, 41 Fed. 505.

2 Chils v. Gronlund, 41 Fed. 505.

3 Insurance Co. v. Boykin, 12 Wall. 433, 20 L. ed. 442. But see Lovejoy v. Murray, 3 Wall. 1, 11, 18 L. ed. 129, 132.

It has been held that, in a joint action against two or more railroad companies to recover a penalty for the violation of the safety appliance act,[4] there may be a verdict and judgment in accordance with the proofs, against all or any of the defendants.[5] When separate judgments are entered against several who are jointly liable, there can be but one collection of the damages awarded; but there may be a collection of costs from each defendant.[6]

A judgment in favor of one or more joint contractors has been held no bar to a suit against another, who was neither served with process nor appeared in the action in which the judgment was rendered.[7]

Where the winner refuses to enter judgment, the unsuccessful party may do so in order that it may be reviewed by writ of error.[8]

At least, in the absence, of a State statute or rule of court upon the subject, it seems that judgment cannot be entered by the judgment creditor, subsequent to the trial term,[9] unless it is entered *nunc pro tunc*.[10] But where a motion for judgment has been granted during vacation a judgment may be entered at the ensuing term,[11] a court rule providing, where there is a failure to enter a judgment on a verdict it shall be considered as entered upon the last day of the term, applies only to a verdict which is sufficient to support a judgment.

The Federal Courts cannot follow a State statute which authorizes the entry of judgment upon the evidence *non obstante veredicto*.[12]

A court rule providing that, where there is a failure to enter judgment on a verdict, it shall be considered as entered upon the last day of the term, applies only to a verdict which is sufficient to support a judgment.[13]

4 Act of March 2, 1893, ch. 196, 27 St. at L. 531.

5 U. S. v. Chicago, P. & St. L. Ry. Co., 143 Fed. 353.

6 U. S. v. New York Cent. & H. R. R. Co., 221 Fed. 1000.

7 Larison v. Hager, 44 Fed. 49.

8 *Re* Watts, C. C. A., 214 Fed. 80.

9 Pressed Steel Car Co. v. Steel Car Forge Co., C. C. A., 149 Fed. 182.

10 See *infra*, § 481.

11 Knotts v. Virginia-Carolina Chemical Co., C. C. A., 204 Fed. 926.

12 Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 57 L. ed. —.

13 Pressed Steel Car Co. v. Steel Car Forge Co., C. C. A., 149 Fed. 182.

Where a plaintiff has recovered a verdict for more than the amount sufficient to warrant a review by writ of error, he may by leave of the court file before judgment a *remittitur* of part of such verdict and enter judgment for an amount less than that required for a review by writ of error.[14] In such a case, no writ of error will issue to the judgment where the jurisdiction of the court of review depends upon the matter in dispute.[15] After judgment a plaintiff cannot, by a release of part of the judgment, deprive his adversary of the right to a writ of error,[16] except by special leave of the court, which may allow him to file a *remittitur nunc pro tunc*, and amend the judgment accordingly, before a writ of error has been allowed.[17]

A judgment may be entered for the recovery of a specified amount "with costs to be taxed,"[18] or a specified amount as damages, together with costs, leaving a blank space into which the costs are to be written by the clerk.[19]

An entry in the "minute book" is not judgment.[20] An en-

14 Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540; Alabama Gold L. Ins. Co. v. Nichols, 109 U. S. 232, 27 L. ed. 915; First Nat. Bank v. Redick, 110 U. S. 224, 28 L. ed. 124; Pacific Exp. Co. v. Malin, 132 U. S. 531, 33 L. ed. 450.

15 Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540; Alabama Gold L. Ins. Co. v. Nichols, 109 U. S. 232, 27 L. ed. 915; First Nat. Bank v. Redick, 110 U. S. 224, 28 L. ed. 124; Pac. Express Co. v. Malin, 132 U. S. 531, 33 L. ed. 450.

An entry in the clerk's minutes that the plaintiff consented to the reduction of a verdict is sufficient evidence thereof; and in such a case, after the reduced amount has been paid and satisfaction of the judgment given, the court will not set aside the transaction on the ground that it had improperly compelled the plaintiff to consent as a condition of a denial of the motion to set the verdict aside as excessive. Lewis v. Wilson, 151 U. S. 551, 38 L. ed. 267. Where the plaintiff had sued for the benefit of others besides herself, it was held that so much of a *remittitur* filed by her as affected the others' share in the verdict was absolutely void. Southern Pac. Co. v. Tomlinson, 163 U. S. 369, 41 L. ed. 193. An omission of allegations of citizenship essential to the jurisdiction cannot be cured by their insertion in a *remittitur*. Denny v. Pironi, 141 U. S. 121, 35 L. ed. 657.

16 N. Y. El. R. Co. v. Fifth Nat. Bank, 118 U. S. 608, 30 L. ed. 359.

17 Pacific Exp. Co. v. Malin, 132 U. S. 531, 33 L. ed. 450.

18 Prescott & Arizona Central R. Co. v. Atchison, T. & S. F. R. Co., C. C. A., 84 Fed. 213.

19 Sizer v. Many, 16 How. 98, 14 L. ed. 861, *supra*, § 423.

20 Denny v. Giles, C. C. A., 250 Fed. 987.

try in the docket may be treated as a judgment.[21] But it is the better practice to enter a formal judgment [22] and two separate documents filed in different county clerk's offices in the same case cannot be pieced together and treated as a judgment.[23]

It has been held that, where the plaintiff's pleading in ejectment describes the land as all of a certain tract, except portions thereof embraced in prior grants and patents from the State, the judgment must accurately describe the parts excluded;[24] and that a judgment for the deportation of a Chinese, which recited that he was a laborer, a subject of the Emperor of China, not registered as required by the acts of Congress upon this subject, that he did not belong to one of the classes excepted by said acts from such registration, and was lawfully within the United States; was not objectionable for failure to state sufficient facts to sustain it.[25]

At common law a judgment does not carry interest as a matter of right,[26] whether interest is recoverable depends upon the nature of the judgment when by its terms it so recites,[27] or when it belongs to a class of judgments upon which a statute awards interest.[28]

The Revised Statutes provide: "interest shall be allowed on all judgments in civil causes recovered in a Circuit court."[29]

It has been said that judgment allowed by statute merely is not contractual, but a penalty or liquidated damages.[30]

A judgment against a collector of internal revenue for taxes illegally collected carries interest.[31]

21 Holford v. James, 136 Fed. 533; Smith v. Smith, C. C. A., 247 Fed. 461; S. M. Hamilton Coal Co. v. Watts, C. C. A., 232 Fed. 832; but see U. S. v. Sixty-five Cases of Glove Leather, 254 Fed. 211, *supra*, § 186k.

22 Oklahoma City v. McMaster, 196 U. S. 529, 532, 533, 49 L. ed. 587; Sabine Hardwood Co. v. West Lumber Co. et al. 238 Fed. 611.

23 Oklahoma City v. McMaster, 196 U. S. 529, 532, 533, 49 L. ed. 587.

24 Green v. Davis, C. C. A., 156 Fed. 352.

25 Lee Won Jeong v. U. S., C. C. A., 145 Fed. 512.

26 U. S. v. Jacob Schmidt Brewing Co., 254 Fed. 714.

27 Ibid.

28 Ibid.

29 U. S. R. S., § 1605.

30 Missouri & Arkansas Lumber & Mining Co. v. Greenwood District, 249 U. S. 170, 173.

31 N. Y. Mail & Newspaper Transp. Co. v. Anderson, C. C. A., 2 Ct. 74 Fed. 590.

A judgment in favor of the United States for taxes carries interest from the date when they fell due.[32]

A judgment for a fine imposed for the commission of a crime does not carry interest.[33]

Originally, by the old common law, the record of an action at common law consisted only of the process, pleadings, verdict and judgment.[34] The statutes of a number of States require interlocutory orders to be incorporated in the record. To what extent they should be followed by the Federal courts has not yet been decided.[35]

The Federal courts should follow the State practice in recording judgments.[36]

§ 480a. Lien and docket of judgments. By the revised statutes: "Judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon." [1]

This section does not apply to judgments in favor of the United States.[2] Consequently, the government need not, and cannot sue to enforce such a judgment by the sale of lands to which the judgment debtor has the legal title, although the judgment by the State law would have lost its lien since it can be enforced by a *fieri facias* or execution.[3]

32 Billings v. U. S., 232 U. S. 261.

33 U. S. v. Jacob Schmidt Brewing Co., 254 Fed. 715.

34 Cassatt v. Mitchell Coal & Coke Co., C. C. A., 10 L.R.A. (N.S.) 99, 150 Fed. 32, 43; Brown v. Warden, 44 N. J. Law, 177.

35 Cassatt v. Mitchell Coal & Coke Co., C. C. A., 10 L.R.A. (N.S.) 99, 150 Fed. 32, 43; reversed for want of jurisdiction. The Federal courts have conformed to the procedure prescribed by Act of Pa. April 22, 1905, P. L. 286, giving a party who has requested binding instructions which have been refused, the right to move to have all the evidence taken on the trial certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* on the whole record, and thereunder the Federal court may order that the evidence taken by an official stenographer be certified and filed as part of the record. Cornette v. Baltimore & O. R. Co., C. C. A., 195 Fed. 59. But see Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

36 Morrison v. Bernards Tp., 35 Fed. 400, 25 St. at L. 357.

§ 480a. 1 U. S. R. S., § 967. See Sellers v. Corwin, 5 Ohio, 398, 24 Am. Dec. 301.

2 U. S. v. Minor, 243 Fed. 953.

3 Ibid.

A recent statute provides as follows: "Judgments and decrees rendered in a Circuit or District Court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: *Provided,* That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State." "The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public."[4] "Congress has repealed a clause providing that this does not require the docket of such a judgment or decree, or the filing

[4] 25 St. at L. 357, as amended by 37 St. at L. 311. Congress could not make it obligatory on the State clerks to docket and enter a judgment of a Federal court on their records. But it was entirely competent for the State to require her clerks to perform this service, and the proviso in § 1 of the act declares, in legal effect, that when the laws of a State provide for docketing in her clerks offices, or other offices, the judgments of Federal courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a Federal court in that State shall be the same as that of a judgment in the State court. Where the laws of a State provide for docketing the judgments of its own courts in any county in the State, but do not make a like provision as to the judgments of the Federal court, the act of Congress is not operative; and in such States the lien of a judgment of a Federal court continues to be co-extensive with its territorial jurisdiction. The law of this State conforms exactly to the requirements of the act of Congress, and makes it operative in this State." Dartmouth Sav. Bank v. Bates et al., 44 Fed. 546, per Caldwell, J. See also Cooke v. Avery,

of a transcript thereof, in any State office within the same county or the same parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish."[5] The clerk cannot charge a fee for allowing an individual or a corporation to inspect these indices or records.[6]

§ 481. Correction of judgments by courts that rendered them. In the correction, amendment, and vacation of their own judgments, the Federal courts act independently of the law regulating the State courts.[1] "The question relates to the power of the courts and not to the mode of procedure."[2] It has been said that, in a removed case, they have the powers vested in the State court.[3]

At the term at which it is entered, a judgment may, for cause shown, be set aside, modified or amended, by the court where it was entered.[4] A party may be relieved from the consequences of a default in pleading caused by mistake, surprise or excusable neglect.[5] A criminal sentence may be modified at the same term.[6]

After the term has expired, unless a motion for the relief was made or noticed during that term,[7] a judgment of which

147 U. S. 375, 37 L. ed. 209.

5 37 St. at L. 311.

6 *Re* Chambers, 44 Fed. 786.

§ 481. 1 Bronson v. Schulten, 104 U. S. 410, 417, 26 L. ed. 797, 799; U. S. v. Mayer, 235 U. S. 55; O'Connor v. O'Connor, C. C. A., 142 Fed. 449; Wellman v. Bethea, 213 Fed. 367; *contra*, Travelers' Protective Ass'n v. Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269, 176; Virginia T. & C. Steel & Iron Co. v. Harris, C. C. A., 151 Fed. 428.

2 Bronson v. Schulten, 104 U. S. 410, 417, 26 L. ed. 797, 799, per Miller, J.; *Ex parte* Casey, 18 Fed. 86.

3 Cady v. Associated Colonies, 119 Fed. 420. *Contra*, Bronson v. Schulten, 104 U. S. 410, 417, 26 L. ed. 797, 799.

4 Bronson v. Schulten, 104 U. S. 410, 415, 26 L. ed. 797, 799.

5 Kinney v. Beaver, 140 Fed. 792. See *supra*, § 172; Howie Mining Co. v. McGary, 256 Fed. 38; *Cf.* Grant v. National Bank of Auburn, 221 Fed. 1007. For a case where such a motion was denied for lack of diligence. Keeler Bros. v. Yellowstone Valley Nat. Bank, 235 Fed. 270.

6 *Re* Graves, 117 Fed. 798; *Cf. Re* Morse, 117 Fed. 763; *infra*, § 532.

7 Amy v. Watertown, 130 U. S.

the court had jurisdiction cannot be vacated, and no alteration or correction can be made therein except by writ of error, and in that class of cases in which the writ of error *coram nobis* was issued in the old English practice.[8] It has been held that this cannot be done, although authorized by a State statute,[9] nor when the attorneys have stipulated that the judgment should abide the event of a writ of error in another suit.[10] The only remedy by the party aggrieved is in equity.[11] The consent of the parties is not sufficient to give the court jurisdiction to grant such relief.[12] This rule applies to an order dismissing a complaint for failure to prosecute which contains a direction for the entry of judgment accordingly with costs,[13] but not, it has been held, to a docket entry of dismissal made by the clerk in obedience to a general order applicable to all cases in which no action had been taken for two years.[14]

301, 313, 32 L. ed. 946, 950; Bronson v. Schulten, 104 U. S. 410, 415, 416, 26 L. ed. 797, 799; Kleever v. Seawall, 65 Fed. 373; Levy v. Caledonian. Ins. Co., 226 Fed. 336. See U. S. R. S., § 987.

8 Bronson v. Schulten, 104 U. S. 410, 415, 416, 26 L. ed. 797, 799; Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013; Hickman v. Fort Scott, 141 U. S. 415, 35 L. ed. 775; Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, 609, 43 L. ed. 1103, 1105; Tubman v. Balt. & O. R. Co., 190 U. S. 38, 47 L. ed. 946; Wetmore v. Karrick, 205 U. S. 141, 51 L. ed. 745; U. S. v. Mayer, 235 U. S. 55; Hook v. Mercantile Tr. Co., 89 Fed. 410; Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., C. C. A., 76 Fed. 479, 481; U. S. v. Four Lorgnette Holders, 132 Fed. 564; O'Connor v. O'Connor, C. C. A., 142 Fed. 449; United States v. One Trunk, 155 Fed. 651; U. S. v. Taylor, 157 Fed. 718. See *supra*, §§ 443, 444. But in the District of Delaware a judgment by default was set aside upon motion at a subsequent term, where the defendant's attorney had believed that the suit was brought in the State court. Brown v. Phila. W. & B. R. Co., 9 Fed. 183.

9 Bronson v. Schulten, 104 U. S. 410, 417, 26 L. ed. 797, 799; O'Connor v. O'Connor, C. C. A., 142 Fed. 449; U. S. v. Mayer, 235 U. S. 55; Wellman v. Bethea, 213 Fed. 367; Loewe v. Union Saving Bank, 222 Fed. 342. *Contra*, Cady v. Associated Colonies, 119 Fed. 420; Virginia, T. & C. Steel & Iron Co. v. Harris, C. C. A., 151 Fed. 428.

10 Brown v. Arnold, 127 Fed. 387.

11 Hamburg-Bremen Fire Ins. Co. v. Pelzer Manuf'g Co., C. C. A., 76 Fed. 479; U. S. v. Taylor, 157 Fed. 718; Tryon v. Pennsylvania R. Co., 213 Fed. 49; *Re* National Telephone Mfg. Co., C. C. A., 230 Fed. 785; Forty Fort Coal Co. v. Kirkendall, 233 Fed. 704.

12 U. S. v. Mayer, 235 U. S. 55.

13 S. M. Hamilton Coal Co. v. Watts, 232 Fed. 832.

14 U. S. v. Sixty-Five Cases of Glove Leather, 254 Fed. 211.

It has been held that an order staying plaintiff's proceedings till he pays costs of a former suit is *res adjudicata* upon a subsequent motion, and is so far final that it cannot be set aside or modified at a subsequent term.[15]

The writ of error *coram nobis* was allowed, to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. It was limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert,* or the like; or to error in the process through default of the clerk.[16] In criminal cases which could not be reviewed by another court this writ may issue to review any error of fact or law.[17]

In practice the same end is now generally obtained by motion, supported, if the case require it, by affidavits.[18] So far did the latter mode supersede the former in the English practice, that Blackstone does not even notice this writ in his description of remedies.

A judgment may be amended on motion subsequent to the time of its entry for the purpose of correcting an error in computation, which appears upon the record.[19]

It has been held that a court has power at any time to set aside a judgment which is absolutely void, not merely voidable.[20] For example, a judgment entered in vacation without statutory authority,[21] a judgment entered by a clerk without statutory authority,[22] a judgment in a case where the court has no jurisdiction because of a lack of difference of citizenship,[23]

15 Buckles v. Chicago, M. & St. Paul Ry. Co., 53 Fed. 566.

16 1 Roll Abr. 746, 747, 749.

17 Tidd's Practice, 9th ed., 1136, 1137; Bronson v. Schulten, 104 U. S. 410, 416, 26 L. ed. 797, 799, per Miller, J.; Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013; U. S. v. Mayer, 235 U. S. 55. See Lincoln Nat. Bank v. Perry, 66 Fed. 887.

18 Pickett's Heirs v. Legerwood, 7 Pet. 144, 148, 8 L. ed. 638, 639.

19 A. J. Woodruff & Co. v. U. S., 154 Fed. 861. See *supra,* § 444.

20 U. S. v. Wallace, 46 Fed. 569, 570. See *supra,* § 444.

21 Abraham v. Levy, C. C. A., 72 Fed. 124. *Cf. supra,* § 444.

22 Rehfield v. Baltimore & O. R. Co., C. C. A., 187 Fed. 810.

23 Politz v. Wabash R. Co., 180 Fed. 950, where the Circuit Court of Appeals has subsequently held that a motion to remand should have been granted.

a judgment based upon a statute which is unconstitutional.[24]

Where a sentence has been made in excess of the power granted by statute, it may be amended *nunc pro tunc* at a subsequent term by striking out so much of the same as exceeds the court's authority.[25] It has been held that an application for the remission of a penalty is not a motion to vacate a judgment and may be granted after the term at which the judgment was entered.[26] A judgment[27] or order may be entered *nunc pro tunc* to embody a decision made at a previous term of the court even in a criminal case;[28] to correct a statement that a dismissal was "without right to further prosecute" so that it shall read "without right to further prosecute for adjudication of bankruptcy under the national bankruptcy law for any of the causes alleged in the petition herein;"[29] in a civil case to make special findings previously omitted, conformably to the opinion filed at the judgment term,[30] and to correct the record, so as to show upon what pleadings[31] or other papers[32] the case was in fact submitted. But not to correct findings made under a mistake[33] nor after a writ of error has been decided to insert in the record new findings some of which were unavoidably and others accidentally omitted.[34] In a proper case

24 U. S. v. Rothstein, C. C. A., 187 Fed. 268.

25 *Ex parte* Harlan, 180 Fed. 119. See *infra*, § 532.

26 U. S. v. Jenkins, C. C. A., 176 Fed. 672.

27 U. S. v. Chicago & A. R. Co., C. C. A., 250 Fed. 101.

28 *Re* Wight, 134 U. S. 136, 33 L. ed. 865; Supervisors v. Durant, 9 Wall. 736, 19 L. ed. 813; Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. See Hickman v. Fort Scott, 141 U. S. 415, 35 L. ed. 775.

29 Bernard v. Abel, C. C. A., 156 Fed. 649.

30 Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. See Sabine Hardwood Co. v. West Lumber Co., 238 Fed. 611; U. S. D. C., S. D. N. Y., Rule 5, extends the term for the purposes of such motions until three calendar months, beginning on the first Tuesday of the month in which the verdict is rendered or judgment or decree entered. Brown v. U. S., C. C. A., 196 Fed. 351.

31 Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 126 Fed. 552.

32 Hays v. Wagner, C. C. A., 150 Fed. 533. Such as the filing and certification as part of the record of the stenographer's minutes, when a State statute provides that they may be made part of the record. Cornette v. Baltimore & O. R. Co., C. C. A., 195 Fed. 59.

33 Mellon v. St. Louis Union Tr. Co., C. C. A., 240 Fed. 359.

34 Hickman v. Fort Scott, 141 U. S. 415, 35 L. ed. 775.

a correction or an omission may be supplemented *nunc pro tunc*, pending a writ of error.[35]

The failure of an alien to file a declaration of his intent to become a citizen cannot be cured by an amendment *nunc pro tunc*.[36]

Where, during the term, a new trial had been granted; it was held that its incidental effect was to vacate a previous judgment, and that the court at a subsequent term, by an order *nunc pro tunc*, might state such vacation.[37] When the facts are recent, it seems that an order, which is founded upon matters within the knowledge of the court, may be entered *nunc pro tunc*, without notice to the party thereby affected.[38] It has been held that, when there is no record of any sort, an order *nunc pro tunc* cannot be made.[39]

The object of an entry *nunc pro tunc* is, not to make an order now for then, but to enter now for then an order previously made.[40] When the delay in making the order was due to the failure of the attorney to draft it, and not to the fault or inadvertence of the judge or the clerk; it cannot be entered *nunc pro tunc* so as to affect intervening rights.[41]

The fact that a judge had, in chambers, expressed a willingness to make a desired order extending time, when no such order was actually made or directed in open court, does not warrant the entry of such an order *nunc pro tunc* at a succeeding term.[42] An order *nunc pro tunc* has no effect upon the statute of limitations;[43] nor can it relate back so as to make a person guilty of contempt for an act done before it was entered.[44] Where a case has been tried and is under advisement

35 U. S. v. Chicago & A. R. Co., C. C. A., 250 Fed. 101.

36 *Re* Stack, 200 Fed. 330.

37 Evans v. Freeman, 140 Fed. 419.

38 Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 126 Fed. 552. But see Wetmore v. Karrick, 205 U. S. 141, 51 L. ed. 745.

39 Gagnon v. U. S., 193 U. S. 451, 48 L. ed. 745. For a case holding that the clerk cannot enter judgment *nunc pro tunc* see Pressed Steel Car Co. v. Steel Car Forge Co., C. C. A., 149 Fed. 182.

40 Klein v. Southern Pac. Co., 140 Fed. 213; Cuebas v. Cuebas, 223 U. S. 376, 56 L. ed. 476.

41 *Re* Finks, C. C. A., 224 Fed. 92.

42 Klein v. Southern Pac. Co., 140 Fed. 213.

43 Fewlass v. Keesham, C. C. A., 88 Fed. 573, 576.

44 *Ex parte* Buskirk, C. C. A., 72 Fed. 14.

at the time of the death of a party, a decree may be entered by the court *nunc p. o tunc* as of a date before his death;[45] but not when the court had no jurisdiction when he died.[46]

An order amending or setting aside a judgment at common law which is beyond the jurisdiction of the court may be reviewed by writ of error,[47] or in a proper case by a mandamus.[48] The power of a court of error to review such an order which although erroneous was not beyond the jurisdiction of the court below is doubtful.[49]

Where neither the record, nor a bill of exceptions, showed either that a defendant excepted to an order, setting aside a judgment at the same term and amending a declaration, which provided that his plea stand to the declaration as amended, or any request by him to file a further plea; it was held that he could not object thereto upon the writ of error.[50]

§ 482. Condemnation proceedings. The Act of August 1, 1888, provides that "in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District Court of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice." "The practice, pleadings,

[45] Mitchell v. Overman, 103 U. S. 62, 26 L. ed. 369; §§ 216, 217, *supra*. Lenoir Car Works v. Trinkle, C. C. A., 228 Fed. 634.

[46] Cuebas v. Cuebas, 223 U. S. 376, 389, 56 L. ed. 476, 480.

[47] *Re* Bennett, C. C. A., 215 Fed. 673; S. M. Hamilton Coal Coke v. Watts, C. C. A., 232 Fed. 832.

[48] U. S. v. Mayer, 235 U. S. 55. See *supra*, § 457.

[49] *Re* Rochester Sanitarium & Bath Co., C. C. A., 222 Fed. 22.

[50] G. Holloway & Bro. v. White-Dunham Shoe Co., C. C. A., 10 L. R.A. (N. S.) 704, 151 Fed. 216.

forms, and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding.''[1] This act is authorized by the Constitution.[2] This statute confers no general authority for public officers to acquire land. It only gives them power to institute proceedings for condemnation, where the acquirement of the land is otherwise authorized.[3]

By the act of April 24, 1890, the Secretary of War has the right to institute proceedings for the ''condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors, for which provision has been made by law.''[4]

By the act of August 8, 1890, ''the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, That when the owner of such land or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: Provided further, That the Secretary of

§ 482. [1] Ch. 728, § 1, 25 St. at L. 357, Comp. St., § 6909. The statutory authority ''for the purchase of land * * * for the assembling, grazing and training of horses purchased for the mounted service,'' Act of Aug. 1, 1888, ch. 728, 25 St. at L. 357, Comp. St. 1901, p. 2516; empowers the Attorney General upon the application of the proper officer to institute proceedings to condemn the same, U. S. v. Beaty, 198 Fed. 284.

[2] *Re* Rugheimer, 36 Fed. 369; Kohl v. U. S., 91 U. S. 367, 23 L. ed. 449; Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. ed. 206, 207; U. S. v. Jones, 109 U. S. 513, 27 L. ed. 1015.

[3] U. S. v. Certain Lands in the Town of Narragansett, R. I., 145 Fed. 654.

[4] 25 St. at L., 94; U. S. v. Certain Lands in the Town of Narragansett, R. I., 145 Fed. 654.

War is hereby authorized to accept on behalf of the United States donations of land or rights pertaining thereto required for the above-mentioned purposes: And provided further, That nothing herein contained shall be construed to authorize an expenditure, or to involve the Government in any contract or contracts for the future payment of money, in excess of the sums appropriated therefor."[5] Proceedings to condemn lands for fortifications and other works of defense, under this statute, are properly instituted in a District Court of the United States,[6] although they may be instituted in a State court.[7]

By the act of July 2, 1917, "the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: Provided further, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above mentioned purposes: And provided further, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest

5 Ch. 797, 26 St. at L. 316; Comp. St., § 6911.

6 20 St. at L. 316; U. S. v. Engeman, 45 Fed. 546; Chappell v. U. S., C. C. A., 81 Fed. 764; Chappell v. U. S., 160 U. S. 499, 40 L. ed. 510.

7 Ibid.

therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency."[8]

By the Act of March 2, 1889, "That hereafter no plan shall be approved by the Secretary of the Treasury for any public building authorized by Congress to be erected, until after the site therefor shall have been finally selected; and he shall not authorize or approve of any plan for any such building which shall involve a greater expenditure in the completion of such building, including heating apparatus, elevators, and approaches thereto, than the amount that shall remain of the sum specified in the law authorizing the erection of such building excluding cost of site.

"That hereafter commissions shall not be paid for disbursements on account of sites for public buildings; nor on account of construction of public buildings except for moneys actually handled and paid out by disbursing agents; and payments for sites for public buildings under the control of the Treasury Department shall be made by the Treasury Department, at Washington, District of Columbia, by drafts or checks payable to the grantors of such sites or their legal representatives.

"That hereafter all legal services connected with the procurement of titles to site for public buildings, other than for life saving stations and pier-head lights, shall be rendered by United States district attorneys: Provided further, That hereafter, in the procurement of sites for such public buildings, it shall be the duty of the Attorney-General to require of the grantors in each case to furnish, free of all expenses to the Government, all requisite

[8] Ch. 35, 40 St. at L. 241. As amended April 11, 1918, ch. 51, 40 St. at L. —; Comp. St. § 6911a.

abstracts, official certifications, and evidences of title that the Attorney-General may deem necessary."[9]

A telegraph company engaged in interstate commerce has no authority to institute condemnation proceedings in a Federal court,[10] nor can it obtain such relief in a court of equity.[11]

It is doubtful whether, in the absence of express statutory authority, land used for a public purpose by a State or a subdivision thereof can be condemned by the United States.[12] In Massachusetts, a city may contest the condemnation of land used as a public park.[13] In proceedings by the United States to condemn land within the boundaries shown by a plat for fortification purposes, together with all roads, ways, and avenues, and all buildings and structures thereon, and all interests therein, the constitutional rule of just compensation entitles a municipal corporation to be compensated for physical structures and improvements which, under the laws of State, it has, by means of taxation, placed or acquired on the lands or streets taken, for the use of its inhabitants or the local public, such as water or sewer pipes, curbing, or the like, of which it is deprived by the taking of the property.[14]

The United States in proceedings to condemn land for Governmental purposes, exercises its own right of eminent domain, subject to the limitation of the Federal constitutional law, and the right to compensation and the measure of compensation may be different from that in a State condemnation proceeding concerning property which had previously been appropriated to public or municipal uses under the State laws.[15] The act of a State legislature authorizing the condemnation, by the United States, of property within the State, operates merely as a formal assent to the exercise by the United States of its own right of eminent domain, and does not entitle the United States to stand upon the local law concerning the rule of damages, where property

9 Ch. 411, § 1, 25 St. at L. 941, Comp. St., §§ 6917, 6907, 6904.

10 Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

11 Western Union Telegraph Co. v. Louisville & N. R. Co., 229 Fed. 234.

12 U. S. v. Certain Land in Town of New Castle, C. C. A., 165 Fed. 783, 788.

13 *Re* Certain Land in Lawrence, 119 Fed. 453.

14 Town of Nahant v. U. S., C. C. A., 136 Fed. 273.

15 Nahant v. U. S., C. C. A., 69 L.R.A. 723, 136 Fed. 273.

taken by the State for a second public use is connected with a prior public use of the same authorized by such State.[16] A proceeding by the United States for the condemnation of land is not a proceeding to collect an account or claim against the United States, and it has consequently been held that the statute forbidding the recovery of interest against the United States does not apply thereto.[17]

Where a condemnation proceeding in a State court arises under the Constitution or laws of the United States,[18] or is instituted in the name or for the benefit of a corporation between whom and the respondent the requisite difference of citizenship exists,[19] it may be removed to the Federal court if the matter in dispute exceeds the jurisdictional amount and the application is made at the proper stage of the proceedings.[20] A condemnation proceeding, although the necessary difference of citizenship exists between the parties interested, cannot be removed to a Federal court when it is a mere administrative proceeding before commissioners of appraisal; but when an appeal is taken to a court, and litigation is then instituted between the parties, the proceeding thereupon becomes a suit which may be removed.[21]

A conveyance of the land to a citizen of another State before the institution of condemnation proceedings but after public notice that they would be instituted had been given by publication in newspapers posting notices on the land and filing maps will not prevent a removal when there is no proof of fraud or collusion.[22]

The pendency of condemnation proceedings in a Federal court does not deprive the State court of jurisdiction over a subsequent suit, to which the United States are not parties, to try the title to the land and to the award for its condemna-

16 Nahant v. U. S., C. C. A., 69 L.R.A. 723, 136 Fed. 273.

17 U. S. v. Sargent, C. C. A., 162 Fed. 81.

18 Pacific Railroad Removal Cases, 115 U. S. 1, 29 L. ed. 319; Helena Power Transmission Co. v. Spratt, 146 Fed. 310.

19 Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, and other cases cited *infra*, § 538.

20 See *infra*, §§ 538, 543.

21 Upshur County v. Rich, 135 U. S. 467, 475, 34 L. ed. 196, 199, and authorities cited *infra*, § 537.

22 *Re* Bensel, C. C. A., 206 Fed. 369, reversed on another point. City of N. Y. v. Sage, 239 U. S. 57.

tion, in which the right of the national government to condemn is not questioned, nor the value considered.[23]

The petition should be brought in the name of the United States;[24] but if originally filed in the name of the Secretary of the Treasury it may be amended accordingly.[25] The proceeding is in substance and effect, an action at common law.[26] It is essentially a proceeding *in rem*.[27] The Constitution requires nothing more than that the owner have notice of the proceedings, and an opportunity to appear and protect his rights upon a fair hearing and payment of the value of his property as assessed by the proper tribunal.[28] The legislature can provide for notice by publication.[29] Personal notice to the owner is not required.[30] Where the statute is silent as to the notifier, he may be the party that institutes the proceedings.[31] The notice is sufficient, in the absence of statutory requirements where it contains the material facts of which the land owner is entitled to be notified and is in substantial conformity with the petition.[32] When the notice has been given the owners are bound to take cognizance of all further steps without notice.[33]

The State practice should be followed in substance; but not necessarily in all details.[34] A Territorial statute, providing that unless an award of damages made in condemnation proceedings shall be paid within two years the owner shall be entitled to recover his costs, reasonable expenses and damages,[35] does not apply to a proceeding by the United States to condemn property for a public use.[36] The New Hampshire statute providing that condemnation proceedings shall be instituted in a special tribunal does not apply to the Federal courts.[37] In the districts of New York, condemnation proceedings should follow the prac-

23 U. S. v. Eisenbeis, C. C. A., 112 Fed. 190.

24 Chappell v. U. S., 160 U. S. 499, 513, 40 L. ed. 510, 515.

25 Ibid; *Re* Rugheimer, 36 Fed. 376.

26 U. S. v. Certain Land in Town of New Castle, 165 Fed. 783.

27 *Re* Condemnation Suits, 234 Fed. 443.

28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

34 U. S. v. Certain Land in Town of New Castle, 165 Fed. 783.

35 Rev. Laws Hawaii 1905, § 505.

36 Kanakanui v. U. S., C. C. A., 244 Fed. 925.

37 U. S. v. Certain Land in Town of New Castle, 165 Fed. 783.

tice prescribed by the Code of Civil Procedure.[38] The proceeding there is not begun until the petition is filed although maps of the property to be condemned have been previously filed and notice of the proceeding given by posting and publication.[39]

It seems that the petition need not state the facts showing the necessity of the acquisition of the property, nor show that there has been an effort to acquire it by purchase, since those are not matters of form or practice.[40] The provision in the Maryland statute that the petition shall be verified by an agent of the United States is inoperative upon a proceeding presented to the court by an officer designated by an act of Congress.[41] It has been held that the constitutional provision concerning the trial by jury of actions at common law does not apply to condemnation proceedings, and that the issues of fact may be tried before commissioners if that be the State practice.[42] No issue except the question of damages need be tried before a jury.[43] If tried before a jury, the jury must be impanelled in accordance with the Federal statutes, and the trial be had before a Federal judge; not before a sheriff's jury in accordance with the State practice.[44] It has been held, that in a proceeding for the condemnation of part of a tract of land, the court should not submit to the jury the question whether the value of the part not taken was diminished by the taking, and, if so, to what extent, without testimony from witnesses shown to have special knowledge or qualifications to enable them to form an intelligent and correct judgment, and the fact that the jury viewed the premises is not in itself sufficient.[45] The land owner must be allowed the market value of his land and also the value of growing crops[46]

38 Ch. 23, XX Litte 1; *Re* Secretary of Treasury, 11 L.R.A. 275, 45 Fed. 396.

39 *Re* Bensel, C. C. A., 206 Fed. 369; reversed on another point. City of New York v. Sage, 239 U. S. 57.

40 *Re* Secretary of Treasury, 11 L.R.A. 275, 45 Fed. 396.

41 Chappell v. U. S., 160 U. S. 499, 513, 40 L. ed. 510, 515.

42 Postal Telegraph Cable Co. v. Southern Ry. Co., 122 Fed. 156; U. S. v. Beaty, 198 Fed. 284; *Cf.* Luxton v. North River Bridge Co., 147 U. S. 337, 37 L. ed. 194; *contra,* Filbin Corporation v. U. S., 266 Fed. 911 and dictor Chappelle v. U. S., 160 U. S. 499, 513, 40 L. ed. 510, 515.

43 Chappelle v. U. S., 160 U. S. 499, 514, 40 L. ed. 510, 515.

44 Chappell v. U. S., 160 U. S. 499, 513, 40 L. ed. 510, 515.

45 U. S. v. Beaty, 198 Fed. 284.

46 U. S. v. First Nat. Bank, 250 Fed. 299.

and fixtures including machinery and other property[47] necessarily destroyed by the public use. He is also entitled to the expense of removing any fixtures or other personal property which is not thus destroyed.[48] But not in addition for the removal of his business.[49] It is his duty to take care of such perishable property as is upon the premises and to minimize the damages as far as is reasonably possible.[50]

The term "market value" as applied to real property indicates fair or reasonable value which the property would have at an open market.[51] The owner is entitled to any rise in value before the taking not caused by the expectation of the event.[52] He is entitled to compensation upon the basis of the value of the land for the purposes to which it might have been applied, having regard to the existing business conditions in the community, and not simply with reference to the productiveness in the condition in which the owner saw fit to leave it;[53] but possible, probable, or imaginary uses are not to be considered.[54] In a proceeding to condemn a right of way for a line of telegraph poles along a railroad, the court allowed evidence of the rental paid for similar easements and permitted witnesses to testify as to the sum which would be reached by capitalizing such rental estimated at from 4½ to 5½ per cent of the fee value.[55]

When the Government took possession of the land before the institution of the proceedings, the owners were not allowed any increased valuation on account of the improvements thus made or proposed to be made; but the enhancement in value of lands not condemned owned by the respondents was not offset against the value of that taken.[56] The availability of land for the use for which it is condemned when it can be so used only in connection with a large amount of land owned by a group of persons is immaterial.[57]

47 *Re* Post Office Site in the Borough of the Bronx, C. C. A., 210 Fed. 832.

48 Ibid.

49 Ibid.

50 U. S. v. First Nat. Bank, 250 Fed. 299.

51 City of N. Y. v. Sage, 239 U. S. 57.

52 Ibid.

53 U. S. v. First Nat. Bank, 250 Fed. 299.

54 Ibid.

55 North American Telegraph Co. v. Northern Pac. Ry. Co., 254 Fed. 417.

56 U. S. v. First Nat. Bank, 250 Fed. 299.

57 City of N. Y. v. Sage, 239 U. S. 57; reversing C. C. A., 201 Fed.

The price paid by the condemner for land in the vicinity to be used for the same purpose is also immaterial.[58] Where land was condemned for temporary use as a camp, the owners were allowed the fair rental for its use.[59] Where the land was wild and not subject to cultivation, this was the prevailing rate of interest upon the value of the field.[60] A provision was also included in the judgment that the government should also pay for the improvements necessarily destroyed and obligate itself either to return the land in as good condition as when taken or to make compensation in the future for the injuries resulting from the military use, the court retaining jurisdiction in order to fix such future damages.[61]

The value at which the owner has previously assessed the land for taxation is competent evidence against him but not conclusive.[62] A proceeding by the United States for the condemnation of land is not a proceeding to collect an account or claim against the United States and it has consequently been held that the statute forbidding the recovery of interest against the United States does not apply thereto.[63] In Alabama the owner is allowed interest from the time of the actual taking.[64] In Massachusetts, the owner is not entitled to interest pending the proceedings, unless he prove that he has suffered loss of the use of the land by reason thereof.[65] In Minnesota, the court may allow interest on the damages assessed from the date of the commissioner's report.[66] In New York no interest is allowed, at least where the owner has had the use of the property for the time during which he makes such a claim.[67]

Where a trial was had before commissioners, a provision in the State laws, that the commissioners' report should be filed in the office of the clerk of the county was not followed,[68] but the report

369, s. c., as *Re* Bensel, 230 Fed. 932.

58 U. S. v. Beaty, 198 Fed. 284.

59 *Re* Condemnation of Lands for Military Camp, 250 Fed. 314.

60 Ibid.

61 Ibid.

62 U. S. v. First Nat. Bank, 250 Fed. 299.

63 U. S. v. Sargent, C. C. A., 162 Fed. 81.

64 U. S. v. First Nat. Bank, 250 Fed. 299.

65 Town of Higham v. U. S, C. C. A., 161 Fed. 295.

66 U. S. v. Sargent, C. C. A., 162 Fed. 81.

67 *Re* Post Office Site in Borough of Bronx, C. C. A., 210 Fed. 832.

68 Luxton v. North River Br. Co., 147 U. S. 337, 340, 37 L. ed. 194, 195.

was filed in the office of the clerk of the Federal court in which the proceedings were instituted.[69] The commissioners may testify upon the hearing of exceptions to their report.[70] Where the fairness of the commissioners is not impeached, their report should not be changed by the court except on clear evidence of error or mistake.[71] If a trial by jury is had by way of appeal from the award of the commissioners, that trial must take place in the Federal court.[72] The District Attorney may consent to an arbitration of the damages, when the State statute gives attorneys in condemnation proceedings such authority.[73] The proceedings may be discontinued at any time.[74]

Neither the Supreme Court nor the Circuit Court of Appeals nor a State court can review the proceedings by *certiorari* addressed to the District Court, although the State statute gives such right of review to a State court.[75] The proceedings can only be reviewed by writ of error[76] not by appeal.[77] No writ of error lies "until after final judgment disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error."[78] No writ of

69 Ibid, 147 U. S. 337, 341, 37 L. ed. 194, 195.

70 U. S. v. Beaty, 198 Fed. 284.

71 Ibid. Where, after the condemnation by the United States in a Federal court, of easements appurtenant to a decedent's lands, and before the award of damages the widow obtained in the State court of probate an assignment of her dower; the former court refused to award her a dower interest in the fund paid into court as damages, where the face of the decree did not show that the value of the easements was not considered by the State court in determining her dower interest; but she was required to apply to the State court for any modification of its decree, which could afford her relief in that respect if she were thereto entitled. U. S. v. Certain Lands in Town of Portsmouth, R. I., 173 Fed. 676.

72 Ibid.

73 Judson v. U. S., C. C. A., 120 Fed. 637.

74 Lawrence Ward's Island Realty Co. v. U. S., C. C. A., 209 Fed. 201; Kanakanui v. U. S., C. C. A., 244 Fed. 923. See City of Des Moines v. Des Moines Water Co., C. C. A., 230 Fed. 570.

75 Luxton v. North River Bridge Co., 147 U. S. 337, 37 L. ed. 194.

76 Luxton v. North River Bridge Co., 147 U. S. 337, 340, 37 L. ed. 194, 195; Macrum v. U. S., C. C. A., 154 Fed. 653; *infra*, § 637.

77 Ibid.

78 Luxton v. North River Bridge Co., 147 U. S. 337, 37 L. ed. 194. But see Wheeling & Belmont Br. Co. v. Wheeling Br. Co., 138 U. S. 287, 290, 34 L. ed. 967, 968.

error lies to review the order appointing the commissioners of appraisal, although that order may be reviewed on a writ of error to the final order in the proceeding.[79] It has been held that where a proceeding to condemn real estate, or an easement therein, is removed from a State, to a Federal court of the United States, and after compensation has been ascertained a writ of error is prosecuted from the judgment, any *supersedeas* obtained should be modified so that the petitioner shall have the same rights as though the proceedings had remained in the State court; and, where the State statute provides that the proposed work shall not be delayed by appellate proceedings in case the amount of compensation awarded is paid into court, the *supersedeas* in the Federal court will be modified to conform to such provision.[80]

The court has the power where the award was separated into two parts, one of which was improperly allowed to enter an order directing judgment for the other part of the award; notwithstanding a provision of the State constitution requiring such awards to be made by either a jury or commissioners.[81] Where the commissioners, under instruction from the court to which no objections were made viewed the land and based their award upon their own observation and judgment as well as on all the evidence; the court of review refused to interfere.[82]

It has been held that the parties to the proceedings may contract with the commissioners for the payment to the latter of a reasonable compensation.[83]

Provisions in the State statutes granting costs and counsel fees to the party whose land is taken have not been followed by the Federal courts;[84] and upon the dismissal of a condemnation proceeding no costs are awarded against the United States, although the State practice allows costs against the petitioner in such a case.[85] It has been held that an attorney appointed by the court to protect the interests of absent property owners

79 Luxton v. North River Bridge Co., 147 U. S. 337, 37 L. ed. 194.

80 Broadmoors Land Co. v. Curr, C. C. A., 133 Fed. 37.

81 *Re* Bensel, 230 Fed. 932.

82 Denver & R. G. R. Co. v. Mills, C. C. A., 222 Fed. 481.

83 Gloucester Water Supply Co. v. Freeman, 211 Fed. 349.

84 U. S. v. Engeman, 46 Fed. 898.

85 Carlisle v. Cooper, 64 Fed. 472. *Re* Post Office Site in Borough of the Bronx, C. C. A., 210 Fed. 832.

may recover compensation in an independent suit against the United States.[86] A stipulation pending an appeal that the award shall be then paid to the owner upon his giving security for which he receives does not relieve him of liability for costs of the appeal if he is unsuccessful.[87] The requirement of the New York statute that a municipal condemner shall furnish the owner with three printed copies of the evidence does not relieve the latter from liability for costs upon appeal for the certification, and supervision by the clerks and for printing the record in the Circuit Court of Appeals.[88]

86 Ibid., 64 Fed. 472, 476. A dictum.

87 *Re* Bensel, 230 Fed. 932.

88 Ibid.

CHAPTER XXXI.

PRACTICE IN CRIMINAL CASES.

§ 483. Sources of federal criminal law. The Constitution has given neither to Congress nor to the Courts of the United States any general criminal jurisdiction. The only specific grants to Congress upon the subject are four, as follows: to punish treason, counterfeiting, Federal securities and coins, crimes committed on the high seas and offenses against the law of nations.

The provisions upon the subject are these: "The Congress shall have Power to declare the Punishment of Treason; but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[1]

"To provide for the Punishment of counterfeiting the Securities and current Coin of the United States"[2] and "to define Piracies and Felonies committed on the high Seas[3] and Offences against the Law of Nations."[4]

The other crimes punishable by the Federal courts are acts which obstruct the exercise of powers vested in the United States or of those such as are inherent to its existence as a sovereignty; and these only when they are made criminal by Acts of Congress. Thereamongst are crimes against the postal laws,[5] the national banking laws,[6] the acts regulating interstate and international commerce laws,[7] including the white slave law,[8] and the immigration laws,[9] crimes against the liquor laws,[10] smuggling,[11] crimes against the internal revenue law,[12] against the land laws,[13] and perjury.[14]

§ 483. 1 Article III, Section 3. See *infra*, § 534.
2 Article I, Section 8. See *infra*, § 506j.
3 Article I, Section 8. See *infra*, § 525a.
4 Article I, Section 8.
5 See *infra*, §§ 506a, 506b.
6 See *infra*, § 506.
7 See *infra*, §§ 506e-506f.
8 See *infra*, § 506g.
9 See *infra*, §§ 506e-506h, 506m-506p.
10 See *infra*, § 506q.
11 See *infra*, § 506n.
12 See *infra*, §§ 506k, 506l.
13 See *infra*, § 506s.
14 See *infra*, § 506r.

Although in the early years of our existence as a nation the opinions of the bench and the bar on this subject were divided,[15] it is now firmly adjudicated, that the Federal courts have no criminal jurisdiction at common law.[16] They can punish no crimes which are not created by acts of Congress.[17] No State statute nor doctrine of the common law established by the adjudications of State tribunals, can enlarge or restrict the power of the Federal court to punish crimes,[18] although such decisions are often used as persuasive analogies[19] and are always treated with great respect.[20] Certain provisions of the State statutes have been incorporated by reference into acts of Congress so that in cases arising thereunder, the Federal criminality of the act depends upon the law of the State where it is committed. Illustrations of this are the former Federal election laws,[21] the civil rights laws,[22] and the provisions of the Criminal Code as to crimes admitted upon territory ceded by the States, or bought or otherwise acquired or received from them.[23]

Such acts of Congress are valid in so far as they adopt State statutes previously enacted.[24] Whether they may make a crime against the United States an action otherwise innocent, which is made criminal before its commission by a State statute passed after the congressional enactment is a serious question because of the doctrine expressed in the maxim *delegatus non potest delegari*.[25]

15 See Henfield's Case, U. S. C. C. Pa. D. 1793; Wharton's State Trials 49; Revara's Case, U. S. C. C. D. Pa. 1793, Ibid 90.

16 U. S. v. Worrall, 2 Dallas 384, 1 L. ed. 426; U. S. v. Hudson, 7 Cranch, 32 L. ed. 259; U. S. v. Coolidge, 1 Wheaton, 415 L. ed. 124; U. S. v. Britton, 108 U. S. 199, 206, 27 L. ed. 703; Jones v. U. S., 137 U. S. 202, 211, 34 L. ed. 691; Manchester v. Mass., 139 U. S. 240, 262, 35 L. ed. 159, 166; Oliver v. U. S., C. C. A., 230 Fed. 971; Duponceau on Jurisdiction, *supra*, § 477a.

17 Ibid.

18 Jones v. U. S., C. C. A., 162 Fed. 472.

19 Howard v. U. S., C. C. A., 75 Fed. 986, 989; Cohen v. U. S., C. C. A., 214 Fed. 23, 26; U. S. v. De Bolt, C. C. A., 253 Fed. 78.

20 Jones v. U. S., C. C. A., 162 Fed. 472.

21 U. S. R. S., § 515. *Ex parte*, Siebold, 100 U. S. 371, 25 L. ed. 717.

22 U. S. R. S., § 5509; U. S. v. Mason, 213 U. S. 115, 53 L. ed. 729.

23 *Infra*, § 483c.

24 Franklin v. U. S., 216 U. S. 559.

25 Knickerbocker v. Stewart, 253 U. S. 149.

§ 483a. Concurrent criminal jurisdiction. In certain cases, the State and Federal courts have concurrent jurisdiction to punish the commission of the same act. The Federal courts now have exclusive jurisdiction to punish crimes against the United States.[1] Before such power was made exclusive, in the opinion of the majority of the Supreme Court the States had the power to grant to their tribunals power to punish crimes against the United States.[2] At the present time, there are a number of acts which are offenses against the laws of the United States and are also crimes under the laws of the State where they are committed. Thereamongst are: the passing of counterfeit money;[3] an assault upon an officer of the United States which is a breach of the peace of a State;[4] formerly under the fugitive Slave laws, aid given to the runaways when prohibited by both a State and a Federal law;[5] keeping a house of prostitution which contains alien women who are recent immigrants;[6] but not perjury before a State officer in testimony upon a contested election to the House of Representatives of the United States.[7]

It has been said: that where an offense made a crime by an act of Congress is expressly punishable as such by a State statute,[8] and that where the same acts constitute a criminal offense against the State and against the United States[9] an acquittal[10] or conviction[11] by a court of either sovereignty does not bar a conviction and punishment by a court of the other; but that in the absence of extraordinary circumstances a double punishment should not be inflicted.[12] This apparent exception to the prohibition against double jeopardy does not apply to the

§ 483a. 1 Jud. Code, § 256, 36 St. at L. 1087.

2 Houston v. Moore, 5 Wheaton 1.

3 Fox v. State of Ohio, 5 How. 410; U. S. v. Marigold, 9 How. 560; Moore v. People, 14 How. 13, 19, 20.

4 U. S. v. Cruikshank, 92 U. S. 542, 550, 23 L. ed. 588. See U. S. v. Barnhart, 22 Fed. 285, 290.

5 Moore v. People, 14 How. 17. See also dissenting opinion of Edmonds, J., Manly v. People, 7 N. Y. 295, 303.

6 U. S. v. Palan, 167 Fed. 991.

7 Re Loney, 134 U. S. 372.

8 Houston v. Moore, 5 Wheaton 1, 35, per Johnson, J. *Contra,* Story, J., Ibid, p. 75.

9 Moore v. People, 14 How. 31, 19, 20; U. S. v. Palan, 167 Fed. 991.

10 Ibid.

11 Ibid.

12 U. S. v. Palan, 167 Fed. 991.

courts held in the Philippines.[13] An acquittal in a State court of murder is a bar to so much of an indictment in a Federal court for a criminal conspiracy as charges a commission of such murder in pursuance thereof.[14]

When the criminal jurisdiction is concurrent, ordinarily the court which first took the offender into custody has the right of way, and may maintain the custody against interference by the other;[15] but such an objection must be raised by the public prosecutor. The criminal cannot thus obtain release.[16]

§ 483b. Concurrent criminal jurisdiction in prohibition cases. The Eighteenth Amendment prohibiting the manufacture, sale, and transportation of intoxicating liquors, ordains: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This clause does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.[1] The phrase "concurrent power" does not mean joint power, nor require that legislation by Congress thereunder, to be effective, shall be approved by any of the States. Nor does it signify that the power to enforce the Amendment is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intra State affairs.[2]

Where Congress, subsequent to the adoption of the Amendment has enacted a law defining the phrase "intoxicating liquors," or has adopted some other measure for the purpose of enforcing prohibition, no subsequent State statute, upon this particular subject which is inconsistent with such act of Congress is valid.[3] Nor is such a State statute enacted prior to the adoption of the Eighteenth Amendment valid. The validity of a State statute for the enforcement of prohibition which is enacted subsequent to the Amendment at a time when no act of Congress upon the subject is in force; but which is repugnant to a subsequent act

13 Grafton v. U. S., 206 U. S. 333, 354, 51 L. ed. 1084.

14 U. S. v. Mason, 213 U. S. 115, 53 L. ed. 25.

15 Re James, 18 Fed. 852, *supra*, § 58, *infra*, § 489.

16 Beavers v. Hulbert, 198 U. S. 77, 49 L. ed. 950; *infra*, § 489.

§ 483b. 1 National Prohibition Cases, 253 U. S. 350, 387.

2 Ibid.

3 Ibid.

of Congress, may be considered as still open.[4] It has been held

[4] But see opinion Van Devanter, J., in National Prohibition Cases, 253 U. S. 350, 387.

The subject is discussed in Harvard Law Rev. for January, 1921, XXXIV, 317-319.

"Among the problems left undecided when the Supreme Court of the United States sustained the validity of the Eighteenth Amendment (Rhode Island v. Palmer, 40 Sup. Ct. Rep., 486, 1920) and with it the constitutionality of the National Prohibition Act (Volstead Act, 41 Stat., at L., 305) was the construction to be given two phrases of section 2 of the amendment: First, what is meant by the 'concurrent power' (the second section of the Eighteenth Amendment reads as follows: 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation') of the Federal and State Governments to enforce the amendment; and, second, what is 'appropriate' (see note 3, supra) State legislation for its enforcement? The court did declare that the concurrent power is not joint, nor is it such a division as exists between interstate and intrastate commerce (Rhode Island v. Palmer, supra, eighth conclusion). But it left its conception thereof to be gathered from the concurring opinion of the chief justice (ibid., 488), which intimated that Congress had the duty of enacting legislation which should be operative throughout the country, but that each State could act as it saw fit within its jurisdiction as long as such acts contemplated enforcement of the amendment and were consistent with the Federal statutes. Such will be assumed to be the meaning and effect of the phrase 'concurrent power' (see 33 Harv. L. Rev., 968).

"From this it would follow that appropriate State legislation for the enforcement of the amendment must be such as coincides, or at least does not conflict, with the Federal statute, *i. e.*, the Volstead Act. But for practical purposes the real question, which is raised in the two recent cases of Commonwealth v. Nickerson (128 N. E., 273, 1920; see recent cases, p. 328, *infra*) and Ex parte Ramsey (265 Fed. 950, 1920; see recent cases, p. 328, *infra*), is whether State legislation enacted prior to the ratification of the amendment can come within the definition of 'appropriate,' and, if so, how far such statutes remain in force. To determine this we must look at the nature of the States' power under the amendment.

"Before the Eighteenth Amendment became a part of the Constitution the regulation of intoxicating liquors, apart from questions of interstate commerce, was exclusively exercised by the States under their general police power (Mugler v. Kansas, 123 U. S., 623, 1887; see License Cases, 5 How., U. S. 504, 1847; In re Rahrer, 140 U. S. 545, 1891). The amendment, as qualified by section 2, affected this power in one of two ways: it operated either (I) as a cession of all their power by the States and a recession of a restricted power; or (II) as a cession of most of their previous power with a reservation of a restricted power.

"I. If it had not been for the ex-

press power conferred upon the States by section 2, the amendment would clearly be enforcible by Congress alone (see concurring opinion of White, C.J., in Rhode Island v. Palmer, *supra*, 490). No State prior to the ratification of this amendment had the right to enforce such a constitutional provision. Under this interpretation, therefore, the effect of section 2 was to give the States a power they did not have before (ibid, 490, White, C.J., said: 'I assume that it will not be denied that the effect of the grant was to confer upon both Congress and the States power to do things which otherwise there would be no right to do.') But if the complete power to regulate liquor passed over to Congress, then the validity of all legislation enacted under it lapsed with it; and though in a twinkling a new power was revested in the States under which portions of the prior existing legislation might have been held good, yet this new power cannot revive defunct statutes. The Supreme Court has held that where a State Liquor Law was invalid in so far as it affected imported liquors, when Congress expressly allowed such liquors to fall under State regulation, the State law became operative without re-enactment (In re Rahrer, *supra*.) But in that case no new power was granted, and the court expressly excluded the present situation with the statement that 'this is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress' (ibid, 565). It is therefore hard to see how this theory can have any other effect than to make all State legislation prior to the Eighteenth Amendment void. But the theory does not seem tenable. To say that the States in the same breath granted away a complete power and then regranted a part of it back to themselves is to talk in circles. Yet in no other way could this power be regranted; Congress certainly could not grant a constitutional power to the States under our theory of government.

"II. The Federal Government is one of delegated powers (see United States v. Cruikshank, 92 U. S. 542, 551, 1875). 'The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people' (United States Constitution, Tenth Amendment). True, the States never had the right to enforce the amendment before. But they had the power to prohibit the manufacture, sale, &c, of intoxicating liquors; in other words, to do exactly what the amendment orders shall be done (see note 10, *supra*). In ratifying the amendment they agreed to exercise this power exclusively for the enforcement of prohibition. If this be so, it would follow that the State laws in existence prior to the ratification of the Eighteenth Amendment were based upon a power which still exists, and are consequently valid if they do not conflict with the purpose of section 1 of the amendment or the Volstead Act (Rhode

in Massachusetts,[5] New Jersey,[6] New York,[7] and seems to be the

Island v. Palmer, *supra*, sixth conclusion).

"Assuming the second interpretation to be correct, the question still remains whether prior State legislation which partially conflicts with the amendment must be discarded altogether or only *pro tanto*. It is a well-established principle that a statute may be unconstitutional in part and yet valid as to the remainder, if the valid and void parts are separable (Presser v. Illinois, 116 U. S. 252, 1885; Fisher v. McGirr, 1 Gray Mass. 1, 1854; August Busch & Co. v. Webb, 122 Fed. 655, 1903). But if to give effect to so much as is valid would bring about a result not desired or contemplated by the Legislature, the whole law will be held unconstitutional (for cases where the unconstitutionality of part of a statute affected the validity of the whole see Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 1902; Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 1895; Commonwealth v. Hana, 195 Mass. 262, 1907; Warren v. Mayor and Aldermen of Charlestown, 2 Gray Mass. 84, 1854; for cases where the court held that the valid part of a statute was enforcible apart from the void part see Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 1903; Lawton v. Steele, 119 N. Y. 226, 1890; State v. Davis, 72 N. J. L. 345, 1905). This rule applies where the legislation is enacted in the light of an existing constitutional provision. But where, as in the present case, legislation perfectly valid when passed is affected by a subsequent change in the organic law, the situation is governed by the further principle that an addition to the fundamental law only repeals such prior constitutional provisions and statutes as are in conflict with it, in whole or in part (Griebel v. State, 111 Ind. 369, 12 N. E. 700, 1887; State v. Schluer, 59 Ore. 18, 115 Pac. 1057, 1911; Kansas City, Fort Scott & Memphis R. Co. v. Thornton, 152 Mo. 570, 1899; in Trustees of University of North Carolina v. McIver, 72 N. C. 76, 89, 1875, Pearson, C.J., concurring, aptly compared the effect of a constitutional amendment on prior constitutional provisions and existing statutes to the effect of a codicil on a will or of a second deed on the original one). On this basis all such portions of prior existing State legislation as contemplate the enforcement of prohibition remain in force and are appropriate legislation under the terms of the amendment (for cases concerning the effect of the amendment and Volstead Act on prior Federal legislation, see United States v. Windham, 264 Fed. 376, 1920; United States v. Sohm, 265 Fed. 910, 1920; United States v. One Essex Touring Automobile, 266 Fed. 138, 1920; United States v. Turner, 266 Fed. 248, 1920)."—(Note, 34 Harv. Law Rev., 317-319, January, 1921.)

5 Commonwealth v. Nickerson (Mass. 1920), 128 N. E. 273, U. S. 350, 387.

6 Gummere, C.J., charged to the grand jury A. D. 1920, in which the other judges of the State of New Jersey concurred quoted in People's Foley, *infra*.

7 People v. Foley, N. Y. Sup. Ct., Sp. Tm., per Tuthill, J., N. Y. L. J. Nov. 24, 1920.

rule in Vermont;[8] that the State laws punishing unlicensed sale of intoxicating liquors which were passed before the adoption of the Amendment, so far as they are not inconsistent with the act of Congress for the enforcement of prohibition,[9] are still in force.

It has been held that a State statute passed subsequent to the Amendment which penalizes an offense previously punished by Congress more severely than does the Federal statute, may still be enforced[10] provided that the offender is not arrested under Federal process or that other proceedings in the Federal Courts are not instituted against him before the initiation of the proceedings in a State Court.[11]

If the objection of prior custody is not raised by the Federal authorities, it is doubtful whether it will be sustained.[12]

If in the case of such a State statute, the offender should be taken into the custody of the State authorities, before the institution of a proceeding in the Federal Court against him: it might well be held that the State could obtain his release from the Federal arrest for the same offense.[13] The effect of an adjudication by a State Court upon Federal proceedings to punish the same transaction has not yet been decided.[14]

It is surprising that no State statute defining the meaning of the phrase "intoxicating liquors" was passed before the act of Congress of October 28, 1919.[15] Had there been, it would have been a very serious question whether the State statute did not, within the jurisdiction of the State, take precedence of the act of Congress.[16]

§ 483c. Criminal jurisdiction over land ceded by the states or reserved, purchased, or otherwise acquired from them. By the Criminal Code, whoever, within the territorial limits of any State, organized territory, or district, but within or upon any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent

8 *Ex parte* Guerra (Vt., May 8th, 1920), 110 Atl. 224.

9 Act of October 28th, 1919, 41 St. at L. 305.

10 *Ex parte* Ramsey, 265 Fed. 950.

11 Ibid.

12 *Supra*, § 483a, *infra*, § 489.

13 See *supra*, §§ 52, 58; *infra*, § 489.

14 See *infra*, § 520.

15 Act of October 28th, 1919, ch. 7, 41 St. at L. 305; *supra*, § 52.

16 *Supra*, §§ 52-59.

of the Legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building, does or omits the doing of any act or thing which is not made penal by any act of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on March 4, 1909,[1] would be penal, is deemed, upon a prosecution in the Federal court of the district within which such place is situated, guilty of a like offense and be subject to a like punishment; "and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District."[2]

This is limited to the criminal laws in force at the time of its enactment,[3] or at least at the time when it took effect.[4] It does not authorize the States to change the criminal laws in force in

§ 483c. [1] Criminal Code, § 289. Act of March 4, 1909, 35 St. at L., 1145, § 289, Comp. St., § 10462. The phrase is "now in force." Ibid. The act took effect January 1, 1910. Criminal Code, § 345, 35 St. at L. 1159, Comp. St., § 10519. The act might be held to incorporate by reference the State laws existing when it took effect.

[2] Criminal Code, §§ 289, 272, Act of March 4, 1909, 35 St. at L. 1145, 1142, Comp. St., §§ 10462, 10445. This section re-enacted the Act of March 3, 1825, ch. 65, 4 St. at L. 115; Act of April 5, 1866, ch. 24, 14 St. at L. 13, U. S. R. S., § 5391; Act of July 7, 1898, ch. 576, 30 St. at L. 717. The original statute was drawn by Judge Story and Daniel Webster, Story's Life, I, pp. 293, 338.

Daniel Webster said: "As to the third section, it must be obvious that, where the jurisdiction of a small place, containing only a few hundreds of people (a navy yard, for instance), was ceded to the United States, some provision was required for the punishment of offenses; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the State in which the yard, etc., might be. He was persuaded that the people would not view it as any hardship that the great class of minor offenses should continue to be punished in the same manner as they had been before the cession."

[3] U. S. v. Paul, 6 Peters 141, 143, 8 L. ed. 348, 349; Franklin v. U. S., 216 U. S. 559, 54 L. ed. 615, affirming 174 Fed. 163.

[4] See note 2 *supra*.

such places.[5] If it did so, it might have been attacked as unconstitutional.[6]

The statute does not apply to places of which the United States is the proprietor and which the Government uses for military purposes or otherwise; but which were not reserved when the State within which they are situated was admitted and have not been ceded by the State or purchased or otherwise acquired from it.[7] Nor to a homestead acquired by an Indian under the General Homestead Law.[8] A statute authorizing the Governor, upon application, to cede the exclusive jurisdiction, is a valid consent.[9]

The statute does not authorize an indictment for a circulation of a libel, published elsewhere within the State, where the State law forbids more than a single prosecution and conviction for different publications of the same libel.[10] It does not incorporate into the Federal law the general statute of limitations of the State relating to crimes, but a prosecution thereunder is governed as to limitation by the Federal statute upon the subject.[11]

An indictment is sufficiently specific in this respect, when it charges the commission of an offense on a parcel of land described by metes and bounds acquired with the consent of the State by the United States and within the exclusive jurisdiction of the United States.[12] In such a case the court will take judicial notice of any State or Federal statutes which vests the United States with exclusive jurisdiction.[13] Oral evidence may be admitted upon the subject.[14]

5 Franklin v. U. S., 216 U. S. 559, 569.

6 Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

7 U. S. v. Bateman, 34 Fed. 86, the *presidio* military reservations in San Francisco, California; U. S. v. Tully, 140 Fed. 899, part of Ft. Missoula in Montana, People v. Godfrey, 17 Johnson (N. Y.) 225, Fort Niagara, in New York. See *supra*, § 66a; U. S. v. Paul, 6 Peters 141, 143. West Point in New York where the military academy is situated is within such a Reservation and thus subject to Federal jurisdiction. Franklin v. U. S., 216 U. S. 559. So are Fort Adams, in Newport Harbor, Rhode Island, U. S. v. Cornell, 2 Mason 60; and Lock No. 3 on Green River, Ohio County, Kentucky. U. S. v. Tucker, 122 Fed. 518. As to Soldiers' Homes, *Re* Kelly, 71 Fed. 545; *Re* O'Connor, 37 Wisc. 379; *supra*, § 66a.

8 U. S. v. Lewis, 253 Fed. 469.

9 Brown v. U. S., 257 Fed. 46.

10 U. S. v. Press Pub. Co., 219 U. S. 1, 55 L. ed. 65.

11 U. S. v. Andem. 158 Fed. 996. See § 180, *supra*.

12 Brown v. U. S., 257 Fed. 46.

13 Ibid.

14 Ibid.

§ 483d. Jurisdiction over criminal cases arising in the land or naval forces. The Fifth Amendment excepts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of "a presentment or indictment of a Grand Jury" before a person shall be "held to answer for a capital, or otherwise infamous crime." The Sixth Amendment does not apply to such cases.[1]

By the Articles of War adopted June 4, 1920:

"Article 8. The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: Provided, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

"(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the

§ 483d. [1] Ex parte Milligan, 4 Wall. 2, 123, 18 L. ed. 281.

armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles:

"(e) All persons under sentence adjudged by courts-martial:

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia."[2]

A superintendent quartermaster corps in service on the Mexican Border was subject to trial before a court martial.[3] After the cessation of hostilities and the discontinuance of the action of the Draft Board, it was held that a man registered and accepted under the Selective Draft Act who had been informed that he would be notified by mail when to report for military duty, could not be tried by a court martial for desertion, and was entitled to have such a charge against him tried before a civil tribunal, when he never received such a notice, although one was mailed to him, and he had been indicted for, and was under bail to meet the charge of a violation to the statute.[4] He was discharged by means of the writ of *habeas corpus* from the custody of a deputy marshal who was holding him for a trial before a court martial upon the ground that he was entitled to have a trial before a civil tribunal.[5]

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed."[6]

2 Ch. 227, sub Chapter II, § 1, Comp. St., § 2308a.

3 *Ex parte* Jochen, 257 Fed. 200.

4 Farley v. Ratliff, C. C. A., 267 Fed. 681.

5 Ibid.

6 Ch. 227, sub Chapter II, § 1, Comp. St., § 2308a.

"Article 13. Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months."[7]

"Article 14. Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.[8]

"Article 15. The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."[9]

"Article 16. Officers shall be triable only by general and special courts-martial and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank."[10]

"Article 81. Whosoever relieves or attempts to relieve the

7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.

enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct." [11]

"Article 82. Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall, on conviction thereof, suffer death." [12]

"Article 92. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." [13]

"Article 93. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct." [14]

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid. "Art. 22. Every trial judge advocate of a general or special court-marshal and every summary court-marshal shall have power to issue like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

"Art. 23. Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being

The Articles for the Government of the Navy which are contained in the Revised Statutes amongst other things provide:

hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: Provided further, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided.

"Art. 24. No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

"Art. 25. A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases.

"Art. 26. Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be

"Article 5. All persons who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge."[15]

"Article 6. If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death."[16]

"Article 23. All offenses committed by persons belonging to the Navy while on shore shall be punished in the same manner as if they had been committed at sea."[17]

A paymaster's clerk on a ship employed in the Navy in time of war is subject to court martial.[18]

Trials of civilians in cases arising in the land forces are usually by provisional courts[19] or by military commissions.[20] The power or military tribunals over civilians not attached to the army or navy has not yet been clearly delimited.[21] A spy or a man committing an act of war in civilian clothes[22] is considered

taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

"Art. 27. The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: Provided, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

"Art. 32. A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: Provided, That such punishment shall in no case exceed one month's confinement or a fine of $100, or both."

15 Article 5, Comp. St., § 2966.

16 Article 6, Comp. St., § 2967.

17 Article 23, Comp. St., § 2984.

18 Johnson v. Sayre, 158 U. S. 109.

19 The Grapeshot, 9 Wall. 129, 19 L. ed. 651; U. S. v. Walters, 268 Fed. 69.

20 *Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281.

21 See the argument on the part of the United States in *Ex parte* Milligan, 4 Wall. 2, 15, 51, 18 L. ed. 281.

22 Proceedings of a Board of General Officers, held by order of His Excellency General Washington,

to be a member of the army of the enemy and as such is subject to execution for violation of the laws of war. There are dicta in an opinion of the Supreme Court, which divided upon the subject, to the effect that so long as the civil courts are open, a civilian cannot be punished by a military court for giving aid and comfort to the enemy.[23] The subject is discussed more at length in the author's "Commentaries on the Constitution."[24]

The judgment of a court martial having jurisdiction over the accused and the offense is *res adjudicata* and is a complete defense against a prosecution for the same offense before a civil tribunal.[25]

It has been held that the record of a court martial upon which

Commander-in-chief of the Army of the United States of America, respecting Major John André, Adjutant General of the British Army, September 29, 1780. Philadelphia. Printed by Francis Bailey in Market Street, 1780; Chandler's Criminal Trials, Vol. II; American State Trials, VI, 464; Trial of John Y. Beall, as a Spy and Guerrillero by Military Commission. New York: D. Appleton and Company, 443 and 445 Broadway. 1865.

23 Beall's Trial *supra*. The Assassination of President Lincoln and the Trial of the Conspirators, David E. Herold, Mary E. Surratt, Lewis Payne, George A. Atzerodt, Edward Spangler, Samuel A. Mudd, Samuel Arnold, Michael O'Laughlin. Compiled and arranged by Ben Pitman, Recorder to the Commission. Publishers: Moore, Wilstach & Baldwin, 25 West Fourth Street, Cincinnati, New York, 60 Walker Street. 1865.

Trial of the Assassins and Conspirators for the Murder of Abraham Lincoln, and the Attempted Assassination of Vice-President Johnson and the Whole Cabinet. The most intensely interesting trial on record. Containing the evidence in full, with arguments of Counsel on both sides, and the verdict of the Military Commission. Correct likenesses and graphic history of all the assassins, conspirators, and other persons connected with their arrest and trial. Philadelphia: Barclay & Co., 602 Arch Street.

The assassination of Abraham Lincoln, Flight, Pursuit, Capture, and Punishment of the Conspirators, by Osborn H. Oldroyd, with an introduction by T. M. Harris, late Brigadier-General U. S. V., and Major-General by Brevet, a member of the Commission. Washington, D. C.; O. H. Olyroyd, MDCCCCI.

The Judicial Murder of Mary E. Surratt, by David Miller DeWitt. Baltimore: John Murphy & Co. 1895.

During the Civil War Franklin E. Smith was arrested by the military authorities in Massachusetts upon the charge of fraud in connection with a Government contract for army supplies. The proceedings were not pressed against him. He afterwards published a book in vindication of himself.

24 See also *supra* notes to § 465; U. S. v. Wolters, 268 Fed. 69.

25 Grafton v. U. S., 206 U. S. 333.

retired officers sat should show in time of war that these were employed on active duty in the discretion of the President, and that such a defect cannot be supplemented in opposition to an application for the writ of habeas corpus by proof of such employment.[26]

By a former statute officers of the Regular Army were not competent to sit on court martials to try the officers or soldiers of other forces,[27] except in certain special cases.[28] It was held that a sentence was void when rendered against a volunteer officer by a court martial composed wholly of regular officers,[29] or by one containing a regular officer whose presence was essential to a quorum.[30]

By the Sixty-second Article of War, which was in force before the war with Germany, "All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."[31] This gave the civil courts of the United States concurrent jurisdiction with the courts-martial of the crimes specified in this article, when punishable by the statutes of the United States.[32] The Articles of War enacted August 29, 1916,[33] did not divest the civil courts of this concurrent jurisdiction,[34] except in the cases of persons subject to military law who committed manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or with assault to do bodily harm.[35] As to these it was held; that

26 *Ex parte* Henkes, 267 Fed. 276.

27 Former Article of War 77, U. S. R. S., § 1342.

28 U. S. R. S., § 1342.

29 McClaughry v. Deming, 186 U. S. 49.

30 U. S. v. Brown, 206 U. S. 240.

31 U. S. R. S., § 1342.

32 Franklin v. U. S., 216 U. S. 559, 54 L. ed. 615; *Ex parte* Dunn, 250 Fed. 871.

33 39 St. at L. 650, Comp. St., § 2308a; *Ex parte* Dunn, 250 Fed. 871.

34 U. S. v. Hirsch, 254 Fed. 109. (District Court, E. D. New York. November 11, 1918.) U. S. v. Hunt, 254 Fed. 365, *supra*, §§ 461a, 464.

35 These were punishable by Article 93 of the Act of August 29, 1916, 39 St. at L. 664; U. S. v. Hunt, 254 Fed. 365, *supra*, §§ 461a, 464.

the military authorities had superior jurisdiction, which could be asserted by the commanding officer of the brigade, although the captain and major had surrendered the offending soldier to the custody of the civil authorities.[36] A statute subsequent to the Articles of War punishing all persons for an offense penalized by these articles does not deprive courts-martial of their power to punish for such an offense, persons subject to their jurisdiction.[37]

Where the civil and the military courts have concurrent jurisdiction an offender convicted by a court-martial cannot defeat its sentence because of the prior pendency of a prosecution against him in a civil court,[38] when the civil authorities have not interfered.[39]

A District Court of the United States will not interfere with the conduct of a court-martial or the enforcement of a sentence thereof unless the court-martial has exceeded its jurisdiction.[40] Proof that a defendant at the time of the commission of the offense charged was in a haze or stupor, does not deprive the court-martial of jurisdiction by raising an issue of insanity when the only plea was "not guilty."

An army officer was discharged by the writ of *habeas corpus* from imprisonment under the sentence of a court-martial for a violation of an Article of War when he had been previously sentenced to dismissal for violation of another Article upon proof of the same facts.[41]

§ 483e. Criminal practice. In General. In criminal actions, the District Courts of the United States follow the old practice at common law, except in so far as the same has been changed by Federal statute.[1] The State practice is not followed[2] except in

[36] *Ex parte* King, 246 Fed. 868.

[37] U. S. v. Barry, 260 Fed. 291.

[38] *Ex parte* Dunn, 250 Fed. 871.

[39] See *supra*, § 58, *infra*, § 489.

[40] *Ex parte* Tucker, 212 Fed. 569, *supra*, § 461g.

[41] *Ex parte* Henkes, 267 Fed. 276. See *infra*, § 520. On the general subject of interference by the writ of *habeas corpus* with the orders of court marshals, see *supra*, §§ 461g, 464; for the protection of soldiers, sailors, and officers of the Army and Navy from criminal proceedings before civil tribunals, see *supra*, § 461e.

§ 483e. [1] U. S. v. Maxwell, 3 Dill. 275; U. S. v. Reid, 12 How. 361, 13 L. ed. 1023; U. S. v. Nye, 4 Fed. 888; Erwin v. U. S., 2 L. R. A. 229, 37 Fed. 470, 488.

[2] Jones v. U. S., C. C. A., 162 Fed. 417, *supra*, § 483; U. S. v. Bopp, 232 Fed. 177; U. S. v. Phelan, 250 Fed. 927.

cases such as bail,[3] the qualifications of jurors,[4] the authentication of documents, admissible as evidence [5] and otherwise, where the Federal statutes so direct.

A suit by the United States to recover a penalty for the importation of contract laborers,[6] or for the violation by a railroad company of the Safety Appliance Act [7] and of the act forbidding cattle to be kept in a car for a period longer than twenty-eight hours without unloading, are treated as actions of debt and the pleadings conform in general to the State practice.[8] So were actions to recover penalties under the Tariff Acts of March 3, 1823,[9] and of June 10, 1890.[10] A proceeding to disbar an attorney [11] and to punish for contempt [12] are not criminal prosecutions within the meaning of the Fifth and Sixth Amendments, although they are in many respects assimilated to these.[13]

The defendant may be an individual, a corporation,[14] a *quasi* corporation [15] or a joint stock company.[16] An officer on a foreign man of war is subject to the criminal jurisdiction of the Federal courts for a crime, such as smuggling [17] and violation of the White Slave Law [18] committed by him ashore; provided at least, that he is arrested on shore.[19] Criminal proceedings are initiated by a complaint,[20] an information,[21] a presentment [22] or an indictment.[23] In a few cases, they are begun by arrests without a warrant.[24]

The prosecutor in a criminal action in a Federal court for a crime against the United States is the District Attorney of

3 *Infra*, § 493.
4 *Infra*, § 508.
5 *Infra*, § 523.
6 U. S. v. Regan, 232 U. S. 37.
7 U. S. v. Atlantic Coast Line R. Co., 153 Fed. 918.
8 N. Y. C. & H. R. R. Co. v. U. S., C. C. A., 165 Fed. 833, *supra*, § 454.
9 Ch. 58, 3 St. at L. 781; Stockwell v. U. S., 13 Wall. 531.
10 Ch. 407, § 9, 26 St. at L. 135; U. S. v. Zucker, 161 U. S. 475.
11 Thatcher v. U. S., 212 Fed. 801.
12 Gompers v. U. S., 233 U. S. 604, 611.
13 Ibid. *Supra*, § 438.
14 John Gund Brewing Co. v. U. S., 204 Fed. 17; U. S. v. McAndrews & Forbes Co., 149 Fed. 823.
15 U. S. v. American Express Co., 199 Fed. 321.
16 U. S. v. Adams Express Co., 229 U. S. 381.
17 U. S. v. Thierichens, 243 Fed. 419.
18 Ibid.
19 See *supra*, §§ 94, 102a, 167.
20 *Infra*, § 485.
21 *Infra*, § 494.
22 *Infra*, § 493a.
23 *Infra*, § 495.
24 *Infra*, § 484.

the United States for the district where the case is tried.[25] The committing magistrate is usually a United States Commissioner.[26] The power of commitment and of the issue of warrants of arrest is also vested in any Justice or Judge of the United States and any Chancellor, Judge, Justice of the Peace, Mayor or other Magistrate of the State where the accused was found.[27]

§ 483f. Prosecuting officer in the Federal courts. The prosecuting officer in the Federal courts is the District Attorney of the United States for the district where the case is tried.[1] In any action which may be brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the District Attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer.[2] It is the duty of the District Attorney of the United States to appear in contempt proceedings, instituted to vindicate the authority of the national government.[3] The Federal courts will not recognize a criminal prosecution instituted before them as legal, unless it is instituted and prosecuted by the District Attorney.[4] It has been held, however, that a Federal court cannot dismiss a proceeding pending before a United States Commissioner.[5]

Where a criminal proceeding has been instituted in the State court against an officer of the United States and has been subsequently removed to a District Court of the United States, it is the duty of the State prosecutor to continue the prosecution and of the United States District Attorney to defend it.[6]

A District Attorney has no power to bind the United States

25 *Infra*, § 483e.

26 *Infra*, §§ 483f, 488-489.

27 U. S. R. S., § 1014; Bagnall v. Ableman, 4 Wisc. 163; *Ex parte* Gist, 26 Ala. 156. *Infra*, §§ 485-489.

§ 483f. 1 U. S. R. S., § 771, Comp. St., § 1296.

2 Act of March 3, 1875, ch. 130, § 8, 18 St. at L. 401, Comp. St., § 117.

3 Riggs v. Supervisors, Woolworth, 377; Durant v. Washington County, Woolworth 297, Fed. Cas. No. 4,191; Kahn C. C. A., 204 Fed. 581, *supra*, § 430a.

4 U. S. v. McAvoy, 4 Blatchf. 418; U. S. v. Doughty, 7 Blatchf. 424.

5 U. S. v. Schumann, 2 Abb. U. S. 523.

6 Delaware v. Emerson, 8 Fed. 411.

by a contract, giving immunity to an accomplice for turning State's evidence. He is aided by assistants appointed by the Attorney General.[7]

§ 483g. United States commissioners. The committing magistrate in the District Courts of the United States is usually a United States Commissioner. His functions correspond to those of a Justice of the Peace under the common law.

Originally the only committing magistrates in the case of crimes against the United States were the Justices and Judges of the Courts of the United States and the Chancellor, Judges, Justices of the Peace, Mayors or other magistrates, of the respective States where the accused was found.[1] The task was usually performed by the local Justices of the Peace.[2] In 1793, the Circuit Courts of the United States were authorized to appoint,[3] "discreet persons learned in the law" to take bail in criminal causes. Their powers were enlarged by the Act of 1817, which describes them as the "commissioners who now are or whoafter may be appointed."[4] The Act of 1842 authorized the appointment of Commissioners of the Circuit Courts with the powers of the Justices of the Peace in respect of "arresting, imprisoning or bailing" offenders against the laws of the United States.[5] The Act of May 28, 1896, abolished the offices of Commissioners of the Circuit Court and made it the duty of the District Court of each judicial district to appoint United States Commissioners who should have the same power and perform the same duties as were then imposed upon Commissioners of the Circuit Courts.[6]

"Such Commissioners shall keep a complete record of all proceedings before them in criminal cases, in a well-bound book, which record book shall be delivered to and preserved by the clerk of the District Court for such district on the death, resignation, removal, or expiration of term of the commissioners, for

7 U. S. v. Ford, 99 U. S. 594, 25 L. ed. 399; U. S. v. Lee, 4 McLean 103.

§ 483g. 1 1 St. at L. 91. See U. S. R. S., § 737, Jud. Code, § 270.

2 Sanford v. Nichols, 13 Mass. 286; U. S. v. Maresca, 266 Fed. 713.

3 1 St. at L. 334.

4 3 St. at L. 350.

5 5 St. at L. 716. See U. S. R. S., § 1014.

6 Ch. 252, § 19, 29 St. at L. 184, Comp. St., §§ 1333, 1677, quoted in full, *supra*, § 418.

which record the commissioners shall receive no compensation."[7] They should enter therein "on the day the transactions occur, the issuing of each warrant, upon whose complaint and request the same was issued, the nature of the offense, and the officer to whom the warrant was delivered for service, together with the proceedings had under said warrant; there shall be entered the names of the witnesses present and examined, and their fees, the name of the guard, if any, and his fees, together with the marshal's fees; and all of said fees, together with mileage and expenses allowed by law, and a statement of the commissioner's own fees, shall be properly entered upon the warrant when returned to the commissioner. After the close of such examination the commissioner shall forward to the Clerk of the U. S. District Court for the proper district all the papers in the case, with a proper transcript of the proceedings, in which he shall schedule the papers forwarded."[8] In Maine, it is his duty to keep a record that will show what warrants were issued and who were arrested, imprisoned, bailed or discharged.[9]

A United States commissioner is an adjunct of the court, possessing independent, though subordinate judicial powers of his own.[10] When considering under a special statute [11] the status of an alleged Chinese laborer, he is holding a court of his own which is by statute inferior to the District Court [12] and said latter court has the power to review his decision upon an appeal.[13] When taking testimony in equity or assessing damages in admiralty, he is sitting in the District Court.[14] It has been said that when sitting in extradition proceedings he is not holding any court;[15] but that when conducting a preliminary examination in criminal proceedings and acting as a committing magistrate he sits in the District Court.[16] He has no power to

7 Ibid., § 21, Comp. St., §§ 1652, 1451.

8 General Order of Court, Governing the Conduct of United States Commissioners; Roe's Criminal Procedure 25.

9 Frost v. Holland, 75 Maine 108.

10 Grin v. Shine, 187 U. S. 181, 187.

11 25 St. at L. 479, § 13, *infra*, § 694.

12 U. S. v. Maresca, 299 Fed. 713.

13 25 St. at L. 479, § 13, *infra*, § 694.

14 U. S. v. Maresca, 266 Fed. 713.

15 Ibid.

16 Ibid.

punish for contempt.[17] Where he is called upon to grant or assist in a new statutory remedy which is attacked as unconstitutional, he is bound to refer that matter to the higher court unless the constitutional question is extraordinarily plain.[18] It has been said that his proceedings cannot be reviewed by the writ of *certiorari* issued from a District Court;[19] but that where his order is final and not interlocutory, it may in a proper case be reviewed by a writ of error from the Circuit Court of Appeals.[20]

§ 483h. Criminal jurisdiction of national park commissioners. The respective District Courts of the districts where the principal National Parks are located have power to appoint commissioners as follows: In the Eastern District of Arkansas for the Hot Springs Reservation.[1] In the Northern District of California for the Yosemite National Park.[2] In the Southern District of California, one commissioner for the Sequoia National Park and the General Grant National Park.[3] In the District of Montana for the Glacier National Park.[4] In the District of Wyoming for the Yellowstone National Park.[5] These commissioners have jurisdiction to punish offenses committed by violations of the respective laws under which they were appointed, and by violations of the rules and regulations made by the Secretary of the Interior for the governments of the respective parks for which such appointments were made and for the protection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by such acts.[6] They

17 *Ex parte* Perkins, 29 Fed. 900, 910; U. S. v. Beavers, 125 Fed. 778.

18 Ibid.

19 Ibid. See *supra*, § 460.

20 U. S. v. Maresca, 266 Fed. 713, citing Veeder v. U. S., C. C. A., 252 Fed 401; *certiorari* denied, 246 U. S. 675.

§ 483h. 1 Act of April 20, 1904, ch. 1400, § 6, 33 St. at L. 188, as amended March 2, 1907, 34 St. at L. 1218, as amended March 3, 1911, 36 St. at L. 1086, Comp. St., § 5266.

2 Act of June 2, 1920, ch. —, § 7, St. at L. Comp. St., § 5216a.

3 Act of June 2, 1920, ch. —, § 8, St. at L. Comp. St., § 5208b.

4 Act of August 22, 1914, ch. 264, § 6, 398, St. at L. 700, Comp. St., § 5249f.

5 Act of May 7, 1904, ch. 72, § 5, 28 St. at L. 74, Comp. St., § 5194.

6 36 St. at L. 1086, Comp. St., § 5266; Act of June 2, 1920, ch. —, §§ 7, 8. Comp. St., §§ 5208b, 5208c, 5216a, 5216b; 398 St. at L. 700, Comp. St., § 5249f, 36 St. at L. 1086, Comp. St., § 5266; 38 St. at L. 74, Comp. St., § 5194.

have jurisdiction to punish misdemeanors committed within their respective parks.[7] They may upon sworn information issue process in the name of the United States directed to the United States Marshals of the districts to which their respective parks are attached for the arrest of any persons charged with the commission of any of the crimes of which they have jurisdiction.[8] In cases of conviction an appeal lies from a judgment of such a commissioner to the District Court of the United States for his district.[9] Such court has power to prescribe, rules, procedure and practice for the National Park Commissioner whom it appoints and for such appeals.[10] In cases arising in the Yellowstone National Park practice on such appeals, unless changed by such rules, is governed by the laws of Wyoming as to appeals in cases of misdemeanor from Justices of the Peace to the State District Courts.[11] Such commissioners have jurisdiction within their respective parks for which they were appointed to issue process for the arrest of any person charged with commission of any criminal offense over which such a commissioner has no jurisdiction, within the park boundaries; to hear the evidence introduced and if he is of the opinion of probable cause is shown for holding the person so charged for trial, to cause such person to be safely conveyed to a secure place of confinement within the jurisdiction of the District Court of the United States for such commissioner's district; to certify to such court a record of his proceedings and the testimony; and to grant bail in all cases bailable under the laws of the United States or of the State within which the lands composing his park were located at the time of the session thereto the United States.[12]

§ 484. Arrests without warrants. Without statutory authority, no one, whether officer or civilian, can arrest without a warrant a person charged or guilty of a misdemeanor which

7 Ibid.

8 34 St. at L. 1218, Comp. St., § 5268. Act of June 2, 1920, ch. —, §§ 7, 8, — St. at L. —, Comp. St., §§ 5216b, 5208c; 38 St. at L. 701, § 8, Comp. St., § 248h; 28 St. at L. 74, Comp. St., § 5194.

9 Act of June 2, 1920, ch. —, §§ 7, 8, Comp. St., §§ 5216c, 5208d.

10 Ibid.

11 28 St. at L. 74, Comp. St., § 5194.

12 34 St. at L. 1218, Comp. St., § 5267; Act of June 2, 1920, ch. —, §§ 8, 9; Comp. St., §§ 5208c, 5207k; 38 St. at L., Comp. St., § 5248f; 28 St. at L. 74, Comp. St., § 5194.

was not committed in the presence of the person making the arrest.[1] By the common law, a person guilty of a felony could be arrested by any one without a warrant.[2] The statutes of most, if not all, of the States of the Union authorize a policeman, constable or other officer of the peace to arrest any one when there is reasonable cause to believe that the latter was guilty of a felony.[3] Pending an application for extradition to a foreign country or to another State or another Federal district an arrest without a warrant will be sustained if the extradition is subsequently granted.[4]

The act of March 1, 1879, provides: "Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of said Revised Statutes."[5]

Under the former election law, it was held that a supervisor of elections might arrest without a warrant in certain cases.[6] Under the National Prohibition Law intoxicating liquor transported in violation of the law can be seized and the person in charge arrested without a warrant.[7] Neither a police officer of a State, nor a private citizen, has authority without any warrant or military order to arrest and detain a deserter from the army of the United States.[8]

It is the duty of the officer making the arrest to exhibit his

§ 484. [1] Bad Elk v. U. S., 177 U. S. 530, 44 L. ed. 874.

[2] Kurtz v. Moffit, 115 U. S. 487, 29 L. ed. 458; Pritchett v. Sullivan, C. C. A., 182 Fed. 480.

[3] Chandler v. Rutherford, 101 Fed. 774.

[4] Ker v. Illinois, 119 U. S. 436, 440, 30 L. ed. 421.

[5] 20 St. at L. 341, § 9.

[6] *Ex parte* Geissler, 9 Biss. 492.

[7] 41 St. at L. 315, Title II, § 26; U. S. ex rel. Soeder v. Crossen, 264 Fed. 459, 462.

[8] Kurtz v. Moffit, 115 U. S. 487, 29 L. ed. 458.

warrant to the prisoner when requested.[9] When the arrest is resisted, the officer is justified in using as much force as is necessary to seize and keep the person named in the warrant.[10] When the arrest is illegal, for lack of a valid warrant or other reasons, the party attacked is justified in using force to preserve his liberty.[11] So he may do if he has no knowledge or information that the person seeking to arrest him is an officer and is not chargeable with notice thereof.[12] An illegal arrest is no defense to an indictment.[13]

§ 485. The complaint in a criminal case. The Fourth Amendment ordains: that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] Although there is reasonable ground for argument, based upon the maxim, *noscitur a sociis* that this language applies to search warrants only; the preponderance of opinion is that it applies also to warrants of arrests where no search is directed.[2]

No warrant of arrest can be issued before an indictment or an information has been filed, except upon a complaint showing probable cause, which is supported by oath or affirmation.[3] It has been held that a certified copy of an information without a copy of any oath or affirmation to the facts showing probable cause for belief in the defendant's guilt, does not authorize the issue of a warrant.[4] The complaint need not, however, be sworn to before another magistrate, who issues the warrant. If verified before another magistrate, that will be sufficient.[5] But

9 O'Halloran v. McGuirk, 167 Fed. 493.

10 Starr v. U. S., 153 U. S. 614, 621, 38 L. ed. 841; Russell on Crimes, 9th Am. ed., Vol. I, 892; Bishop Criminal Law II, § 647.

11 West v. Cabell, 153 U. S. 78, 38 L. ed. 643; Bad Elk v. U. S., 177 U. S. 530, 44 L. ed. 874.

12 Starr v. U. S., 153 U. S. 614, 621, 38 L. ed. 841.

13 *Ex parte* Johnson, 167 U. S. 120, 42 L. ed. 103.

§ 485. 1 See Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 285 L. ed. 372.

2 West v. Cabell, 153 U. S. 78, 87, L. ed. 643; U. S. v. Maresca, 266 Fed. 713, citing Farrow v. Springer, 57 N. J. Law 353.

3 U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273.

4 U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273.

5 Burr's Trial, Vol. I, 97.

it has been said, that, before issuing the warrant, he should satisfy himself as to its truth beyond a reasonable doubt.[6]

It has been held that the complaint cannot be sworn to before a notary.[7] And in another case it has been suggested that where sworn to before a notary a County Clerk's certificate, that the notary was duly appointed, is required.[8] An affidavit containing no venue is insufficient.[9] Letters which purport to have been written by the accused cannot be considered without proof that they were written or authorized by him.[10] A complaint making a charge upon belief,[11] or upon information and belief, is ordinarily insufficient, unless it states facts within deponent's knowledge, upon which his belief is based.[12] It has been so held of a complaint seeking a bench warrant under the Federal Prohibition Law,[13] but a count upon information and belief will not vitiate others in the same complaint made upon personal knowledge.[14] The offense should be plainly charged.[15] A charge of conspiracy by the defendant to defraud the United States with no other specification concerning the conspiracy nor an allegation of any overt act except that to effect the object of the conspiracy the defendants on a specified date had an interview within the district was held to be insufficient.[16] Complaints for violations of the Internal Revenue Laws should be verified by a United States District Attorney, Assistant District Attorney, Collector, or Deputy Collector of Internal Revenue, or Revenue agent.[17] A complaint by a private citizen charging such a violation will not support a warrant unless first approved in writing by a United States District Attorney.[18] The ap-

6 Burr's Trial, Vol. I, 97.

7 U. S. v. Schallinger Produce Co., 230 Fed. 290.

8 U. S. v. Baumert, 179 Fed. 735.

9 Ibid.

10 Ibid.

11 U. S. v. Tureaud, 20 Fed. 621.

12 U. S. v. Sapinkow, 90 Fed. 654; Matter of a Rule of Court, 3 Woods, 502, Fed. Cas. No. 12,126.

13 U. S. v. Michalski, 265 Fed. 839.

14 Rice v. Ames, 180 U. S. 371, 45 L. ed. 577.

15 U. S. v. Ruroede, 220 Fed. 210, *infra*, § 497.

16 Ibid.

17 Act of May 28, 1896, ch. 252, § 19, 29 St. at L. 184, Comp. St., § 1677. See Appropriation Act of August 18, 1894, c. 301; 28 St. at L. 372, par. 18; 2 Suppl. U. S. R. S., § 258. See also Appropriation Act of March 3, 1893, c. 208, par. 19; 27 St. at L. 572; 2 Suppl. U. S. R. S., § 123.

18 Ibid.

proval of the District Attorney is not required to support a complaint of a violation of the Act to enforce Prohibition.[19] In all cases except those arising under the Internal Revenue Laws, any one with personal knowledge of the fact that an offense has been committed against the United States may present a complaint under oath, to the United States Commissioner or other committing magistrate possessing jurisdiction who should then authorize the issue of a warrant for the arrest of the accused.[20]

The sanction of the District Attorney of the United States is not a prerequisite to the issue of the warrant.[21] It has been held to be the proper practice for the commissioner, where practicable, before the issue of his warrant, to submit his complaint to the District Attorney for the latter's determination as to whether the ends of public justice require the prosecution;[22] and that a magistrate is not bound to investigate charges, which have been made known to the District Attorney, and which the latter has declined to prosecute.[23] A complaint of a criminal offense cannot be amended [24] except in summary proceedings under the navigation laws.[25]

§ 486. The warrant. The Revised Statutes provide that, in case of any crime against the United States, the offender may, "agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the face. And where any offender or witness is committed in

19 Instructions of Attorney General to District Attorneys, June 3, 1920.

20 U. S. v. Skinner, 2 Wheeler, Crim. Cas. (N. Y.) 232, Fed. Cas. No. 16,309; U. S. v. Mackenzie, 1 N. Y. Legal Observer, 227, Fed. Cas. No. 15,690; U. S. v. Burr, 2 Wheeler, Crim. Cas. (N. Y.) 573, Fed. Cas. No. 14,692.

21 U. S. v. Skinner, 2 Wheeler's Crim. Cas. (N. Y.) 232, Fed. Cas. No. 16,309.

22 U. S. v. Skinner, 2 Wheeler, Crim. Cas. (N. Y.) 232, Fed. Cas. No. 16,309.

23 U. S. v. Mackenzie, 1 N. Y. Legal Observer, 227, Fed. Cas. No. 15,690.

24 U. S. v. Tureaud, 20 Fed. 621.

25 *Infra*, § 528.

any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."[1]

A court may issue a bench wrrant upon probable cause, supported by oath.[2]

It has been held that allegations upon information and belief are insufficient unless the sources of the information are set forth and show probable cause.[3] In time of war or of an invasion or predatory incursion perpetrated, attempted, or threatened against the territory of the United States the President has the power to issue a warrant for the apprehension of an alien enemy.[4] A warrant of arrest, which issues from the Supreme Court must be witnessed in the name of the Chief Justice; or, when that office is vacant, of the Associate Justice next in precedence.[5] A warrant issued from a District Court must be witnessed in the name of the judge of that court; or, when that office is vacant, of the clerk thereof.[6]

The warrant must specifically name or describe the person to be arrested thereunder.[7] His surname and christian name are sufficient without his middle names or initials.[8] Where the marshal, under a warrant directing him "to arrest the body of James West," arrested Vandy M. West, whom he knew to be the person intended, but who had never been known nor called by the name of James West; it was held that he was liable to an action for false imprisonment.[9] The warrant must be returnable at some specified time or before some specified person.[10] In proceedings for extradition a judge who issues a warrant may make it returnable before a United States Com-

§ 486. [1] U. S. R. S., § 1014.

[2] U. S. v. Bollman, 1 Cranch C. C. 373, Fed. Cas. No. 14,622.

[3] U. S. v. Michalski, 265 Fed. 839.

[4] U. S. R. S., §§ 4067-4070, as amended April 16, 1918, ch. 55, 40 St. at L.; Minotto v. Bradley, 252 Fed. 600, *supra*, § 462a.

[5] U. S. R. S., § 911; *supra*, § 455.

[6] U. S. R. S., § 911; *supra*, § 455.

[7] West v. Cabell, 153 U. S. 78, 38 L. ed. 643.

[8] O'Halloran v. McQuirk, 167 Fed. 493.

[9] West v. Cabell, 153 U. S. 78, 38 L. ed. 643. But see Williams v. Tidball, 2 Arizona, 50, 8 Pac. 351.

[10] U. S. v. Almeida (U. S. C. C. N. Y.), 2 Wheeler's Crim. Cas. 576, Fed. Cas. No. 14,433.

missioner [11] or before himself, or a specified United States Commissioner.[12]

A general order of the court, prepared by the Attorney General of the United States, has been adopted by most of the District Courts, and provides, amongst other things, as follows: "That whenever a warrant shall be issued by a commissioner for the arrest of any person it shall be made returnable before him, provided he be the commissioner nearest or most convenient to the residence of the accused. If he is not, then he shall retain a copy of the affidavit on which the warrant is issued and make the warrant, accompanied by the original affidavit, returnable before a commissioner having an office and acting nearest to the residence of the accused; and such commissioner shall make the examination of the party, and discharge, commit to prison, or admit to bail, as the case may be." [13]

A warrant is probably void unless it is under seal.[14] Certainly so if the State practice requires the seal.[15]

It has been held that a warrant cannot be signed with a lead pencil.[16]

"When two or more charges are made, or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms." [17] Ordinarily a general description of the offense is sufficient.[18]

"It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest Circuit Court Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such

11 Grin v. Shine, 187 U. S. 181, 187.

12 *Re* Henrick, 5 Blatchf. 414.

13 Roe's Criminal Procedure, p. 25.

14 U. S. R. S., § 911, *supra*, § 455.

15 U. S. v. Clough, C. C. A., 55 Fed. 373.

16 U. S. v. Thompson, 2 Cranch C. C. 409, Fed. Cas. No. 16,484.

17 U. S. R. S., § 1027.

18 U. S. v. Green, 136 Fed., 618.

officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof."[19]

"Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon."[20]

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917."[21]

§ 487. Search warrants. In General. The Fourth Amendment ordains: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

This applies only to warrants in criminal proceedings,[1] in-

19 Act of Aug. 18, 1894, ch. 301, § 1, 28 St. at L. 416, Comp. St., § 1678.

20 U. S. R. S., § 1028.

21 Act of Oct. 28, 1919, Title II, § 2, 41 St. at L. 305, Comp. St., § 10138½a.

§ 487. 1 Murray v. Hoboken Land

cluding proceedings to forfeit property for fraud against the United States.[2] It has been held not to apply to proceedings for the exclusion of Chinese,[3] nor, to a search to prevent the unlawful introduction of a letter into the United States.[4]

It has been said: to forbid the compulsory production of a person's books and papers to be used against himself and his property in a penal or criminal proceeding or a proceeding for a forfeiture;[5] and to forbid *subpœna duces tecum* against a corporation charged with a crime directing the production before a Grand Jury of all its papers or substantially all its correspondence since its organization,[6] unless the organization and each act of the corporation is a violation of the law.[7] It has been said that search and seizures of private books and papers to secure evidence of criminality is forbidden by the Constitution as unreasonable.[8]

By the Revised Statutes, "It shall be lawful for any officer of the customs, including inspectors, or occasional inspectors, or of a revenue-cutter, or authorized agent of the Treasury Department, or other persons specially appointed for the purpose in writing by a collector, naval officer, or surveyor, to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end to hail and stop such vessel if under way, and to use all necessary force to compel compliance; and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel, or the merchandise, or any part thereof, on board of or imported by such vessel, is liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest, or in case of escape, or any attempt to escape, to pursue and arrest any person engaged in such breach or violation."[9] Before this statute, it was held, that a

& Improvement Co., 18 How. 272, 15 L. ed. 372, holding that it does not apply to a distress warrant.

2 Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746.

3 *Re* Chin Wah, 182 Fed. 256.

4 U. S. v. Welsh, 247 Fed. 239.

5 Ibid.

6 Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 562.

7 See U. S. v. Rice, S. D. N. Y., Oct. 1911.

8 U. S. v. Premises in Butte, Mont., 246 Fed. 185.

9 U. S. R. S., § 3059.

United States Commissioner could not issue a search warrant to seize letters, writings, and printed matter used or intended for use in the execution of a scheme to defraud in which the mails were used.[10]

"If any collector, naval officer, surveyor, or other person specially appointed by either of them, or inspector, shall have cause to suspect a concealment of any merchandise in any particular dwelling-house, store-building, or other place, they, or either of them, upon proper application on oath to any justice of the peace, or district judge of cities, police justice, or any judge of the 'District Court of the United States, or any United States Commissioner,' shall be entitled to a warrant to enter such house, store, or other place, in the day-time only, and there to search for such merchandise; and if any shall be found, to seize and secure the same for trial. And all such merchandise, upon which the duties shall not have been paid, or secured to be paid, shall be forfeited." [11] It has been held that this does not authorize the seizure of letters or other papers.[12] It has been held further that a United States Commissioner does not act judicially in issuing a warrant authorizing a customs inspector to search certain premises for merchandise fraudulently imported and to seize it if found.[13]

By the Tariff Act of October 3, 1913:

"G. Subsection 1. All persons are prohibited from importing into the United States from any foreign country any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law. All such prohibited articles and the package in which they are contained

10 U. S. v. Jones, 230 Fed. 262.

11 U. S. R. S., § 3066, as amended 22 St. at L. 49, 2 Fed. St. Ann. 743.

12 U. S. v. Maresca, 266 Fed. 713.

13 *Re* Chin K. Shue, 199 Fed. 282.

in the course of importation shall be detained by the officer of customs, and proceedings taken against the same as hereinafter prescribed, unless it appears to the satisfaction of the collector of customs that the obscene articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee: Provided, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this section.[14]

"G. Subsection. 2. Whoever, being an officer, agent, or employee of the Government of the United States, shall knowingly aid or abet any person engaged in any violation of any of the provisions of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail obscene or indecent publications or representations, or means for preventing conception or procuring abortion, or other articles of indecent or immoral use or tendency, shall be deemed guilty of a misdemeanor, and shall for every offense be punishable by a fine of not more than $5,000, or by imprisonment at hard labor for not more than ten years, or both.[15]

"G. Subsection 3. Any circuit or district judge of the United States, within the proper district, before whom complaint in writing of any violation of the two preceding sections is made, to the satisfaction of such judge, and founded on knowledge or belief, and if upon belief, setting forth the grounds of such belief, and supported by oath or affirmation of the complainant, may issue, comformably to the Constitution, a warrant directed to the marshal or any deputy marshal in the proper district, directing him to search for, seize, and take possession of any such article or thing mentioned in the two preceding sections, and to make due and immediate return thereof to the end that the same may be condemned and destroyed by proceedings, which shall be conducted in the same manner as other proceedings in the case of municipal seizure, and with the same right of appeal or writ of error." [16]

[14] Ch. 16, § 14; sub. sec. 1, 38 St. at L. 194, Comp. St., § 5299.

[15] Ibid sub. sec. 2, 38 St. at L. 195, Comp. St., § 5300.

[16] Ibid. sub. sec. 3, 38 St. at L. 195, Comp. St., § 5301.

The judges of the District Courts of the States and commissioners "may, within their respective jurisdictions, issue a search-warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises." [17]

It has been held that an entry into a plaintiff's dwelling-house through a door which was open at half past eight at night was not an unlawful execution of the warrant.[18] But, ordinarily, unless the search warrant contains a direction that it may be served by night it cannot then be used.[19]

By the Revised Statutes, "The several judges of the Circuit and District courts of the United States, and Commissioners of the Circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises." [20]

"The several judges of courts established under the laws of the United States and United States commissioners may, upon proper oath or affirmation, within their respective jurisdictions, issue a search warrant authorizing any marshal of the United States, or any other person specially mentioned in such warrant, to enter any house, store, building, boat, or other place named in such warrant, in which there shall appear probable cause for believing that the manufacture of counterfeit money, or the concealment of counterfeit money, or the manufacture or concealment of counterfeit obligations or coins of the United States or of any foreign government, or the manufacture or concealment of dies, hubs, molds, plates, or other things fitted or intended to be used for the manufacture of counterfeit money, coins, or obligations of the United States or of any foreign government, or of any bank doing business under

17 U. S. R. S., § 3462.

18 Kercheval v. Allen, C. C. A., 220 Fed. 262.

19 Act of June 15, 1917, ch. 30, Title XI, § 10, 40 St. at L. 228, Comp. St., § 10496j; U. S. v. Rykowski, 267 Fed. 866. See *infra*, § 487a.

20 U. S. R. S., § 3462, Comp. St. § 10496j.

the authority of the United States or of any State or Territory thereof, or of any bank doing business under the authority of any foreign government, or of any political division of any foreign government, is being carried on or practiced, and there search for any such counterfeit money, coins, dies, hubs, molds, plates, and other things, and for any such obligations, and if any such be found, to seize and secure the same and to make return thereof to the proper authority; and all such counterfeit money, coins, dies, hubs, molds, plates, and other things, and all such counterfeit obligations so seized shall be forfeited to the United States." [21]

In the enforcement of the internal-revenue laws, the search-warrant may be addressed to any or all officers of the United States authorized to enforce such a warrant.[22] It need not be executed by the one who swears it out.[23]

By the Revised Statutes: "The Postmaster-General may, by a letter of authorization under his hand, to be filed among the records of his Department, empower any special agent or other officer of the Post-Office Establishment to make searches for mailable matter transported in violation of law; and the agent or officer so authorized may open and search any car or vehicle passing, or having lately before passed, from any place at which there is a post-office of the United States to any other such place, or any box, package, or packet, being, or having lately before been, in such car or vehicle, or any store or house, other than a dwelling-house, used or occupied by any common carrier or transportation company, in which such box, package, or packet may be contained, whenever such agent or officer has reason to believe that mailable matter, transported contrary to law, may therein be found." [24]

21 Act of Feb. 10, 1891, c. 127, § 5, 26 Stat. 743. March 4, 1909, c. 321, § 173, 35 Stat. 1121, Comp. St., § 10343. The police court or the municipal court of the District of Columbia shall have power, upon information supported by oath or affirmation showing probable cause for believing that there exists in any place, bundle, package, or other container in the District of Columbia any plant or plant product which is infected or infested with plant pests or disease, to issue warrants for the search for and seizure of all such plants and plant products.

22 Kercheval v. Allen, C. C. A., 220 Fed. 262.

23 Ibid.

24 U. S. R. S., § 4026, Comp. St., § 7552.

"Any special agent of the Post-Office Department, when instructed by the Postmaster-General to make examinations and seizures, and the collector or other customs officer of any port, without special instructions, shall carefully search all vessels for letters which may be on board or which have been conveyed contrary to law."[25]

"Any special agent of the Post-Office Department, collector, or other customs officer, or United States marshal or his deputy, may at all times seize all letters and bags, packets or parcels, containing letters which are being carried contrary to law on board any vessel or on any post-route, and convey the same to the nearest post-office, or may, by the direction of the Postmaster-General or Secretary of the Treasury, detain them until two months after the final determination of all suits and proceedings which may, at any time within six months after such seizure, be brought against any person for sending or carrying such letters."[26]

"Every package or parcel seized by any special agent of the Post-Office Department, collector, or other customs officer, or United States marshal or his deputies, in which any letter is unlawfully concealed, shall be forfeited to the United States, and the same proceedings may be had to enforce the forfeiture as are authorized in respect to goods, wares, and merchandise forfeited for violation of the revenue laws; and all laws for the benefit and protection of customs officers making seizures for violating revenue laws shall apply to officers making seizures for violating the postal laws."[27]

A warrant for the arrest of a person on the charge of using the mails in aid of a scheme of fraud, does not authorize the destruction of property, the cutting of telegraph wires, the seizure of instruments, books and records, the breaking open of a safe, or, when there is no resistance, the pointing of a revolver at the occupants of the office.[28]

[25] U. S. R. S., § 3989, Comp. St., § 7473. It would seem that this can now be done by Post Office inspectors Act of June 11, 1880, ch. 206, § 1, 21 St. at L. 177.

[26] U. S. R. S., § 3990, Comp. St., § 7474.

[27] U. S. R. S., § 3991, Comp. St., § 7475.

[28] U. S. v. McHie, 194 Fed. 894; *Re* Chin K. Shue, 199 Fed. 282. See Dillon v. O'Brien (Irish Exch. Div.), 16 Cox. Crim. Cas. 245.

Under the former statutes it was held that a search-warrant might be issued from the clerk's office upon a bench warrant after the direction by the judge upon a verified petition.[29]

By the act of June 15, 1917, "to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," provides as follows: "A search-warrant authorized by this title may be issued by a judge of a United States District court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property is located." [30]

This statute applies to the law imposing a tax on oleomargarine.[31] It has been said that "papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure." [32] It has been said to be sufficient to justify the search-warrant, that the property was used, as the means of committing a felony barred by the Statutes of Limitations.[33]

The affidavit should contain sufficient allegations as to the time and place of the alleged offense as to show that the felony has not been barred by the Statute of Limitations, and that the court has jurisdiction to issue the warrant.[34] The affidavit must particularly describe the place to be searched and the things to be seen.[35] The affidavit must also show facts, which, when the law is properly applied to them, tend to establish probable cause for belief that the legal conclusions required by the statute are right.[36] Conclusions of law are insuffi-

29 U. S. v. McHie, 194 Fed. 894.

30 Ch. 3, Title XI, § 1, 40 St. at L. 228, Comp. St., § 10496¼a.

31 Act of Aug. 6, 1886, ch. 840, 24 St. at L. 209; Comp. St., § 6215-6232; Kercheval v. Allen, C. C. A., 220 Fed. 262.

32 Veeder v. U. S., C. C. A., 252 Fed. 414, 418, per Baker, J.

33 Ibid., 252 Fed. 414, 419.

34 Ibid.

35 The Fourth Amendment; Ripper v. U. S., C. C. A., 178 Fed. 24.

36 Veeder v. U. S., C. C. A., 252 Fed. 414, 416-419. Certiorari denied, 246 U. S. 675, 38 Sup. Ct. 428, 62 L. ed. 933. There the search warrant was set aside. The material parts of the affidavit were as follows:

"He has good reason to believe, and does verily believe, that in and upon certain premises within said district and division, to wit, in suite

1200 in the building at 76 West Monroe street, in the city of Chicago, known as the Ft. Dearborn Bank Building, said suite being the offices occupied by one Henry Veeder, there has been and now is located and concealed certain property, to wit, books of account, minute books, letterpress copy books, ledgers, journals, cash books, day books, memorandum books, bank books, check books, receipt books and other documents, which other documents are more particularly enumerated, described and indexed by words, letters and figures, as follows, to wit: [Then follows a list of references to letter files, and document files, comprising about 2,000 items] which said property has been used as a means of committing certain felonies; that is to say, the felony on the part of Swift & Company, a corporation organized under the laws of the state of Illinois, of storing, acquiring and holding for the purpose of limiting the supply thereof to the public, and affecting the market price thereof in commerce, among the several states, of certain articles suitable for human food, to wit, meats, canned vegetables, canned fruit, canned fish, poultry, cheese, butter, eggs and oleomargarine; the felony on the part of said corporation of willfully making false entries and statements of fact in certain reports pertaining to the ownership and control of subsidiary corporations by said corporation, which the Federal Trade Commission required it to make under subdivision (B) of section 6 of the act approved September 26, 1914, entitled An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes; the felony on the part of said corporation of willfully making false entries in divers accounts, records, and memoranda kept by said corporation of all facts and transactions appertaining to the business of said corporation, it being a corporation subject to said act of Congress; the felony on the part of said corporation of willfully neglecting and failing to make or causing to be made full, true, and correct entries in said accounts, records, and memoranda of all facts and transactions appertaining to the business of said corporation; and the felony of engaging in conspiracy with Armour & Company, Morris & Company, Wilson & Company, Inc., Cudahy & Company, and with divers other corporations, and divers individuals and partnerships to defraud the United States through and by means of collusive bidding upon contracts to be let to the lowest bidder to furnish to the United States large quantities of meats, hides, leather, canned goods, and other commodities for the use of the military and naval forces of the United States."

The deposition was as follows:

"Q. State, if you know whether there are certain papers and documents there in the office of Mr. Veeder, relating to Swift & Company.

"A. Yes, sir; there are.

"Q. Just state, if you will, what those papers and documents are.

"A. There are a large number of papers.

"Q. Also state the occasion of your going and seeing them there.

"A. I made a partial examination of the papers of Henry Veeder, and he has a large quantity of files, among the papers showing that they have been used in the commission

cient.[37] Proof of suspicions, beliefs and surmises, is insufficient.[38]

of various felonies, one of them being in connection with the alteration of the books of Swift & Company, and other companies; some of them concerning violations of law that would make them with the ultimate purpose of enhancing the prices thereof.

"Q. What food?

"A. Canned goods, canned fish, poultry, cheese, butter, eggs, all kinds of canned vegetables, and other foods. There are also papers there which show the false entry or various false entries made in books, account books, and papers required under the Federal Trade Commission Act.

"Q. Books of whom?

"A. Books of Swift & Company in the possession of Henry Veeder.

"Q. What else?

"A. There are other records which have been used in the furtherance of a conspiracy, between Swift & Company, Morris & Company, Cudahy & Company and Wilson & Company, for the purpose of defrauding the United States government in bidding upon contracts for the supply of hides, foods, leather, etc., for the government.

"Q. What else did you see there? Judge Landis: You say you have seen these papers?

"A. I have seen some and have had a glance at others, which I was not permitted to inspect in detail, and apparently there are a great number of files there which relate to all these matters."

Re Tri-State Coal & Coke Co., 253 Fed. 605, 607; the following averments in the affidavit were held to be insufficient: that the property "has been used as the means of committing certain unlawful felonies; that is to say, the felony of knowingly and willfully, with knowledge that the price of bituminous coal has heretofore been fixed at $2.45 per ton, f.o.b. mines, in accordance with the regulations prescribed under and by virtue of the Food and Fuel Act of Congress approved August 10, 1917, to ask, demand and receive higher prices per ton for bituminous coal at the mine than the price theretofore prescribed by the said regulations under the said act of Congress, and the further felony of combining, conspiring, agreeing, and arranging with other persons to exact excessive prices for bituminous coal, said prices being higher per ton at the mine than the prices theretofore prescribed by the regulations prescribed under and by virtue of the Food and Fuel Act of Congress approved August 10, 1917, and the further felony of aiding and abetting the felony of making, demanding, and receiving higher prices per ton for bituminous coal at the mine than the price theretofore prescribed by the said regulations under the act of Congress of August 10, 1917." See Jones v. German, A. D. 1896, 2 Q. B. D. 418; s. c. on appeal A. D. 1897, 1 Q. B. D. 374.

[37] Veeder v. U. S., C. C. A., 252 Fed. 414, 418, certiorari denied, 246 U. S. 675, 38 Sup. Ct. 428, 62 L. ed. 933; *Re* Tri-State Coal & Coke Co., 253 Fed. 605; U. S. v. Rykowski, 267 Fed. 866, 869.

[38] Veeder v. U. S., C. C. A., 252 Fed. 414, 416-419, certiorari denied, 246 U. S. 675, 38 Sup. Ct. 428, 62 L. ed. 933.

An affidavit is insufficient which alleges merely that the officer believes, and has good reason to believe, that the accused is unlawfully engaged in manufacturing oleomargarine on the premises therein described.[39]

The Act of June 15, 1917, continues:

"A search warrant may be issued under this title upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed." [40]

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched." [41]

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them." [42]

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." [43]

39 Ripper v. U. S., C. C. A., 178 Fed. 24.

40 Act of June 15, 1917, ch. 30, Title XI, § 2, 40 St. at L. 228, Comp. St., § 10496b.

41 Ibid., § 3, Comp. St., § 10496c.

42 Ibid., § 4, Comp. St., § 10496d.

43 Ibid., § 5, Comp. St., § 10496e.

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."[44]

"A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."[45]

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after a notice of his authority and purpose, he is refused admittance."[46]

"He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation."[47]

"The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night."[48] The search-warrant should specifically describe the place of search.[49] The street and number if practicable should be named.[50] It is the better practice also to describe the purpose for which the building is used.[51]

44 Ibid., § 6, Comp. St., § 10496f.

45 Ibid., § 7, Comp. St., § 10496g.

46 Ibid., § 8, Comp. St., § 10496h.

47 Ibid., § 9, Comp. St., § 10496i.

48 Ibid., § 10, Comp. St., § 10496j.

49 Ripper v. U. S., C. C. A., 178 Fed. 24; U. S. v. Friedman, 267 Fed. 856; U. S. v. Rykowski, 267 Fed. 866, 870, *infra*, § 487a.

50 U. S. v. Friedman, 267 Fed. 856; U. S. v. Rykowski, 267 Fed. 866, 870, *infra*, § 487a.

51 Ibid.

"A search-warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void." [52]

"When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property." [53]

"The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect: 'I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.'" [54]

"The judge or commissioner must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant." [55]

"If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness." [56]

"If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause

52 Act of June 15, 1917, ch. 30, Title XI, § 11, 40 St. at L. 228, Comp. St., § 10496k; U. S. v. Rykowski, 267 Fed. 866. *Infra*, § 487a.

53 Ibid., § 12, Comp. St., § 10496l.

54 Ibid., § 13, Comp. St., § 10496m.

55 Ibid., § 14, Comp. St., § 10496n.

56 Ibid., § 15, Comp. St., § 10496o.

for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law." [57]

"The judge or commissioner must annex the affidavits, search-warrant, return, inventory, and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire." [58]

"Whoever shall knowingly and willfully obstruct, resist, or oppose any such officer or person in serving or attempting to serve or execute any such search-warrant, or shall assault, beat, or wound any such officer or person, knowing him to be an officer or person so authorized, shall be fined not more than $1,000 or imprisoned not more than two years." [59]

"Sections one hundred and twenty-five and one hundred and twenty-six of the Criminal Code of the United States shall apply to and embrace all persons making oath or affirmation or procuring the same under the provisions of this title, and such persons shall be subject to all the pains and penalties of said sections." [60]

"A person who maliciously and without probable cause procures a search-warrant to be issued and executed shall be fined not more than $1,000 or imprisoned not more than one year." [61]

"An officer who in executing a search-warrant willfully exceeds his authority, or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year." [62]

"Nothing contained in this title shall be held to repeal or impair any existing provisions of law regulating search and the issue of search-warrants." [63]

§ 487a. Search warrants under the national prohibition law. By the National Prohibition Law: "It shall be unlawful to have or possess any liquor or property intended for use in vio-

57 Ibid., § 16, Comp. St., § 10496p.
58 Ibid., § 17, Comp. St., § 10496q.
59 Ibid., § 18, Comp. St., § 10496r.
60 Ibid., § 19, Comp. St., § 10496s.
61 Ibid., § 20, Comp. St., § 10496t.
62 Ibid., § 21, Comp. St., § 10496u.
63 Ibid., § 22, Comp. St., § 10496v.

lating this title or which has been so used; and no property rights shall exist in any such property. A search-warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search-warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."[1]

By a previous section of the same statute, "Section 1014[2] of the Revised Statutes of the United States is hereby made applicable in the enforcement of this act. Officers mentioned in said Section 1014 are authorized to issue search-warrants under the limitations provided in title XI of the Act approved June 15, 1917."[3] The statute describing the practice to which reference is made is quoted at length in the preceding section.[4] Although such former statute, as originally enacted, may have only applied to felonies; it must be followed in proceedings founded upon misdemeanors under the Prohibition Law.[5]

The search warrant may be issued by a judge of a United States District Court, or by a judge of a State, or Territorial

§ 487a. [1] Act of October 28, 1919, ch. —, Title II, § 25, 41 St. at L. 305.

[2] This applies to arrests. See *supra*, §§ 485, 486, *infra*, § 489.

[3] Act of October 28, 1919, ch. —. Title II, § 2, 41 St. at L. 305.

[4] *Supra*, § 487.

[5] U. S. v. Friedman, 267 Fed. 856, 858.

Court of Record, or by a United States Commissioner for the district wherein the property sought is located.[6]

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts."

"All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds

[6] Act of June 15, 1917, ch. 30, Title XI, § 1, 40 St. at L. 228, Comp. St., § 10496¼a, *supra*, § 487.

of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the Treasury of the United States as miscellaneous receipts." [7]

"In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this Act the court shall have jurisdiction upon the application of the United States Attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor, the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts, and all liquor heretofore seized in any suit or proceeding brought for violation of law may likewise be so disposed of, if not claimed within sixty days from the date this section takes effect." [8]

"§ 39. In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered and the citizen is not the one which person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction." [9]

A search warrant under the National Prohibition Law must be supported by an affidavit stating facts to the knowledge of the deponent which show probable cause for the belief that intoxicating liquor [10] or property intended for use in violation of the statute is upon the premises where the search is to be

[7] Act of October 28, 1919, ch. —, Title II, § 26, 41 St. at L. 305; Comp. St., § 10138½mm; U. S. v. Fenton, 268 Fed. 221.

[8] Ibid., § 27, Comp. St., § 10138½n.

[9] Ibid., § 39, Comp. St., § 10138½o.

[10] U. S. ex rel. Soeder v. Crossen, 264 Fed. 459.

made.[11] An affidavit upon "knowledge, information and belief,"[12] or that the affidant "has reason to believe and does believe" that the premises are used in violation of the statute[13] is insufficient. It is sufficient to allege upon the knowledge of the affiant that the premises are occupied in whole or in part as a saloon, and that at a given time the affiant bought intoxicating liquor there which is described in the affidavit.[14] The affidavit and the warrant must contain a description of the premises and their location.[15] If they are upon a street or road which bears a name, such name must be fully given.[16] If there are two streets or roads by the same name the papers must show which of them is intended.[17] The street number, if any, should be given.[18] It is the better practice also to state the purpose for which the premises are used.[19] No search can be made at night, unless the warrant contains a direction that it be served at any hour of the day or night.[20] The warrant cannot be executed when ten days after its date have expired.[21] When liquor has been improperly seized by a prohibition officer without a search-warrant, or under a search-warrant not supported by a proper affidavit, it has been held that the writ of mandamus will issue to compel him to sue out a summons to the claimant in order that the validity of the seizure and the right to the property may be tested;[22] but according to a New Jersey ruling it seems that unless such summons is issued the court cannot direct the return.[23]

§ 487b. Effect of unlawful seizures. Papers which have been unlawfully seized by officers of the United States cannot be put in evidence against the person to whom they belong,[1] nor can

11 U. S. ex rel. Soeder v. Crossen, 264 Fed. 459; U. S. v. Rykowski, 267 Fed. 866.

12 U. S. v. Heed, 219 Fed. 1019.

13 U. S. v. Pitotto, 267 Fed. 603.

14 U. S. v. Friedman, 267 Fed. 856.

15 U. S. v. Friedman, 267 Fed. 856; U. S. v. Rykowski, 267 Fed. 866; *supra*, § 487.

16 Ibid.

17 U. S. v. Rykowski, 267 Fed. 866.

18 U. S. v. Friedman, 267 Fed. 856; U. S. v. Rykowski, 267 Fed. 866.

19 Ibid.

20 U. S. v. Rykowski, 267 Fed. 866, *supra*, § 487.

21 Ibid.

22 U. S. v. Michalski, 265 Fed. 839.

23 Ibid.

§ 487b. 1 Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. ed. 652; Silverthorne Lumber Co. v. U. S., 251 U. S. 385; Flagg v. U. S., C.

the District Attorney, after he has returned them, lawfully make use, against the owner, of information thus obtained, by compelling their production through a subpoena *duces tecum* or otherwise.[2] But a conviction will not be reversed because incriminating papers have been improperly seized, when upon the trial no use was made of them nor of information which they contained.[3]

These rules do not apply to a case where the papers were voluntarily surrendered to a public authority by a witness,[4] nor when the objection to their seizure was waived,[5] nor, it has been said, when the seizure was not seriously resisted,[6] nor where they were offered in evidence by the accused in the same [7] or another case,[8] nor where the seizure was made under a valid search-warrant,[9] nor to a search of the person of a man who has been arrested,[10] nor, it has been held, where the property seized, such as intoxicating liquors and an automobile in which they are unlawfully transported, was forfeited to the United States,[11] or the seizure has been made by a State officer who did not claim to act under Federal authority.[12]

It has not yet been settled whether the fraudulent [13] or the surreptitious [14] seizure of incriminating papers prevents their

C. A., 233 Fed. 481; Fitter v. U. S., 258 Fed. 567; U. S. v. Wang Quong Wong, 94 Fed. 832, *supra*, § 339a.

2 Silverthorne Lumber Co. v. U. S., 251 U. S. 385.

3 Fitter v. U. S., 258 Fed. 567.

4 Perlman v. U. S., 247 U. S. 7; U. S. v. Hart, 214 Fed. 655; Farmers v. U. S., C. C. A., 223 Fed. 903; Linn v. U. S., C. C. A., 234 Fed. 543; U. S. v. Abrams, 230 Fed. 313.

5 U. S. v. Gouled, 253 Fed. 242.

6 Luneyan v. U. S., C. C. A., 193 Fed. 970, 972, citing Abrams v. N. Y., 192 U. S. 585, 24 Sup. Ct. 372, 48 L. ed. 575.

7 Perlman Rim Corp. v. Firestone Tire & Rubber Co., 244 Fed. 304.

8 Perlman v. U. S., 247 U. S. 7, affirming 244 Fed. 304.

9 Schenck v. U. S., 249 U. S. 48; U. S. v. Gouled, 253 Fed. 770; U. S. v. Stilson, 254 Fed. 120.

10 Weeks v. U. S., 232 U. S. 383, 392, 34 Sup. Ct. 341, 344, 58 L. ed. 652.

11 U. S. v. Fenton, 268 Fed. 221. *Contra*, U. S. v. Rykowski, 267 Fed. 866.

12 Youngblood v. U. S., C. C. A., 266 Fed. 765.

13 U. S. v. Maresca, 226 Fed. 713, holds that such papers are competent evidence.

14 In Gouled v. U. S., C. C. A., 264 Fed. 839, 841, 842, the following questions were certified to the Supreme Court by the Court of Appeals for the Second Circuit: "First: Is the secret taking or abstraction without force by a representative of any branch or subdivision of the govern-

admission in evidence. A consent by the wife of the accused,[15] or by her attorney at law, does not ordinarily bind the accused in this respect.[16]

A surrender of papers under a threat has the same effect as an unlawful seizure.[17]

The admission in a State court of papers unlawfully seized is not a violation of the Fourteenth Amendment.[18]

§ 487c. Return of books, papers and property unlawfully seized. When books, papers or property have been unlawfully seized, the courts should direct them returned to the owner by the District Attorney if they are in his possession,[1] or by

ment of the United States of a paper writing, of evidential value only, belonging to one suspected of crime, and from the house or office of such person, a violation of the Fourth Amendment? Second. Is the admission of such paper writing in evidence against the same person, when indicted for crime, a violation of the Fifth Amendment? Third. Are papers of no pecuniary value, but possession evidential value against persons presently suspected and subsequently indicted under sections 37 and 215, C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment? Fourth. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment? Fifth. If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense? Sixth. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted, if he then move before trial for the return of said papers, and said motion is denied, is the court at trial bound in law to inquire as to origin of or method of procuring said papers, when they are offered in evidence against the party so indicted?''

15 U. S. v. Rykowski, 267 Fed. 866, 871.

16 *Re* Tri-State Coal & Coke Co., 253 Fed. 605.

17 U. S. v. Abrams, 230 Fed. 313.

18 Adams v. New York, 192 U. S. 585, 48 L. ed. 575.

§ 487c. 1 U. S. v. Mounday, 208 Fed. 186; Wise v. Mills, 220 U. S. 549, 557; affirming U. S. v. Mills, 185 Fed. 318, S. C., C. C. A., 189 Fed. 583; Weeks v. U. S., 232 U. S. 383; U. S. v. Friedberg, 233 Fed. 313; *Re* Marx, 255 Fed. 344; U. S. v. McHee, 194 Fed. 894; U. S. v. Premises in Butte, 246 Fed. 185, *Supra*, § 339a.

the marshal; since they are the court's officers and consequently subject to its orders.[2] It has been held that the court should not make a summary order for their return, when they are in the possession of revenue officers, or others not officers of the court.[3] In cases arising under the Act of June 15, 1917, "if it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken."[4]

By the National Prohibition Law: "The property seized on any search-warrant thereunder issued shall not be taken from the officers seizing the same on any writ of replevin or other like process."[5] By a subsequent section of this statute: "In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court."[6] It has been held that the owner of liquor unlawfully seized, may obtain the writ of mandamus to compel the Supervising Prohibition Agent to cause a summons to be issued and served upon the claimant in a proceeding to determine whether the property is subject to forfeiture.[7]

If at the time of the hearing of the motion for a return of the things seized the magistrate is then of the opinion that there existed probable cause when the warrant issues he should sustain the seizure.[8] The facts that subsequently the defendants were indicted and one of them pleaded guilty may then be considered.[9] Knowledge gained by the act of seizure,[10] or, it has been said, from the thing seized[11] cannot be used to support a finding of probable cause; but it has been held that if the thing seized, such as a burglar's tool, or a mash, or still, or

2 Ibid.

3 U. S. v. Hee, 219 Fed. 1019.

4 Ch. 30, Title XI, § 16, 40 St. at L. 229, Comp. St., § 10496¼p.

5 Act of October 28, 1919, ch. 85, Title II, § 25, 41 St. at L. 315; U. S. v. Fenton, 268 Fed. 221.

6 Ibid., § 39.

7 U. S. ex rel. Soeder v. Crossen, 264 Fed. 459.

8 Gouled v. U. S., 253 Fed. 770; U. S. v. Maresca, 266 Fed. 713.

9 Gouled v. U. S., 253 Fed. 770.

10 U. S. v. Maresca, 266 Fed. 713.

11 U. S. v. Maresca, 266 Fed. 713.

a part thereof, is clearly intended for an illicit use and is contraband it should not be returned.[12]

The person executing the warrant is upon such an application bound by his return thereof.[13]

It has been said that no gift or surrender of the property seized nor estoppel subsequent to the return can then be considered by the magistrate; who should, when such a claim is made, so frame his order, if he directs a return, as to direct a return in so far as only the property seized is held by virtue of the search-warrant.[14] This will leave the claimants to their remedies at common law, after annulling any defense based upon the warrant.[15]

§ 487d. The manner of making objections to search warrants. An objection to the form of the search-warrant or to the papers upon which it was granted may be made by a motion to quash the warrant.[1] A denial of the motion may be reviewed by writ of error.[2]

An order quashing a warrant is not a bar to a subsequent application for another search-warrant against the same property upon proper papers.[3]

Where the warrant is void upon its face, resistance to its execution is justified,[4] even when a deadly weapon is used by the party resisting,[5] or an action for trespass may be maintained against the officers who have executed it.[6] When the only defect is that the warrant is too broad they are not liable if they have seized nothing except the papers or articles therein specified.[7]

§ 488. Preliminary examination. A person arrested under process of a Federal court has the right to a preliminary investigation of the charge against him and to proof of probable cause, before he is committed to await an indictment or for trial.[1]

12 U. S. v. Rykowski, 267 Fed. 866, 870.
13 Ibid.
14 Ibid.
15 Ibid.
§ 487d. 1 Veeder v. U. S., C. C. A., 252 Fed. 414; Certiorari denied, 246 U. S. 675.
2 Ibid.
3 Ibid.
4 U. S. v. Pitotto, 267 Fed. 603.
5 Ibid.
6 Kercheval v. Allen, C. C. A., 220 Fed. 262.
7 Ibid.
§ 488. 1 U. S. v. Shepard, 1. Abb. U. S. 431, Fed. Cas. No. 16,273.

A defendant who has been indicted has no right to a preliminary hearing because of an information presented against him before his arrest.[2]

The hearing is usually held in the presence of the magistrate before whom the warrant is returnable, who is ordinarily a United States Commissioner.[3] The statutory provision authorizing a State judge or magistrate to conduct the proceedings is constitutional.[4] It is the duty of a United States Commissioner, who issues a warrant, to make the same returnable before him, provided that he is the commissioner nearest or most convenient to the residence of the accused. Otherwise, he should make it returnable before the commissioner having an office, and acting, nearest to the residence of the accused.[5]

Since the United States Commissioner has the power to administer oaths, an indictment for perjury will lie because of intentional false testimony in answer to a material question before him;[6] although it has been held not to be perjury committed in a court of the United States when a United States judge conducts the proceedings.[7]

The proceedings must take place agreeably to the usual mode of process against defendants, in the State where the accused is arrested.[8] "It was the intention of Congress by these words 'Agreeably to the usual mode of process against offenders in such State,' to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the State where the proceedings should take place."[9] The United States Commissioner, upon such a hearing, acts as a committing magistrate.[10] He has the same power as a State magistrate and no greater power.[11] The commissioner must proceed according to

2 U. S. v. Kerr, 159 Fed. 185.

3 See *supra*, § 483f.

4 *Ex parte* Gist, 26 Ala. 156; Bagnall v. Ableman, 4 Wis. 163.

5 General Order of Court Governing the Conduct of United States Commissioners; Roe's Criminal Procedure, 25.

6 Safford v. U. S., C. C. A., 252 Fed. 471.

7 U. S. v. Clark, 1 Gallison, 497 Fed. Cas. No. 14,804.

8 U. S. R. S., § 1014.

9 U. S. v. Rundlett, 2 Curtis C. S. 41, Fed. Cas. No. 16,208, per Mr. Justice Curtis.

10 U. S. v. Walker, 6 Pitts. L. J. 37; U. S. v. Martin, 17 Fed. 150, 9 Sawyer 90.

11 U. S. v. Horton, 2 Dillon, 94,

the State law concerning committing magistrates in similar cases.[12] In States where a magistrate has such power, the commissioner may order the accused to give a recognizance to appear before him upon a specified day;[13] but, it has been held, that he cannot do this in New York.[14]

In the districts of New York the accused may waive a preliminary examination.[15] But this is no waiver of his right to object that the complaint fails to state a criminal offense.[16] In the districts of Indiana the commissioner may refuse to accept such a waiver.[17]

Where the State statute so authorizes, the commissioner may adjourn the hearing to a different time and place.[18] It has been held that he has no power to commit the prisoner, pending the examination, for more than twenty-four hours, except for cause shown or at the prisoner's request.[19] He has no power to punish for contempt.[20] He has the power to take evidence in accordance with the practice of the State where he sits.[21] In Alabama, it is his duty to reduce to writing the testimony of the witnesses.[22]

In the districts of New York, he may issue a subpœna at the request of the Government, which may be served anywhere in the State.[23] It has been held there that a subpœna issued by him, upon the application of a defendant, cannot be served outside the county where the hearing takes place, unless the court makes an order for the attendance of such witness or endorses such an order on the subpœna, which can only be done upon an affidavit by the defendant or his counsel stating that he believes that the evidence of the witness is material, and

Fed. Cas. No. 16,393; *Re* Kaine, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598.

12 U. S. v. Martin, 17 Fed. 150, 9 Sawyer 90.

13 U. S. v. Rundlett, 2 Curtis C. C. 41, Fed. Cas. No. 16,208; U. S. v. Walker, 6 Pitts. L. J. 37; U. S. v. Evans, 2 Fed. 147.

14 U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

15 U. S. v. Ruroede, 220 Fed. 210.

16 Ibid.

17 Van Buran v. U. S., 56 Fed. 77.

18 U. S. v. Rundlett, 2 Curtis C. C. 41, Fed. Cas. No. 16,208.

19 U. S. v. Worms, 4 Blatchf. 332, Fed. Cas. No. 16,765.

20 *Ex parte* Perkins, 29 Fed. 900, 910; U. S. v. Beavers, 125 Fed. 778.

21 U. S. v. Smith, 17 Fed. 510.

22 Strong v. U. S., 34 Fed. 17.

23 U. S. v. Beavers, 125 Fed. 778, 782.

that the attendance of the witness at the examination is necessary.[24]

The accused may be represented by counsel upon the preliminary examination and can call witnesses to contradict or to explain the testimony of the witnesses for the prosecution;[25] but, it has been held, that he cannot offer evidence to impeach the character of a witness.[26] It has been said that when documentary proof is given it is not an essential prerequisite to the commitment, that witnesses also be examined before the magistrate in the presence of the accused.[27] A certified copy of the indictment is sufficient evidence to authorize the magistrate to permit the accused to be committed for trial in the district where the indictment is pending.[28] So is a confession of the accused.[29] The District Attorney, without the consent of the commissioner and prosecutor, has no power to dismiss a criminal charge, while the examination of the accused is proceeding before a commissioner.[30]

He may, pending the examination before a commissioner, obtain an indictment, if the grand jury will find one;[31] or he may file an information for the same offence.[32] The discharge

[24] U. S. v. Beavers, 125 Fed. 778, 782.

[25] U. S. v. Bollman, 1 Cranch C. C. 373, Fed. Cas. No. 14,622; U. S. v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16,685.

[26] U. S. v. Walker, 6 Pitts. L. J. 37.

[27] *Re* Alexander, 1 Lowell 530, Fed. Cas. No. 162.

[28] *Re* Alexander, 1 Lowell 530, Fed Cas. No. 162; U. S v. Jacobi, 4 Am. L. T. U. S. 148, Fed. Cas. No. 15,460; U. S. v. Haskins, 3 Sawyer 262, Fed. Cas. No. 15,322; U. S. v. Pope, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069. *Contra*, Bagnall v. Albeman, 4 Wis. 163.

[29] U. S. v. Bloomgart, 2 Benedict 356, Fed. Cas. No. 14,612. See *infra*, § 523g.

[30] U. S. v. Schumann, 2 Abb. U. S. 523, Fed. Cas. No. 16,235.

[31] U. S. v. Kerr, 159 Fed. 135; U. S. v. Achen, 267 Fed. 595, 597.

[32] U. S. v. Archen, 267 Fed. 595, 597, a prohibition case, per Garvin, J.:

"In each of the cases before the court, a hearing was in progress before the commissioner when the information was filed, upon the conclusion of which the commissioner determined that there was not sufficient before him to justify holding the respective defendants. However that may be, the proof by affidavit submitted to the court in each case amply justified a holding that probable cause had been shown. It is urged in behalf of the defendants that, once a proceeding is begun be-

of the accused by the commissioner is not a bar to subsequent proceedings.[33]

§ 488a. The commitment. The commitment after the examination must be in writing.[1] It may be a writ, warrant or mittimus.[2] It must state the existence of a probable cause.[3] It is the better practice to state therein that the probable cause was supported by oath or affirmation of a witness or witnesses.[4]

"When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms."[5]

"Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff, or jailer, as his authority to hold the

fore a commissioner, the government can take no other action until a determination has been made by the commissioner, and the defendant either held to bail or discharged. If that were the law, a commissioner's illness, absence, inadvertence, inability to reach a conclusion, or reluctance or arbitrary refusal to render a decision, would result in prosecutions being unreasonably and unnecessarily delayed. If a commissioner holds that there is a lack of probable cause, the United States attorney may nevertheless submit a charge to a grand jury, and no reason appears why under like circumstances (when the charge is a misdemeanor) he may not ask leave to file an information. If the court finds probable cause to exist, every requirement has been met."

33 *Re* Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; U. S. v. Burr, 1 Burr's Trial 1179.

§ 488a. 1 State v. James, 78 N. C. 455. See People v. Wilson, 93 Cal. 377, 28 Pac. 1061, 12 Cyc. 313.

2 U. S. R. S., § 1028.

3 *Ex parte* Burford, 1 Cranch C. C. 276, 4 Fed. Cas. No. 2,148; *Ex parte* Sprout, 1 Cranch C. C. 424, 22 Fed. Cas. No. 13,267; U. S. v. Lumsden, 1 Bond 5, Fed. Cas. No. 15,641; U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273; *Re* Van Campen, 2 Benedict 419, Fed. Cas. No. 16,835.

4 *Ex parte* Burford, 3 Cranch 448, 2 L. ed. 495; reversing 1 Cranch C. C. 276, 4 Fed. Cas. No. 2,148; *Ex parte* Bennett, 2 Cranch 612, 3 Fed. Cas. No. 1,311; *Ex parte* Sprout, 1 Cranch, C. C. 424, 22 Fed. Cas. No. 13, 267; State v. Tennison, 39 Kansas 726, 18 Pac. 948; King v. State, 18 Neb. 375, 25 N. W. 519; People v. Rhonor, 4 Parker Cr. Cases (N. Y.) 166; *Contra,* Commonwealth v. Murray, 2 Virginia Cases 504; see also Rex v. Platt, 1 Leach C. C. 187; Rex v. Wyndhan, 1 Str. 2; Rex v. Wilkes, 2 Wilson C. P. 151, 12 Cyc. 313.

5 U. S. R. S., § 1027.

prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon."[6]

A commitment made before the assembling of the grand jury remains in force while the grand jury is in session;[7] and a commitment may be made during a session of the grand jury.[8]

After an indictment is quashed, the accused may be committed to await a new indictment.[9]

After conviction and sentence, a certified copy of the record of the sentence is sufficient to authorize the detention of the convict and his arrest if he is out on bail without any warrant or formal mittimus.[10]

§ 489. Warrants of removal. "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit court to take bail, or by any chancellor, Judge of a Supreme or Superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."[1] The statute applies to a removal to the District of Columbia,[2] and from a district in a State to a district within

6 U. S. R. S., § 1028.

7 U. S. v. Burr, 1 Burr's Trial 1179.

8 U. S. v. Burr, 1 Burr's Trial 1179.

9 U. S. v. Town-Maker, Hemp. 299; U. S. v. Smith, 2 Cranch C. C. 111, Fed. Cas. No. 16,326.

10 *Ex parte* Wilson, 114 U. S. 417, 421, 29 L. ed. 89; *Ex parte* Thurston, 233 Fed. 847; People v. Nevins, 1 Hill (N. Y. 154). See *infra*, § 534c.

§ 489. 1 U. S. R. S., § 1014.

2 Benson v. Henkel, 198 U. S. 1,

a Territory.[3] It has been held that there can be no removal to Alaska for an offense such as kidnapping, which is made a crime by the compiled of Alaska but not by the Statutes which apply throughout the United States.[4]

A similar removal may be made from the District of Columbia to a Federal District,[5] and the accused may be arrested in the District of Columbia on a warrant from a District Court of the United States in another district and held a reasonable time for the issue of extradition papers.[6]

It seems that the statute does not apply to proceedings before military courts.[7] A warrant for the arrest of a person on trial before a naval court of inquiry was refused.[8]

It is provided by the Act of February 9, 1903: "The provisions of section ten hundred and fourteen of the Revised Statutes, so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippine Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States. Such fugitive may, by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and imprisoned, or bailed, as the case may be, pending the issuance of a warrant for his removal to the United States, which warrant it shall be the duty of a judge of the court of first instance seasonably to issue, and of the officer or agent of the United States designated for the purpose to execute. Such officer or agent, when engaged in executing such warrant without the Philippine Islands, shall have all the

25 Sup. Ct. 569, 49 L. ed. 919; *Re* Buell, 3 Dillon 116; U. S. ex rel. Vause v. McCarthy, S. Cas., 250 Fed. 800; Easterday v. McCarthy, C. C. A., 256 Fed. 651.

3 U. S. v. Haskins, 3 Sawyer 262.

4 *Ex parte* Crause, 228 Fed. 547, but see Tiberg v. Warren, C. C. A., 192 Fed. 458.

5 Stallings v. Splain, D. C., C. C. A., 258 Fed. 510.

6 Ibid.

7 Kurtz v. Moffitt, 115 U. S. 487, 500, 29 L. ed. 458, 461.

8 U. S. v. Mackenzie, 1 N. Y. Leg. Obs. 227.

powers of a marshal of the United States so far as such powers are requisite for the prisoner's safe-keeping and the execution of the warrant."[9]

The validity of the proceedings may be reviewed by *habeas corpus* and *certiorari*.[10] The decisions upon proceedings for extradition to foreign countries do not necessarily apply to those for a removal from one to another Federal district of the United States.[11] "Obviously very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made, while here the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial."[12]

The application for removal cannot be granted until after the accused has been arrested and committed to jail for want of bail.[13] He is entitled to a reasonable opportunity in which to obtain the bail.[14] A prisoner may be committed by one magistrate upon an affidavit made before another.[15] The arrest is justified, although the party arrested is described in the warrant by a fictitious name, if he is in fact the person against whom the complaint is made.[16]

A preliminary examination is necessary before the issue of the warrant of removal, unless it is waived by the accused.[17]

The accused is entitled to a hearing before the commissioner and the judge who signs the order.[18] The court must look into the indictment "to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought

9 Act of Feb'y 9, 1903, 32 St. at L. 806, 10 Fed. St. Ann. 259, Pierce Fed. Code, § 4026.

10 Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689; *supra*, §§ 460, 467.

11 Beavers v. Henkel, 194 U. S. 73, 83, 48 L. ed. 882, 886.

12 Beavers v. Henkel, 194 U. S. 73, 83, 48 L. ed. 882, 886, per Brewer, J.

13 Bagnall v. Albeman, 4 Wis. 163; U. S. v. Shepard, 1 Abbott's U. S. 431; U. S. v. Jacobi, 4 Am. L. T. U. S. 148, 14 Int. Rev. Rec. 45.

14 Bagnell v. Ableman, 4 Wis. 163.

15 *Ex parte* Bollman, 4 Cranch 75, 2 L. ed. 554.

16 Williams v. Tidball, 2 Arizona 50, 8 Pac. 351.

17 *Re* Burkhardt, 33 Fed. 25; *Re* Bailey, Woolworth, 422.

18 Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689; U. S. v. Shepard, 1 Abbott's U. S. 431; U. S. v. Jacobi, 4 Am. L. T. U. S. 148.

to be removed has jurisdiction thereof.[19] The removal may be denied because the statute upon which the indictment is unconstitutional,[20] but ordinarily such an objection will be left to the trial court.[21] It has been held that, in such a proceeding, neither the judge nor the commissioner can compel the attendance of a witness by a subpœna served outside the district, although within one hundred miles of the hearing.[22]

An indictment is not a condition precedent to the removal.[23] An indictment is *prima facie* evidence of probable cause for the removal.[24] The accused may, however, offer evidence in opposition to the indictment, tending to show that he did not commit the offense charged within the district where the indictment alleges that it occurred;[25] and also it has been held, to show want of probable cause;[26] but not, it seems, an affirmative defense.[27] If he is denied this right, he will be discharged upon *habeas corpus*.[28]

When the indictment is valid upon its face and purports to have been found by a grand jury acting, in fact, as such, at a regular term of a court of the United States, presided over by one of its judges, and hearing testimony in the ordinary way, the commissioner is not entitled to consider evidence tending to show that the grand jurors were improperly selected.[29] Upon such an application, the accused cannot prove that there was no evidence before the grand jury, which justified an indict-

19 U. S. v. Yount, 267 Fed. 861.

20 U. S. v. Yount, 267 Fed. 861.

21 Rumely v. McCarthy, 250 U. S. 273.

22 U. S. v. Stern, 177 Fed. 479.

23 Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177. It was the former practice of the District Court for the Northern District of Texas, not to entertain such an application until after indictment. U. S. v. White, 25 Fed. 716.

24 Green v. Henkel, 183 U. S. 249, 46 L. ed. 177; Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882; Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919; Hyde v. Shine, 199 U. S. 62, 51 L. ed. 689; U. S. v. Green, 100 Fed. 941; Witte v. Shelton, C. C. A., 240 Fed. 265.

25 Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689; U. S. v. Campbell, 179 Fed. 762.

26 Hastings v. Murchie, C. C. A., 219 Fed. 83. See Witte v. Shelton, C. C. A., 240 Fed. 265; Rumely v. McCarthy, 256 Fed. 565; affirmed 250 U. S. 283, 287.

27 Rumely v. McCarthy, 250 U. S. 283.

28 Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689.

29 Greene v. Henkel, 183 U. S. 249, 262, 46 L. ed. 177, 189.

ment.[30] Formal defects in the indictment will be disregarded.[31] It has been said that the indictment cannot be attacked as a pleading, but may be as a piece of evidence.[32] If one count in the indictment is good, the removal will be made, although the rest are bad.[33] Defects and uncertainties in the indictment may be supplemented or cured by testimony tending to show probable cause.[34] Probable cause may be proved before the commissioner by oral and documentary evidence.[35] When the indictment or testimony fails to prove that an offense was, in fact, committed within the district, to which it is sought to remove the accused, the application will be denied. For example, when it is fatally deficient in essential averments,[36] or alleges an act, which does not constitute an offense against the United States;[37] or acts which, although they constitute an offense against the United States, are not triable within the district to which the removal is sought;[38] or where the indictment is vague or uncertain as to the place of the commission of the offense;[39] or, it has been said, when the indictment sets forth an impossible offense.[40]

It has been held that the accused may not be removed if he was in the custody of a State court before the Federal court obtained jurisdiction.[41] The same rule applies when he is, at that time, in the custody of a court of the United States, in the

30 Beavers v. Henkel, 194 U. S. 73, 88, 48 L. ed. 882, 888.

31 *Re* Clark, 2 Benedict, 540; U. S. v. Lyman, 190 Fed. 414; Conetto v. U. S., C. C. A., 251 Fed. 42. So far as respects technical objections, the sufficiency of the indictment is to be determined by the court in which it was found and is not a matter of inquiry in removal proceedings. Beavers v. Henkel, 194 U. S. 73, 87, 48 L. ed. 882, 887, per Brewer, J.

32 U. S. v. Reddin, 193 Fed. 798.

33 Price v. Henkel, 216 U. S. 488, 54 L. ed. 581. *Ex parte* Birdseye, 244 Fed. 972.

34 Greene v. Henkel, 183 U. S. 249, 260, 46 L. ed. 177, 189; Price v. McCarty, C. C. A., 89 Fed. 84, 32 C. C. A. 162.

35 Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177; Price v. McCarty, C. C. A., 89 Fed. 84, 32 C. C. A. 162.

36 *Re* Clark, 2 Ben. 540; *Re* Buell, 3 Dillon, 116. See Bagnall v. Ableman, 4 Wis. 163.

37 *Re* Doig, 4 Fed. 193.

38 *Re* Doig, 4 Fed. 193; *Re* Dana, 68 Fed. 886, 7 Benedict, 1.

39 *Re* Dana, 68 Fed. 886, 7 Benedict, 1.

40 U. S. v. Pope, 24 Int. Rev. Rec. 29.

41 *Re* James, 18 Fed. 853; U. S. v. Corre, 23 L. Rep. 145; U. S. v. Burr, 2 Burr's Trial, 455.

district from which it is sought to remove him;[42] unless such court relinquishes its jurisdiction, which it may do with the consent of the Government; and if it does so, the accused will be removed.[43]

No statement of the reasons for the selection of the other court or other charge is then required.[44] Where the first court declines to relinquish its jurisdiction, it has been held that the practice is for the marshal to hold, but not to execute, the second warrant, until it is determined whether the accused shall be held under that first issued.[45] The fact that the crime is triable in the district where the application is made, is no objection to the removal when the court of the other district has also jurisdiction of the same.[46] A previous indictment in the district where the application is made is no ground for an objection by the accused to the removal,[47] although it might exonerate his sureties.[48]

A previous conviction and sentence in such district is no bar after the sentence has expired to his removal to another district where he was convicted after the other sentence but before its enforcement had begun and sentenced to imprisonment for a longer term.[49] Nor is a previous conviction in a State court when the accused has been discharged upon parole and the State authorities interposes no objections.[50] The fact that the crime is not punishable by any Federal statute, but is merely criminal by the common law, is no objection to the removal to the District of Columbia, where the common law still prevails in criminal cases.[51] A removal to the District of Columbia was denied when it appeared that it was the intention there to try the accused before a police court without a jury.[52]

42 *Re* Johnson, 167 U. S. 120, 124, 42 L. ed. 103, 104.

43 Beavers v. Haulbert, 198 U. S. 77, 49 L. ed. 950; *Re* Beavers, 125 Fed. 988; Haas v. Henkel, 216 U. S. 462, 54 L. ed. 569; Peckham v. Henkel, 216 U. S. 483, 54 L. ed. 579, affirming 166 Fed. 627; Price v. Henkel, 216 U. S. 488, 54 L. ed. 581.

44 Rumely v. McCarthy, 250 U. S. 283.

45 *Re* Beavers, 125 Fed. 988.

46 Haas v. Henkel, 216 U. S. 462, 54 L. ed. 569; Hyde v. U. S., 225 U. S. 347, 56 L. ed. 1114.

47 Peckham v. Henkel, 216 U. S. 483, 54 L. ed. 579, affirming 166 Fed. 627; Price v. Henkel, 216 U. S. 488, 54 L. ed. 581; *Re* Tillinghast, 233 Fed. 712.

48 Peckham v. Henkel, 216 U. S. 483, 54 L. ed. 579, affirming 166 Fed. 627; Rumely v. McCarthy, 256 Fed. 565.

49 U. S. v. Marrin, 227 Fed. 314.

50 Ibid.

51 U. S. v. Wimsatt, 161 Fed. 586.

52 *Re* Cross, 20 Fed. 824.

It has been held that the strict rules of evidence need not be applied upon a hearing before a commissioner, on an application for a removal, where fraud is charged.[53] If there is competent legal evidence, upon which the commissioner might base his decision, it will not be reviewed by *habeas corpus*, because of improper rulings as to the admission of other evidence.[54]

A previous decision by a United States commissioner refusing to commit a prisoner for removal is not *res adjudicata*, although another commissioner will usually follow the same.[55] When the application for a removal is denied, the accused is entitled to an order discharging him under a commitment pending the proceedings for his removal.[56]

The commissioner has no power to order the removal, although he may commit the accused to the custody of the marshal.[57]

A judge to whom application is made for the warrant of removal after the commitment, does not exercise a mere ministerial function. He must look into the indictment, warrant or complaint to ascertain whether an offense against the United States is charged, and whether there is probable cause.[58]

It is sufficient if the indictment is framed in the language of the statute, with ordinary averments of time and place, and sets out the substance of the offense in language sufficient to apprise the accused of the nature of the charge against him.[59]

The application to the judge for a warrant of removal may be heard with or without the aid of a writ of *habeas corpus*.[60] If the judge thinks the bail excessive, he may reduce it without a writ of *habeas corpus*.[61] The judge may take further evidence offered on behalf of the accused.[62] The decision of the court to which the application for removal is made that probable cause

53 U. S. v. Greene, 108 Fed. 816.

54 Bryant v. U. S., 167 U. S. 104, 42 L. ed. 94; Greene v. Henkel, 183 U. S. 249, 261, 46 L. ed. 177, 189.

55 U. S. v. Haas, 167 Fed. 211; sustained upon *habeas corpus*, Haas v. Henkel, 216 U. S. 462, 54 L. ed. 569.

56 U. S. v. Black, C. C. A., 160 Fed. 431.

57 Hastings v. Murchie, C. C. A., 219 Fed. 83.

58 Tinsley v. Treat, 205 U. S. 20, 29, 51 L. ed. 689, 694.

59 U. S. v. Wimsatt, 161 Fed. 586.

60 U. S. v. Brawner, 7 Fed. 86; *Re* James, 12 Fed. 853; U. S. v. Rogers, 23 Fed. 658.

61 *Re* Martin, 5 Blatchf. 303; U. S. v. Brawner, 7 Fed. 86.

62 Price v. McCarty, C. C. A., 89 Fed. 84, 32 C. C. A. 162.

is shown, is not reviewable by *habeas corpus,* unless the indictment is clearly defective.[63]

The warrant of removal is not vitiated because it directs the prisoner to be delivered for trial for the larceny of a part only of the property, which the commissioner committed him for stealing;[64] nor because it directs a marshal to remove the prisoner "to be tried in said district upon such counts in the indictment" as he "can be legally tried upon."[65]

It has been held that, in criminal proceedings to punish a person for contempt, the accused may be removed under this statute;[66] and that, in such a case, a certified copy of the contempt proceedings and attachment are sufficient to authorize the issue of the warrant.[67] It seems that, if he is imprisoned in one district for a contempt of court of the United States there, he can be arrested in another district, to which he has escaped, and will be returned.[68] It has been held that no removal will be ordered in a case where the accused, who has not been arrested in anothr district, has failed to obey an order of a Federal court there, directing him to pay money to the clerk thereof for the benefit of parties to a civil suit.[69] Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed.[70]

§ 490. Extradition to foreign countries. "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice

63 *Re* Quinn, 176 Fed. 1020. A statement in the opinion of a District Judge that, upon the evidence before him, the case is a proper one for submission to a jury, is equivalent to a finding of probable cause, although he does not use those two words in his order or opinion. Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177.

64 Price v. McCarty, C. C. A., 89 Fed. 84.

65 U. S. v. Horner, 44 Fed. 677; aff'd Horner v. U. S., 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. 407.

66 U. S. v. Jacobi, 4 Am. L. T. U. S. 148; *Re* Manning, 44 Fed. 275, in which the author was counsel.

67 Ibid.

68 Fanshawe v. Tracy, 4 Biss. 490.

69 *Re* Graves, 29 Fed. 60.

70 U. S. R. S., § 1029.

of the Supreme court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made:[1] Provided, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglary, defined to be the breaking and entering by night time into the house of another person with

§ 490. [1] U. S. R. S., § 5270, 3 Fed. St. Ann. 68, Pierce Fed. Code, § 4009.

intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or of the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: Provided further, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. And provided further, That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial."[2]

[2] Act of June 6, 1900, 31 St. at L. 626, Comp. St. 3591.

"It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape."[3]

"Whenever any person who is committed under this Title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered."[4]

It is no valid objection to the extradition that other charges are pending against the prisoner in a foreign country for an offense not included in the treaty.[5]

All hearings in cases of extradition under treaty stipulation "shall be held on land, publicly, and in a room or office easily accessible to the public."[6]

"The following shall be the fees paid to commissioners in

[3] U. S. R. S., § 5272, 3 Fed. St. Ann. 77, Pierce Fed. Code, § 4011.

[4] U. S. R. S., § 5273, 3 Fed. St. Ann. 77, Pierce Fed. Code, § 4012.

[5] *Re* Roth, 15 Fed. 506.

[6] Act of Aug. 3, 1882, 22 St. at L. 215, 3 Fed. St. Ann. 89, Comp. St. 3593, Pierce Fed. Code, § 4020.

cases of extradition under treaty stipulation or convention between the Government of the United States and any foreign government, and no other fees or compensation shall be allowed to or received by them: For administering an oath, ten cents. For taking an acknowledgement, twenty-five cents. For taking and certifying depositions to file, twenty cents for each folio. For each copy of the same furnished to a party on request, ten cents for each folio. For issuing any warrant or writ, and for any other service, the same compensation as is allowed clerks for like services. For issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense as set forth in said article, two dollars. For issuing any warrant under the provision of the convention for the surrender of criminals, between the United States and the King of the French concluded at Washington November ninth, eighteen hundred and forty-three, two dollars. For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of any treaty or convention, five dollars a day for the time necessarily employed."[7]

"All witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign government by whom the proceedings for extradition may have been instituted."[8]

"The provisions of this Title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer."[9]

7 Ibid., § 2, Pierce Fed. Code, § 4021.

8 Ibid., § 4, Pierce Fed. Code, § 4023.

9 U. S. R. S., § 5274.

If the commissioner commits the prisoner, his proceedings may be reviewed by the writ of *habeas corpus*.[10]

§ 490a. Extraditable offenses. The offenses for which persons within the United States may be extradited to foreign countries are enumerated in the respective treaties.

Where a treaty contains no definition of an offense therein mentioned what constitutes the crime is usually determined by the law of the State where the accused is found.[1] It was held that, under the treaty between the United States and Austria-Hungary, forgery should have, in extradition proceedings, its common law definition.[2] Where the treaty provides for extradition for acts "made criminal by the laws of both countries," an act made criminal by the law of the foreign country and the law of the State in which a fugitive is found is extraditable, although it is not a crime against the United States.[3] Absolute identity of the statutes in both countries is not required, provided that the transaction is by the law of both such an offense as the treaty describes.[4]

Extradition to Germany was denied upon a charge of the offense of forgery when the proof showed that the accused filled into a blank check endorsed by his partner a larger sum than he was authorized to write therein.[5]

Extradition was allowed for the offense of writing and selling without authority tickets of admission to performances by a company of players.[6]

§ 490b. Complaint for extradition to a foreign country. The complaint may be made by any one authorized by the Executive of the foreign government.[1] When made by a consul, his official

10 See § 462, *supra*.

§ 490a. 1 Wright v. Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *Re* Walshe, 125 Fed. 572; aff'd 194 U. S. 217, 24 S. Ct. 657, 48 L. ed. 938.

2 In *Re* Adutt, 55 Fed. 376. See, also, Cohn v. Jones, 100 Fed. 639; *Re* Ezeta, 62 Fed. 972; *Re* Cross, 43 Fed. 517; *Re* Windsor, 6 B. & S. 522, 10 Cox C. C. 118, 11 Jur. N. S. 807, 34 L. J. M. C. 163, 12 L. T. Rep. N. S. 307, 13 Wkly. Rep. 655, 118 E. C. L. 522; Reg. v. Phipps, 3 Can. L. T. 55.

3 Wright v. Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; affirming 123 Fed. 463.

4 Ibid. See *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107.

5 *Ex parte* Geissler, 196 Fed. 168, in which the author was counsel.

6 *Ex parte* Geissler, 196 Fed. 168.

§ 490b. 1 *Re* Ferrelle, 28 Fed. 878.

character is sufficient evidence of such authority.[2] When made by a private individual, it must appear that he is acting under the authority of the foreign government.[3] The complaint may precede the requisition.[4] The complaint need not set forth the crime with the particularity of an indictment, provided that it sets forth the substance of the offense charged and clearly apprises the party of his accusation.[5] Where the charge is forgery, the time, place and nature of the forgery should be specified.[6]

§ 490c. Evidence upon applications for extradition to foreign countries. By the Act of June 6, 1900: "In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."[1]

By the Act of August 3, 1882: "In all cases where any depositions, warrants, or other papers or copies thereof shall be

2 Ornelas v. Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; *Re* Grin. 112 Fed. 790; affirmed in 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130; *Re* Adutt, 55 Fed. 376.

3 *Re* Herres, 33 Fed. 165; *Re* Ferrelle, 28 Fed. 878; Commonwealth v. Deacon, 10 S. & R. (Pa.) 125.

4 Benson v. McMahon, 127 U. S. 457, 8 S. Ct. 240, 32 L. ed. 234; *Re* Adutt, 55 Fed. 376.

5 Grin v. Shine, 187 U. S. 181, 23 St. Ct. 98, 47 L. ed. 130; affirming 112 Fed. 790; *Re* Macdonnell, 11 Blatchf. 79, 16 Fed. Cas. No. 8,771; *Ex parte* Van Hoven, 4 Dill. 411, 28 Fed. Cas. No. 16,858. See, also, *Re* Adutt, 55 Fed. 376.

6 *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107. See *Re* Charleston, 34 Fed. 531; *Re* Nonrich, 5 Blatchf. 414, 11 Fed. Cas. No. 6,369. See 19 Cyc. 66.

§ 490c. 1 U. S. R. S., § 5271, 3 Fed. St. Ann. 76, Pierce Fed. Code, § 4010.

offered in evidence upon the hearing of any extradition case under Title Sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act."[2]

The provisions of the Fifth and Sixth Amendments to the Federal Constitution do not apply to such proceedings.[3] The accused need not be confronted with the witnesses against him.[4] An authentication in the language of the statute is sufficient.[5] It is sufficient if it recites that the papers "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes" in the foreign country.[6]

A conviction of the accused *in contumaciam* in his absence is treated only as a charge of a crime.[7] If the laws of the foreign country permit, copies of depositions taken before a magistrate may be received as proof of criminality.[8] Where the certificate of a minister to a foreign country stated that the documents were legally and properly authenticated, so as to entitle them to be received in evidence in support of the criminal charges therein mentioned and for similar purposes mentioned in the statute, and they were also authenticated by functionaries of the country to which he was committed as records of its tribunals; it was held that they should properly

2 Ibid., § 5, Pierce Fed. Code, § 4024.

3 *Ex parte* La Mantia, 206 Fed. 330.

4 *Ex parte* La Mantia, 206 Fed. 330.

5 *Re* Krejanker, 44 Fed. 482; *Re* Herres, 33 Fed. 165; *Re* Behrendt, 22 Fed. 699, 23 Blatchf. 40; *Re* Wadge, 15 Fed. 864; *Re* Farez, 3 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107; 10 Op. Atty.-Gen. 501.

6 *Re* Breen, 73 Fed. 458. See, also, *Re* Grin, 112 Fed. 790.

7 *Ex parte* La Mantia, 206 Fed. 330.

8 *Re* Charleston, 34 Fed. 531.

be received in evidence, although the minister's certificate did not state to what country he referred.[9]

Where the certificate was signed by a person describing himself as "*charge d'affaires ad interim,*" the court took judicial notice that he was, when he gave the certificate, the principal diplomatic officer of the United States in the country where it was executed.[10] It seems that it is not essential that each deposition should be separately certified, when the court can ascertain with reasonable certainty to what papers the certificate refers.[11] The depositions need not be sworn to if the foreign law does not so require.[12] Papers which purported to be depositions and were so certified, were held to be admissible, although, according to their recitals, they were statements and not depositions.[13]

"On the hearing of any case under a claim of extradition by foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpœned; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States." [14]

A certificate that the depositions were authenticated so as "to enable them to be used in evidence, and as proof that the originals were duly received in evidence * * * in proof of the criminality" of the accused, was held to be insufficient.[15] It has been said that where the authentication of the officer of the United States does not comply with the statutory requirements,

9 *Re* Stupp, 12 Blatchf. 509, 23 Fed. Cas. No. 13,563.

10 *Re* Orpen, 86 Fed. 760.

11 *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107. But see *Re* Henrich, 5 Blatchf. 414, 11 Fed. Cas. 6,369.

12 *Ex parte* La Mantia, 206 Fed. 330.

13 *Re* Ezeta, 62 Fed. 972.

14 Act of Aug. 3, 1882, 22 St. at L. 215, 3 Fed. St. Ann. 89, Comp. St., § 3593, § 2, Pierce Fed. Code, § 4021.

15 *Re* McPhun, 30 Fed. 57.

the defects therein may be supplemented by other proof.[16] It was held under a treaty with Switzerland, that original papers, such as forgeries, which were identified by witnesses who gave the depositions in the foreign country, need not be produced before the commissioner.[17] The usual method of proving the identity of the prisoner is by the oral testimony of a witness from the country which demands him; but his identity may be proved by his admission and otherwise.[18] Commissioner Alexander held that identification by a photograph was sufficient. The commitment was set aside upon another ground.

Testimony taken in another proceeding before the immigration authorities is inadmissible.[19] Circumstantial evidence of the commission of the offense may be sufficient.[20] "The evidence to detain a party, for the purpose of surrender, must be sufficient to commit the party for trial, if the offense was committed here. The admonition in Grotius is not to be forgotten—*non decet homines dedere causa non cognita.*"[21] The accused has the right to call witnesses in his defense,[22] and to testify in his own behalf,[23] but it has been said that he cannot offer, on his own behalf, depositions taken abroad.[24]

16 *Re* Wadge, 15 Fed. 864; s. c., 16 Fed. 332, 21 Blatchf. 300; *Re* McPhun, 30 Fed. 57, 63; *Re* Benson, 34 Fed. 649.

17 *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107

18 *Re* Charleston, 34 Fed. 531. See *Ex parte* Geissler, 196 Fed. 168 (where the writer was counsel).

19 *Ex parte* La Mantia, 206 Fed. 330.

20 *Re* Bryant, 80 Fed. 282. For a case where the discovery of a stolen calf and poultry on the farm of the accused the day after the theft after a posse of unfriendly people had been in possession during the intervening time and had previously failed to find them was held to be insufficient evidence to justify the extradition. *Ex parte* La Page, 216 Fed. 256.

21 Chancellor Kent in Matter of Washburn, 4 J. Ch. 106, 114. See, also, Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. ed. 938 (affirming 125 Fed. 572); Wright v. Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *Re* Frank, 107 Fed. 272; *Re* Ezeta, 62 Fed. 972; *Re* Muller, 17 Fed. Cas. No. 9,913, 5 Phila. (Pa.) 289; U. S. v. Warr, 28 Fed. Cas. No. 16,644, 3 N. Y. Leg. Obs. 346; Matter of Calder, 2 Edmonds' Select Cases (N. Y.) 374, 376.

22 *Re* Kelley, 25 Fed. 268.

23 *Re* Farez, 7 Blatchf. 345, 8 Fed. Cas. No. 4,645, 2 Abb. U. S. 364, 40 How. Pr. (N. Y.) 107.

24 *Re* Wadge, 15 Fed. 864; s. c., 16 Fed. 332, 21 Blatchf. 300. See Oteiza v. Jacobus, 136 U. S. 330, 10 S. Ct. 330, 34 L. ed. 464.

§ 490d. Custody and protection of persons extradited from foreign countries. "Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."[1]

"Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping."[2]

"Every person who knowingly and wilfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment of not more than one year."[3] A person extradited from a foreign country is not protected from being tried and convicted for a crime committed in the State after extradition, such as perjury committed on the trial of the crime for which the party was extradited.[4]

§ 490d. [1] U. S. R. S., § 5275, 3 Fed. St. Ann. 78, Pierce Fed. Code § 4014.

[2] U. S. R. S., § 5276, 3 Fed. St. Ann. 78, Pierce Fed. Code, § 4015.

[3] U. S. R. S., § 5277, 3 Fed. St. Ann. 78, Pierce Fed. Code, § 4016.

[4] Collins v. Johnston, 237 U. S. 502.

§ 490e. Extradition of seamen. By the Revised Statutes: "On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect.[1]

This section has been repealed; the repeal to take effect upon the expiration of the treaties which stipulate for such restoration.[2]

§ 490f. Extradition from the Philippines. By the Act of February 6, 1905, it is provided that these provisions of the Revised Statutes concerning extradition to foreign countries shall apply to the Philippine Islands:

"Such fugitive from justice of a foreign country may, upon

§ 490e. [1] U. S. R. S., § 5280, 3 Fed. St. Ann. 86, 6 Fed. St. Ann. 916, Pierce Fed. Code, § 4019, Comp. St. § 10129.

[2] Act of March 4, 1915, Ch. 153, §§ 16-18, 38, St. at L. 1184, Comp. St., §§ 8382a-8382c.

warrant duly issued by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and brought before such judge or magistrate, who shall proceed in the matter in accordance with the provisions of the Revised Statutes hereby made applicable to the Philippine Islands: Provided, That for the purposes of this section the order or warrant for delivery of a person committed for extradition prescribed by section fifty-two hundred and seventy-two of the Revised Statutes shall be issued by the governor of the Philippine Islands under his hand and seal of office, and not by the Secretary of State."[1]

§ 491. Extradition from one State to another. The Constitution ordains: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered upon claim of the party to whom such service or Labor may be due."[1]

The Revised Statutes provide: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the

§ 490f. [1] Act of Feb. 6, 1905, 33 St. at L. 698, 10 Fed. St. Ann. 260, Comp. St. Supp. 714, Pierce Fed. Code, § 4028.

§ 491. [1] Art. IV, Section 2.

agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."[2]

"Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year."[3]

A person charged with a misdemeanor may be thus removed.[4] The removal should be made where the act charged is a crime by the laws of the State from which the accused has fled, although it is not a crime in the State into which he has come.[5] A person may be extradited as a fugitive from justice although he has left the State on legitimate business,[6] or upon his return to his home in another State,[7] or by a State to which he has been extradited upon another charge from the State to which he originally fled,[8] but not if, at the time the crime was committed, he was only constructively in a State which demands him and not personally within its borders.[9] Where the crime consists of

2 U. S. R. S., § 5278, 3 Fed. St. Ann. 78, Pierce Fed. Code, § 4017.

3 U. S. R. S., § 5279, 3 Fed. St. Ann. 88, Pierce Fed. Code, § 4018.

4 *Ex parte* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

5 Commonwealth of Kentucky v. Dennison, 24 How. 66, 103, 16 L. ed. 717, 727. *Cf.* Holmes v. Jennison, 14 Peters, 540, 10 L. ed. 579.

6 *Re* White, C. C. A., 55 Fed. 54, 5 C. C. A. 29; Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, affirming 24 Fed. 132; Biddinger v. Commissioner of Police of the City of New York, 245 U. S. 728; *Re* Bruce, 132 Fed. 390; *Re* Bloch, 87 Fed. 981; *Ex parte* Brown, 28 Fed. 653. But see *Re* Tod, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566.

7 Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, affirming 24 Fed. 132; *Ex parte* Brown, 28 Fed. 653; *Re* Keller, 36 Fed. 681; *Re* White, C. C. A., 55 Fed. 54, 5 C. C. A. 29; *Re* Bloch, 87 Fed. 981; *Re* Bruce, 132 Fed. 390. But see *Re* Tod, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566.

8 Innes v. Tobin, 240 U. S. 127. But see *Re* Whittington (Cal., July, 1917), 67 Pac. 404, criticized N. Y. L. J. Oct. 25, 1917.

9 Hyatt v. People, 188 U. S. 691,

several acts, and the accused commits one of them within the State, but departs before the others, which he authorized or contemplated, he is a fugitive from justice within the meaning of the Constitution.[10] This may be when the crime consists in obtaining money or goods by false pretenses;[11] and receiving deposits in a bank which is insolvent;[12] and in running a gambling house.[13]

A statement in the affidavit annexed to the requisition that the accused is a fugitive, is *prima facie* evidence of that fact;[14] but it may be rebutted by the accused.[15] The indictment should set out the substance of the crime against the law of the demanding State.[16] An extradition proceeding, however, will not be dismissed because of technical defects therein.[17] If an affidavit is presented in the place of an indictment it must set out the crime charged sufficiently to apprise the receiving governor of the facts that constitute the offense.[18] It need not, however, have the technical exactness of an indictment.[19] It

713, 23 S. Ct. 456, 47 L. ed. 657 affirming People v. Hyatt, 172 N. Y. 176, 60 L. R. A. 774, 64 N. E. 825, 92 Am. St. Rep. 706; Tennessee v. Jackson, 36 Fed. 258, 1 L. R. A. 370. But see Adams v. People, 1 N. Y. 173; *Ex parte* Graham, 216 Fed. 813.

10 *Re* Sultan, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L. R. A. 294; *Ex parte* Montgomery, 244 Fed. 967. It was held to be sufficient under an indictment for a continuing conspiracy; that after the formation of the conspiracy the accused had been for a short time in a part of the State remote from the place of such formation and that at another time he passed through the State without alighting from his railroad train in company and in conference with one of his fellow conspirators.

11 *Re* Cook, 49 Fed. 833; aff'd 146 U. S. 983, 13 S. Ct. 40, 36 L. ed. 934.

12 Hayes v. Palmer, 21 App. Cas. (D. C.) 450.

13 State v. Clough, 71 N. H. 594, 43 Atl. 1086, 67 L. R. A. 946; 19 Cyc. 87, 88.

14 *Ex parte* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

15 Ibid. Tennessee v. Jackson, 36 Fed. 258, 1 L. R. A. 370.

16 Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, affirming 24 Fed. 132; *Ex parte* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; Reichman v. Harris, C. C. A., 252 Fed. 371.

17 *Ex parte* Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. ed. 250; *Ex parte* Graham, 216 Fed. 813.

18 Webb v. York, C. C. A., 79 Fed. 616, 25 C. C. A. 133; People v. Brady, 56 N. Y. 182; *Ex parte* Slausen, 73 Fed. 666.

19 *Ex parte* Manchester, 5 Cal. 237; State v. Goss, 66 Minn. 291, 68 N. W. 1089.

must have sufficient certainty to justify a magistrate in committing the accused,[20] for a sufficient charge.[21] Where there is no indictment, the affidavit must be sworn to upon knowledge. Statements "on information" or "on belief," are insufficient to support a requisition.[22] So are statements that the deponent "verily believes and has good reason to believe."[23] But it has been said that an affidavit charging a crime directly and positively is not vitiated by the conclusion, "as said deponent verily believes."[24]

The authentication by the governor is sufficient when they purport to be sworn to by the clerk of any court in the demanding State.[25] It has been said that the original affidavit need not be forwarded with the requisition if a copy thereof, duly authenticated, is submitted.[26] It has been held that an information unaccompanied by an affidavit is insufficient.[27]

The warrant of the governor of the State returning the accused is *prima facie* evidence of compliance with all the necessary requirements.[28] The warrant of surrender should show compliance with the requirements of the statute, namely, that the person seized has been charged with crime and is demanded as a fugitive from justice, and that the requisition was accompanied by a copy of an indictment or of an affidavit, made before a magistrate and certified to be authenticated.[29] It must specify

20 *Ex parte* Morgan, 20 Fed. 298.

21 *Re* Keller, 36 Fed. 681 (of embezzlement); *Re* Strauss, C. C. A., 126 Fed. 327, 63 C. C. A. 99 (of false pretenses).

22 *Ex parte* Smith, 3 McLean 121, 22 Fed. Cas. No. 12,968; *Ex parte* Morgan, 20 Fed. 298; *Ex parte* Spears, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341; *Ex parte* Rowland, 35 Tex. Cr. 108, 31 S. W. 651.

23 *Ex parte* Baker, 43 Tex. Cr. 281, 65 S. W. 91, 96 Am. St. Rep. 871.

24 *Re* Keller, 36 Fed. 681.

25 Chung Kin Tow v. Flynn, C. C. A., 218 Fed. 64.

26 Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173; Johnston v. Vanamringe, 5 Blackf. (Ind.) 311.

27 *Ex parte* Hart, C. C. A., 63 Fed. 249, 11 C. C. A., 165, 28 L. R. A. 801; reversing 59 Fed. 894.

28 Chung Kin Tow v. Flynn, C. C. A., 218 Fed. 64.

29 Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *Ex parte* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; *Ex parte* Dawson, C. C. A., 83 Fed. 306, 28 C. C. A. 354; *Re* Romaine, 23 Cal. 585; *Re* Sylvester, 21 Wash. 263, 57 Pac. 829; *Re* Baker, 21 Wash. 259, 57 Pac. 827; *Re* Fove, 21 Wash. 250, 57 Pac. 825.

the offense charged,[30] in substance,[31] but it seems that it need not show that the act charged is a crime by the laws or statutes of the demanding State.[32] The copy of an indictment or affidavit that accompanied the requisition need not be annexed to the warrant, nor set forth therein.[33] A recital that the governor acted upon the report of his Attorney General, as required by the State statute as well as upon the extradition papers does not effect the validity of the proceedings.[34] The Federal Constitution does not effect the power of a State to arrest in advance of extradition proceedings.[35] Such arrest may be made when authorized by the common law,[36] or the statutes[37] of the State of the asylum. It has been said that he cannot be thus arrested unless it appears that in the State where the crime is alleged to have been committed he is charged by indictment or affidavit before a magistrate or by some equivalent accusation sanctioned by the laws of such State.[38] It has been held that a warrant of arrest by a State magistrate is void when based upon an information alleging "that the offense of fugitive from justice has been committed," and accusing the prisoner thereof, although supported by an affidavit reciting that the prisoner had unlawfully entered the State from Mississippi "where he is charged with the crime of murder."[39] It has been held, that a person charged with a misdemeanor and not with any felony is entitled to bail as a matter of right, unless his enlargement would be a menace to the community;[40] that repeated denials of an application for his discharge from a criminal insane asylum made upon the returns of writs of *habeas corpus* were not adjudications which could effect the determination of his subsequent mental capacity.[41] A commis-

30 *Ex parte* Cubreth, 49 Cal. 435.

31 State v. Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946. See People v. Stockwell, 135 Mich. 341, 97 N. W. 765.

32 *Re* Leary, 10 Benedict, 197, 15 Fed. Cas. No. 8,162; 19 Cyc. 93.

33 *Ex parte* Dawson, C. C. A., 83 Fed. 306, 28 C. C. A. 354; *Re* Leary, 10 Benedict, 197, 15 Fed. Cas. No. 8,162; 19 Cyc. 93. *Contra, Re* Doo Woon, 18 Fed. 898, 9 Sawyer, 417.

34 Chung Kin Tow v. Flynn, C. C. A., 218 Fed. 64.

35 Burton v. N. Y. Central & Hudson River R. R. Co., 245 U. S. 315.

36 Ibid.

37 Ibid.

38 Reichman v. Harris, C. C. A., 252 Fed. 371.

39 Ibid.

40 *Ex parte* Shaw, 209 Fed. 954.

41 *Ex parte* Thaw, 209 Fed. 954.

sion of experts was then appointed to report whether the prisoner's mental condition was then such, that it was reasonably probable that his liberty under bail would be dangerous to the public peace and safety.[42]

The accused is not entitled to a hearing before the Governor.[43] If the proceedings are void for want of jurisdiction or because of due process of law they may be reviewed by the writ of *habeas corpus*.[44]

The Governor of a State cannot be compelled, by the writ of mandamus, to surrender a fugitive.[45]

The only evidence which can be considered is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed.[46] The defense of the Statutes of Limitations is inadmissible.[47]

42 Ibid.

43 *Ex parte* Chung Kin Tow, 218 Fed. 185.

44 Burton v. New York Central & Hudson River Railroad Company, 245 U. S. 315. *Ex parte* Thaw, 209 Fed. 954.

45 Commonwealth of Kentucky v. Dennison, 24 How. 66, 103, 16 L. ed. 717, 727. In Shevlin's Case, (A. D. 1840) Governor Seward, of New York, refused an extradition upon the charge of a resistance to arrest in a civil action by a Pennsylvania writ, while touching in that State upon a voyage from Detroit to Buffalo. In 1842, the same Governor refused to surrender to Virginia three men who were charged with assisting a slave to escape. In Curry's Case, in the following year, the Governor of Virginia, in return, refused to surrender a man demanded by Governor Seward, although the latter Governor had complied with the previous Virginia requisition. He was overruled, however, by the House of Delegates. The surrender was made and the Governor resigned. In Large's Case, (A. D. 1860) Governor Dennison, of Ohio, refused to honor a requisition from Kentucky charging the enticement of a slave to escape. Moore on Extradition, §§ 522, 523. The last case was the cause of the litigation in Commonwealth of Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717. In Johnson's Case, A. D. 1917, Governor McCall of Massachusetts refused to honor a requisition from West Virginia, charging a colored man with rape because he believed that exaggerated reports of the crime had been generally circulated in the vicinity of its alleged commission and that on account of the nature of these reports and the race of the defendant there existed a prejudice against the latter which will be difficult if not impossible of control (Official papers of Governor McCall for 1916-1918). There are a number of other precedents of refusals to honor requisitions.

46 Biddinger v. Commissioner of Police of City of N. Y., 245 U. S. 128, 135.

47 Ibid.

§ 492. Summons in criminal cases. Unless some statute otherwise provides, the proper original process against a corporation,[1] and or is against a *quasi* corporation,[2] or joint stock association,[3] or joint stock company,[4] in a criminal prosecution is a writ of summons. It seems that a summons cannot issue unless supported by an affidavit charging the offense to which it relates.[5] It has been held that, where it is charged that a foreign corporation has committed a crime within the district, service of the summons may be made upon its manager or highest officer within the district.[6] Jurisdiction thus acquired was sustained in a criminal prosecution for a violation of the Interstate Commerce law by accepting unlawful preferential rates,[7] for a violation of the Anti-Trust law by a conspiracy in restraint of trade,[8] and for the sale of malt liquor without a license.[9]

§ 493. Bail. Bail is the taking of security for the appearance of the party accused at the court at the time and place for trial or arraignment.[1] A recognizance is an obligation of record entered into before a court of record.[2] It need not be signed by either principal or surety.[3] A bail bond must be signed by those who are bound thereby, the consideration thereof being the release of an accused from custody.[4] Sureties upon the former must personally appear in court.[5] Sureties upon the latter may sign before the clerk [6] or his deputy [7] or a United States Commissioner.[8]

§ 492. [1] U. S. v. John Kelso Co., 86 Fed. 304; U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66; U. S. v. Standard Oil Co. of Indiana, 154 Fed. 728; John Gund Brewing Co. v. U. S., C. C. A., 204 Fed. 17.

[2] U. S. v. Adams Express Co., 229 U. S. 381, affirming 199 Fed. 321.

[3] Ibid.

[4] Ibid.

[5] U. S. v. Schallinger Produce Co., 230 Fed. 290.

[6] U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66; U. S. v. Standard Oil Co. of Indiana, 154 Fed. 728; John Gund Brewing Co. v. U. S., C. C. A., 204 Fed. 17.

[7] U. S. v. Standard Oil Co. of Indiana, 154 Fed. 728.

[8] U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66.

[9] John Gund Brewing Co. v. U. S., C. C. A., 204 Fed. 17.

§ 493. [1] U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

[2] Ewing v. U. S., C. C. A., 240 Fed. 241.

[3] Ibid.

[4] Ibid.

[5] Hunt v. U. S., C. C. A., 63 Fed. 568.

[6] Ibid. Hunt v. U. S., C. C. A., 63 Fed. 568.

[7] Ewing v. U. S., C. C. A., 240 Fed. 241.

[8] U. S. v. Louis, 149 Fed. 277.

Ordinarily, money will not be taken in lieu of bail,[9] but this may be done by a special order of the court.[10]

The Eighth Amendment to the Federal Constitution ordains: "Excessive bail shall not be required."[11]

9 U. S. v. Faw, 1 Cranch C. C. 486, Fed. Cas. No. 15,078.

10 U. S. v. Neely, 178 Fed. 748. It was said to be against public policy to permit the United States to attach the deposit in a civil suit. Ibid.

11 U. S. v. Lawrence, 4 Cranch C. C. 518, Fed. Cas. No. 15,577.

Cooley's Constitutional Limitations, 6th ed., 377. "When bail is allowed, unreasonable bail is not to be required, but the constitutional principle that demands this is one which, from the very nature of the case, addresses itself exclusively to the judicial discretion and sense of justice of the court or magistrate empowered to fix upon the amount. That bail is reasonable which, in view of the nature of the offence, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party's attendance. In determining this, some regard should be had to the prisoners' pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with the like offence. When the court of magistrate requires greater security than in his judgment is needful to secure attendance, and keeps the prisoner in confinement for failure to give it, it is plain that the right to bail which the constitution attempts so carefully to secure has been disregarded; and though the wrong is one for which, in the nature of the case, no remedy exists, the violation of constitutional privilege is aggravated, instead of being diminished, by that circumstance."

Ibid. "The magistrate in taking bail exercises an authority essentially judicial. Regina v. Badger, 4 Q. B. 468; Linford v. Fitzroy, 13 Q. B. 240. As to his duty to look into the nature of the charge and the evidence to sustain it, see Barronet's Case, 1 El. & Bl. 1. See Carmody v. State, 105 Ind. 546, as to fixing amount of bail in advance for different classes of cases."

U. S. v. Lawrence, 4 Cranch 518, Fed. Cas. 15,577: "To require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law." If this dictum were followed, prisoners who have nothing should in every case be released upon giving no bail or bail of six cents; which would make our system a criminal law not very practicable.

In U. S. v. Brawner, 7 Fed. 86, 87, before Hammond, J., there was an application for a warrant for removal from the Western District of Tennessee to the Eastern District of Missouri upon a charge of counterfeit. The prisoner "stated that he could give bond for a smaller sum than $5,000, but could not for that amount. On his oath he stated that he himself had no property except two small town lots, worth about $75, but that his father, upon whom he relied for bail, owned about 240 acres of land and necessary

The usual remedy for the requirement of excessive bail is an application for the writ of *habeas corpus*.[12] Upon an application for a warrant and for the removal of the prisoner to another Federal District, the judge reduced the bail fixed by the commissioner.[13] A motion to reduce the bail might be sustained;[14] but its denial could not, like the denial of a discharge upon *habeas corpus,* be immediately reviewed upon an appeal.[15]

A petition for the writ will be dismissed, if the prisoner before the decision, give the bail which he claims to be excessive.[16]

The Revised Statutes provide: "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor

farming stock, the land being assessed for taxes at about $8 or $10 per acre." The bail was reduced from $5,000 to $2,000.

In U. S. v. Petit, 11 Fed. 58, Ed. Mo. the defendant to a charge of passing a counterfeit half dollar was held in bail in the sum of $1,000.

In Smith v. Lee, 13 Fed. 28, an arrest in a civil action by a receiver for conversion of the money of a bank after a disagreement of the jury upon one trial the bail was reduced from $100,000 to $10,000. The defendant was under bail in the sum of $10,000 upon indictments. He had made a general assignment for the benefit of creditors without preferences the schedules in which filed by the assignee estimated his property at the value of $35,000. The greater part of his property was real estate in the city where the bank was located. The affidavit also stated that, with the exception of the property so assigned, he had nothing whatever with which to pay any judgment that might be awarded against him; that from the day the bank suspended—April 14, 1882—until May 18th, the date of the arrest in this action, he was, with the exception of one day, at large in the city of Buffalo, making no attempt to depart; that he has now no property to offer as security, and it will be absolutely impossible for him to procure bail unless the same be mitigated; that if reduced to a nominal sum in this action, it may be possible, through his friends, to secure bail in the criminal actions to the amount of $15,000." The plaintiff did not claim that there was danger of defendant's absconding.

In People v. Tweed, 63 N. Y. 202, an order was affirmed which fixed the amount of bail at $3,000,000, in a civil suit to recover more than $6,000,000.

12 U. S. v. Brawner, 7 Fed. 86.

13 Ibid.

14 Smith v. Lee, 13 Fed. 28, a civil case.

15 See § 467, *supra,* § 695, *infra.*

16 Johnson v. Hoy, 227 U. S. 445, 57 L. ed. 497; *supra,* § 467.

of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."[17]

It has been said that this statute is as regards District Courts merely declarative of the inherent powers of such courts to admit offenders to bail.[18]

"Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."[19] "Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstances of the offense, and of the evidence, and to the usages of law."[20]

"When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from

17 U. S. R. S., § 1014.

18 Ewing v. U. S., C. C. A., 240 Fed. 241.

19 U. S. R. S., § 1015.

20 U. S. R. S., § 1016.

custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error."[21]

"When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."[22]

"When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterwards arrested in any other district and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or to his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an *exoneratur* be entered upon the bail-piece, where special bail shall have been found, or otherwise discharge such bail."[23]

"When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in

21 U. S. R. S., § 1017.
22 U. S. R. S., § 1019.
23 U. S. R. S., § 943.

order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is."[24]

"Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; 'and such acknowledgements of bail and affidavits shall have the same effect as if taken before any judge of such courts.'"[25]

"When a bail-bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies."[26]

It has been said: that courts have inherent power to take recognizances; but that clerks possess such power only by statute.[27] "Recognizances of special bail may be taken *de bene esse* by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable."[28]

A Circuit Court of Appeals, pending a writ of error therefrom, may admit to bail a prisoner after his conviction of a crime which is not capital.[29] It has been said by a high authority: "The granting of the writ of error in itself stays the execution of the sentence of the trial court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail there is no excuse for refusing or denying such relief."[30] The

24 U. S. R. S., § 944.
25 U. S. R. S., § 945.
26 U. S. R. S., § 946.
27 U. S. v. Evans, 2 Fed. 147.
28 U. S. R. S., § 947.
29 McKnight v. U. S., C. C. A., 113 Fed. 451, 453, § 493, 51 C. C. A. 285.
30 McKnight v. U. S., C. C. A., 113 Fed. 451, 453, 51 C. C. A. 285;

Circuit Court of Appeals may allow bail in such a case, although the trial judge has refused an application therefor.[31] The fact that the judgment is the third conviction after the third trial upon the same indictment is not a sufficient reason for denying bail.[32] The better practice in the Circuit Court of Appeals is to permit bail for a time only sufficient to insure the filing of the transcript there, reserving the question of further bail until then, when a new bond may be taken by the trial court immediately or by direction of the Circuit Court of Appeals for such time as the latter may prescribe.[33]

After the conviction has been affirmed, pending a motion for a rehearing, the prisoner may be allowed to remain at large on

per Lurton, J.: It has been said by the Circuit Court of Appeals for the Sixth Circuit: "Detention pending the writ is only for purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and policy of the statute of the United States; for in Hudson v. Parker, cited above, the court said, 'The statutes of the United States have been framed upon this theory; that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.' The fact that bail has been refused by the trial judge, though not conclusive, is a fact which would make it more seemly, in the absence of some great urgency, that further application should be made to the appellate court, which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ or error. We quite agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction." The Circuit Court of Appeals for the Second Circuit will rarely, before a bill of exceptions has been prepared, admit a prisoner to bail after conviction, pending a writ of error, when the trial judge has refused to do so. U. S. v. Morse, C. C. A., Second Circuit, Nov. 1, 1909."

31 McKnight v. U. S., C. C. A., 113 Fed. 451, 453, 51 C. C. A. 285, per Lurton, J.

32 Ibid., 113 Fed. 451, 454.

33 Ibid.

bail;[34] but the Circuit Court of Appeals has no power, when its judgment is final, to continue his bail or to admit him to new bail pending his application to the Supreme Court for a writ of certiorari, although it may, for good cause shown, defer the beginning of his sentence for a reasonable time.[35] A judge of a District Court, after a writ of error to review a judgment of conviction, may grant a stay of proceedings, when the punishment was imprisonment in a penitentiary, so as to keep the prisoner in the county jail pending proceedings upon his writ of error.[36] It has been held that, pending a writ of error, bail should be allowed only for a time sufficient to insure the filing of the transcript in the court of review within a reasonable time, reserving the question of further bail until the lapse of the time thus fixed.[37] Bail has been denied pending a writ of error until after an application had been made to the Supreme Court for the advancement of the cause, because the plaintiff in error was imprisoned.[38] It has been held that three successive convictions of a defendant, upon the same indictment, is no sufficient ground for denying him bail pending his third writ of error.[39]

The Act of March 3, 1879, giving the Circuit courts jurisdiction over writs of error to certain judgments of conviction of crime, provides: "Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the District Court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay for proceedings under the sentence; but the allowance of such writ shall not so operate without such order. The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same

34 Walsh v. U. S., C. C. A., 174 Fed. 621.

35 Walsh v. U. S., 177 Fed. 208.

36 Order of Lacombe, J., in U. S. v. Morse (C. C.), S. D. N. Y., Nov. 6, 1908.

37 McKnight v. U. S., C. C. A., 113 Fed. 451, 51 C. C. A. 285.

38 U. S. v. Simmons, 47 Fed. 723, 14 L. R. A. 78.

39 McKnight v. U S., C. C. A., 113 Fed. 451, 51 C. C. A. 285.

shall be prosecuted to effect, and that the respondent shall abide the judgment of the Circuit court thereon. And if the writ shall be allowed to operate as a stay in proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent of the term of the Circuit court to which such writ of error shall be returnable, and that he will not depart without leave of course."[40] This, if still in force, might be held to apply to the review by the Circuit Court of Appeals of convictions of Crime.[41]

Upon a writ of error from the Supreme Court of the United States to review a judgment of conviction of an infamous crime which is not capital, any Justice of the Supreme Court, or any Circuit or District Judge, may, after the citation is served, admit the accused to bail.[42] The justice who signs the citation and grants a supersedeas may order the prisoner, after the service of the citation to be admitted to bail by the judge before whom the conviction was had, upon giving a bond in a certain sum, in proper form and with sufficient sureties.[43] An appearance bond in addition to a supersedeas bond is necessary to allow the prisoner to go at large.[44] If that judge refuses to admit the prisoner to bail, he may be compelled to do so by the writ of mandamus, issued from the Supreme Court of the United States.[45]

The Supreme Court Rules provide: "1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus,* the custody of the prisoners shall not be disturbed. 2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided. 3. Pending an appeal from the final decision of any court or judge dis-

40 20 St. at L. 354, c. 176, § 2.

41 Hudson v. Parker, 156 U. S. 277, 39 L. ed. 424.

42 Hudson v. Parker, 156 U. S. 277, 285, 15 Sup. Ct. 450, 39 L. ed. 424; small caps below, U. S. v. Hudson, 65 Fed. 68.

43 Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424.

44 Hardesty v. U. S., C. C. A., 184 Fed. 269.

45 Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424; *supra,* § 457.

charging the prisoner, he shall be enlarged upon recognizance with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required."[46] "Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under Section 238,[47] the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed."[48]

Previously to the Revised Statutes, it was doubtful whether the court had the right to bail any one indicted for high treason.[49] A prisoner held for conspiracy may be bailed.[50] The court in its discretion may, pending deportation proceedings or proceedings to review the same, allow the prisoner to be at large on bail,[51] but not, it has been held, in extradition proceedings.[52] Where a prisoner has been remanded to the custody of State officers, in pursuance of the Supreme Court rules, pending an appeal from a decision of a court of the United States, discharging his writ of *habeas corpus*, the Federal court has no jurisdiction to admit him to bail.[53] When a party, who is under bail, absconds, he cannot, when he is captured, demand that he be committed to bail as a matter of right;[54] but the court has discretionary power to do so.[55] In the latter case, an additional recognizance is usually required.[56] A prisoner may be admitted to bail, although his plea of not guilty has

46 Supreme Court Rule 34; *supra*, § 467.

47 In reference to writs of error direct from a District Court to the Supreme Court.

48 Supreme Court Rule 36, subdivision 2.

49 Burr's Trial, I, pp. 18, 104, 310; U. S. v. Hamilton, 3 Dallas 17, 1 L. ed. 490.

50 U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 51,495.

51 *Re* Chin Wah, 182 Fed. 256; *Ex parte* De Castro, S. D. N. Y., 1913.

52 Wright v. Henkel, 190 U. S. 40, 62, 47 L. ed. 948, 956; *Re* Kaine, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598; *Re* Carrier, 57 Fed. 578. But see *Re* Mitchell, 171 Fed. 289.

53 *Re* Bissert, 113 Fed. 12.

54 Case of Robt. M. Lee, 6 Phila. 96.

55 Case of Robt. M. Lee, 6 Phila. 96.

56 U. S. v. Feely, 1 Brock. 255, Fed. Cas. No. 15,082.

been stricken out during the term that it was entered.[57] No person has an absolute right to bail during his trial, although bail may be then allowed in the discretion of the court in a case where the punishment is not capital.[58] The trial court may in its discretion grant a *supersedeas,* after conviction, in order to allow the convict to sue out a writ of error.[59] Application in such case must be first made to the trial judge.[60]

Upon one application for bail a court appointed an expert to determine whether the applicant's mental capacity was such that his enlargement would probably not be a menace to the public peace.[61] The continuance of a case is, in itself, no cause for admission to bail;[62] but if the prisoner is sick, and the nature of his disease is such that confinement must be injurious and may be fatal to him, he may be admitted to bail.[63]

It has been said that where the indictment does not charge an indictable offense, the amount of bail is in the discretion of the magistrate.[64]

Separate bonds or recognizances must be given for separate offenses.[65] Where the commissioner required two separate recognizances, each for a certain sum, and a single recognizance for the total amount was given, it was held that it was void and did not bind the sureties.[66]

Where a person, whose name did not appear in the body of a recognizance, signed it on a day, subsequent to the signature of a surety therein named; it was held that he was not bound.[67]

It has been held that, where the magistrate certifies the acknowledgement of the parties to a recognizance, it is valid, although they do not sign.[68]

57 Bassett v. U. S., 9 Wall. 38, 19 L. ed. 547. See U. S. v. Horton's Securities, 2 Dillon 94, Fed. Cas. No. 15,393.

58 U. S. v. Rice, 192 Fed. 720.

59 U. S. v. Gibson, 188 Fed. 396.

60 Ibid.

61 *Re* Thaw, 209 Fed. 954.

62 U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495.

63 U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495.

64 U. S. v. Smith, 4 Cranch C. C. 727, Fed. Cas. No. 16,330.

65 U. S. v. Goldstein's Sureties, 1 Dillon 413, Fed. Cas. No. 15,226.

66 U. S. v. Goldstein's Sureties, 1 Dillon 413, Fed. Cas. No. 15,226.

67 U. S. v. Pickett, 1 Bond. 123, Fed. Cas. No. 16,043.

68 U. S. v. Pickett, 1 Bond. 123, Fed. Cas. No. 16,043.

Where a doubtful question of law was involved, the court accepted a single surety.[69]

The bail must be taken "agreeably to the usual mode of process against offenders in such State."[70]

The form of the bond should in all substantial particulars conform to the requirements of the laws of the State where the commissioner sits.[71] In a District Court for Tennessee a bond was held to be sufficient when it recited that the principal and surety acknowledged themselves indebted to the United States in a specified sum, to be levied of their proper goods, and chattels, lands and tenements, but to be void if the principal should make his personal appearance before the court at a specified time and further reciting that it was signed, sealed, acknowledged before, and approved by, the Deputy Clerk; although, it was not taken in open court and signed by a single surety.[72] In a district of Texas a bond was held to be sufficient in its recitals as to the crime when it set forth that defendant was charged with having committed a felony by attempting to export munitions of war into Mexico in violence of a Presidential Proclamation, although the date of the proclamation was inaccurately stated.[73]

A recognizance or bail bond is void if it does not set forth an act that is made an offense by a statute of the United States;[74] but it is sufficient if it sets out an offense punishable under an act of Congress, without stating the particulars.[75] Thus, a recital that the defendant "conspired to defraud the United States," is sufficient, without stating the number of the section of the Revised Statutes alleged to have been violated, or the date of the commission of the alleged offense,[76] or the

69 U. S. v. Petit, 11 Fed. 58. It has been said that a bail bond, as regards its status, differs in no respect from a bond given by an individual surety. *Ex parte* Marrin, 164 Fed. 631.

70 U. S. R. S., § 1014; U. S. v. Rundlett, 2 Curtis, 41, Fed. Cas. No 16,208.

71 Ewing v. U. S., C. C. A., 240 Fed. 241; U. S. v. Buchanan, 255 Fed. 915.

72 Ewing v. U. S., C. C. A., 240 Fed. 241.

73 U. S. v. Buchanan, 255 Fed. 915.

74 U. S. v. Hand, 6 McLean, 274, Fed. Cas. No. 15,296.

75 U. S. v. Dennis, 1 Bond. 103, Fed. Cas. No. 14,949.

76 U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C A. 488.

person defendant conspired with, or the acts of the conspiracy,[77] and so is a recital that defendant "unlawfully aided and abetted the landing of Chinese laborers in the United States."[78] But where a State statute required a bail bond to name the offense, of which defendant was accused, it was held that such a bond, taken by the United States Commissioner reciting that defendant was charged with concealing smuggled goods, but not stating that he did so knowing them to be smuggled, was invalid.[79] The bond is not invalid because of an apparent clerical inaccuracy the result of a transposition of words caused by filling the blanks in the printed forms.[80]

In Texas, at least, a bail bond executed on Sunday is valid.[81]

Where the magistrates have the power to admit to bail, the United States Commissioner, before whom the accused is brought after his arrest, may do so.[82] Where the magistrates have no such power, it has been held that the United States Commissioners have not.[83] In a later case, however, it was said: "The power to take bail for the appearance for trial before the proper court, of one charged with crime against the United States, is expressly conferred upon—among other officers—any Commissioner of a Circuit Court of the United States."[84] It has been held that a justice of the peace has not power to admit to bail after a commitment;[85] but a commissioner, after a commitment to await the issue of a warrant of removal by a District Judge, may admit to bail the person committed by him.[86] It has been held that a commissioner may admit the accused to bail after an indictment.[87]

77 U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488.

78 U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488.

79 U. S. v. Sauer, 73 Fed. 671.

80 Anduaga v. U. S., C. C. A., 254 Fed. 61.

81 De Orozco v. U. S., C. C. A., 237 Fed. 1008.

82 U. S. v. Rundlett, 2 Curtis, 41, Fed. Cas. No. 16,208; U. S. v. Sauer, 73 Fed. 671.

83 U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742. See U. S. v. Sauer, 73 Fed. 671.

84 U. S. v. Dunbar, C. C. A., 83 Fed. 151, 154; U. S. v. Louis, 149 Fed. 277. See Ewing v. U. S., C. C. A., 240 Fed. 241.

85 U. S. v. Faw, 1 Cranch, C. C. 486, Fed. Cas. No. 15,078.

86 U. S. v. Volz, 14 Blatchf. 15, Fed. Cas. No. 16,627.

87 Hoeffner v. U. S., C. C. A., 87 Fed. 185.

The clerk of the court,[88] or his deputy,[89] or a United States Commissioner,[90] may take the acknowledgement and justification of the principal and sureties upon a bail bond or recognizance, when he is required by the court to do so. It has been held that a surety who is an attorney cannot object that the approval was not given by the proper officer.[91] No person has an absolute right to bail during his trial, although bail may be allowed in the discretion of the court in a case where the punishment is not capital.[92]

Sureties upon a bail bond, in a criminal case, cannot recover against the defendant or his estate the amount they are compelled to pay by reason of his default.[93] It has been held: that money deposited as cash bail by a third party cannot be applied to fines of defendants who have stood their trial and not defaulted,[94] and that a bail bond should not be accepted when the sureties thereupon have indemnified themselves by taking bonds from the accused and other;[95] but sureties have been allowed to obtain indemnity from securities deposited with them for that purpose,[96] when they had accepted these in good faith, although it was the proceeds of the crime of which the principal was convicted.[97] The surety is not entitled to charge the fund with the defense of successful litigation in defending his title.[98]

The magistrate has no power to take bail requiring an appearance from day to day pending the preliminary examination;[99]

88 U. S. v. Evans, 2 Fed. 147; Hunt v. U. S., C. C. A., 63 Fed. 568.

89 Ewing v. U. S., C. C. A., 240 Fed. 241.

90 U. S. v. Louis, 149 Fed. 277.

91 Ewing v. U. S., C. C. A., 240 Fed. 241.

92 U. S. v. Rice, 192 Fed. 720.

93 U. S. v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. ed. 308; Ewing v. U. S., C. C. A., 240 Fed. 241. *Contra,* Moloney v. Nelson, 158 N. Y. 351; Carr v. Davis, 64 W. Va. 522, 20 L. R. A. (N. S.) 58. See also Simpson v. Roberts, 35 Ga. 180; Holker v. Hennessey, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642; People v. Skidmore, 17 Cal. 261; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162.

94 U. S. v. Berkman, C. C. A., March, 1918, — Fed. —.

95 U. S. v. Simons, 47 Fed. 575, 14 L. R. A. 78.

96 Leary v. U. S., C. C. A., 229 Fed. 660. See Essig v. Turner, 60 Wash. 175, 110 Pac. 998.

97 Leary v. U. S., C. C. A., 257 Fed. 246, aff'd U. S. v. Leary, 25 U. S. 94.

98 Ibid.

99 U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

unless the State statute gives him such authority when a bond or recognizance so conditioned will be enforced.[100] The failure of the commissioner to enter upon his docket a continuance of the hearing,[101] or to take such an affidavit which the State law requires before granting an adjournment will not exonerate the bail.[102] Such a recognizance, after an indictment, was held to be good.[103] Where the accused has given bail to appear in court, he must appear upon the first day of the term, and he does not have the whole term within which to appear.[104] Where the recognizance stipulated for the appearance of the accused at the next term, and at any subsequent term to be thereafter held, it was held that it contemplated only such subsequent term as followed in regular succession in the course of the business of the court, and that an agreement to continue the case for an indefinite period discharged the bail.[105] Where the accused appeared in conformity with his recognizance, at the next term, and the court passed away without taking any order in respect to him, it was held that he was discharged.[106]

In the districts of Tennessee a bond conditioned that the principal appear at a fixed term then and there to answer, and continue in attendance from day to day, and from term to term until discharged and abide the decision of the court in the premises is forfeited by his failure to attend for sentence when he has been allowed to go free after conviction pending a motion for a new trial.[107]

Where the undertaking provided that the sureties should produce the defendant, "whenever requested to do so," it was held that no request or notice was required to bind them, except that duly given in open court at the time regularly set for the trial.[108] Where a defendant to a criminal prosecution, in a State court, removed the cause after he had given bail, it was

100 De Orozco v. U. S., C. C. A., 237 Fed. 1008

101 Ibid.

102 Ibid.

103 U. S. v. White, 5 Cranch C. C. 368, Fed. Cas. No. 16,678.

104 U. S. Hodgkin, 1 Cranch C. C. 510, Fed. Cas. No. 15,375.

105 Reese v. U. S., 9 Wall. 13, 19 L. ed. 541.

106 U. S. v. Burr, 1 Burr's Trial, 79.

107 Ewing v. U. S., C. C. A., 240 Fed. 241.

108 U. S. v. Dunbar, C. C. A., 83 Fed. 151, 27 C. C. A. 488.

held that the bond was not forfeited by his failure to appear in the State court after the removal.[109] Where a judicial vacancy occurred by the death of the District Judge, it was held that a bail bond was continued in force, both against the principal and sureties, until the next term after the appointment and qualification of the next incumbent.[110]

The death of the principal after default and forfeiture, although before judgment, does not exonerate the sureties.[111] The arrest, conviction and imprisonment of the accused under State laws, when they occur subsequent to the recognizance, do not ordinarily exonerate the bail from their obligation to produce him;[112] but where, at the time of the arrest, under process of the United States, the accused was under bail to the State court in a previous prosecution, it was held that his bail in the Federal court were by subsequent imprisonment under the State law, relieved from their obligation.[113] The removal of a prisoner from one Federal district to another might exonerate his bail in the former district.[114]

Where an accused who while at large on bail after a warrant for his removal to another district was re-arrested on a new warrant, by giving bail under such latter warrant he waived any objection to the jurisdiction of the commissioner to issue it.[115]

After he has been bailed, the accused is considered to be in

109 Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. ed. 574.

110 U. S. v. Murphy, 82 Fed. 893.

111 U. S. v. Van Fossen, 1 Dillon, 406, Fed. Cas. No. 16,607; De Orozco v. U. S., C. C. A., 237 Fed. 1008, under Texas Law.

112 U. S. v. Van Fossen, 1 Dillon 406, Fed. Cas. No. 16,607; U. S. v. Marrin, 170 Fed. 476. In People ex rel. Am. Surety Co. v. Benham, 71 Misc. (N. Y.) 345. Gavegan, J.; held that where, pending a writ of error to review the conviction in a Federal court in another district, the plaintiff in error was convicted, sentenced and imprisoned in the State court for another crime, his bail could not obtain the surrender by the State to the Federal court, the authorities of the United States not having joined in the application, although they were proceeding against the bail upon the bond. See *Ex parte* Marrin, 164 Fed. 631.

113 *Re* James, 18 Fed. 853.

114 Peckham v. Henkel, 216 U. S. 483, 54 L. ed. 579.

115 Stallings v. Splain, D. Ct. A., 258 Fed. 510. See U. S. v. Lamar, 210 Fed. 685.

the custody of his surety, who is a *quasi* jailer,[116] and has the right to arrest and surrender him.[117]

"Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and *exoneratur* of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law." [118]

Where the accused has been actually surrendered the court may endorse the discharge and *exoneratur* of the bail, *nunc pro tunc*, upon the trial of a proceeding to enforce the bail bond.[119]

During the term at which a bail bond or recognizance is forfeited, if the accused appears and submits to the jurisdiction of the court, the court may take off the forfeiture.[120]

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." [121]

The default is willful, if intentional and not unavoidable, although the defendant's attorney advised him not to appear.[122] In determining whether to remit the penalty the court may consider the probability that it will ultimately be paid by persons indirectly responsible for the offense charged,[123] and the expense caused the Government by the default.[124] The petition for the remission may be signed by a person who advanced

116 Ewing v. U. S., C. C. A., 240 Fed. 241.

117 Ibid.

118 U. S. R. S., § 1018.

119 U. S. v. Stevens, 16 Fed. 101.

120 U. S. v. Feely, 1 Brock. 255, Fed. Cas. No. 15,082; U. S. v. Barger, 20 Fed. 500.

121 U. S. R. S., § 1020.

122 U. S. v. Fabata, 253 Fed. 586.

123 U. S. v. Jacobson, 257 Fed. 760.

124 U. S. v. Fidelity & Casualty Co. of N. Y., C. C. A., 258 Fed. 449.

money to indemnify the sureties.[125] An allegation therein, that there was no willful default is sufficient.[126] A judgment upon a bail bond cannot be set aside upon a motion made subsequent to the judgment term unless it was a nullity.[127]

A party who has forfeited his bail may be subsequently arrested.[128]

A party who has forfeited his bail cannot move in arrest of judgment until he personally appears and submits himself to the jurisdiction.[129]

Sureties cannot defend a proceeding to enforce their recognizance or bail bond upon the ground that the indictment against their principal was bad,[130] or that the statute of limitations had run against the prosecution.[131] It has been held that the fact there was an appearance or discontinuance after a forfeiture of a bail bond is not a legal defense to an action thereupon.[132] It is no defense to such action that the defendant was misled or misinformed as to the contents and effects of the bond, when there is no proof of fraud nor incapacity to read.[133] A complaint in an action on a bail bond was held to be fatally defective when it did not allege that criminal proceedings had been commenced against the principal, or that there had been an examination before the proper officer, at which reasonable cause for relief in his guilt appeared, or that he had been by any one held to bail or required to give any bail.[134]

It has been said that a bail bond, as regards its legal status, differs in no respect from a bond given by an individual surety.[135]

The surety is liable only within the absolute terms of his

125 U. S. v. Smart, C. C. A., 237 Fed. 978.

126 Ibid.

127 U. S. v. Buchanan, 255 Fed. 915. See *supra*, § 481.

128 *Ex parte* Milburn, 9 Peters, 704, 9 L. ed. 280.

129 U. S. v. Askins, 4 Cranch C. C. 98, Fed. Cas. No. 14,471; U. S. v. Erskine, 4 Cranch C. C. 299, Fed. Cas. No. 15,057.

130 U. S. v. Evans, 2 Fed. 147.

131 U. S. v. Dunbar, C. C. A., 83 Fed. 151.

132 U. S. v. McGlashen, 66 Fed. 537; reversed for want of jurisdiction, McGlashen v. U. S., C. C. A., 71 Fed. 434.

133 Taylor v. Fleckenstein, 30 Fed. 99.

134 U. S. v. Keiver, 56 Fed. 422.

135 *Ex parte*, Marrin, 164 Fed. 631.

undertaking which cannot be enlarged.[136] The obligation of a surety upon a bail bond binds his estate after his death.[137] No judgment can be entered against the wife of the principal when she did not execute the bond and is not his executrix or administratrix.[138] Before there can be a recovery it must be shown that the offender was bailed by an officer qualified to admit to bail.[139] Where the record does not show who admitted the accused to bail, the Government can supply the omission by parol evidence.[140]

The question whether a proceeding to enforce a criminal bail bond must be taken in accordance with the practice of the State, or may proceed according to the common law by a writ of *scire facias,* is doubtful.[141] It is too late to raise in the court of review, for the first time, the objection that the proceedings were not instituted by an original action.[142] A judgment *nisi,* without notice to the sureties, cannot be issued upon a forfeited recognizance of bail.[143] Such a judgment does not merge the obligation of the surety and he may be sued upon the recognizance that he gave.[144]

§ 493a. Presentments. A criminal prosecution must be instituted by a presentment, an indictment [1] or an information.[2] A presentment is the notice of an offense taken by a grand jury from its own knowledge or observation without the testimony of witnesses and without a bill of indictment being laid before it by the District Attorney.[3] It is generally regarded in the light of instructions upon which an indictment should be found.[4]

136 Ewing v. U. S., C. C. A., 240 Fed. 241.

137 U. S. v. Keiver, 56 Fed. 422.

138 De Orozco v. U. S., C. C. A., 237 Fed. 1008.

139 Ewing v. U. S., C. C. A., 240 Fed. 241.

140 Ewing v. U. S., C. C. A., 240 Fed. 241.

141 Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158, 37 L. ed. 1163. See *supra,* § 368b.

142 Hardesty v. U. S., C. C. A., 184 Fed. 269.

143 U. S. v. Winstead, 12 Fed. 50.

144 Leary v. U. S., C. C. A., 170 Fed. 941.

§ 493a. 1 See *infra,* §§ 495-506.

2 Weeks v. U. S., C. C. A., 216 Fed. 292, 293.

3 McKinney v. U. S., C. C. A., 199 Fed. 25, 39; Commonwealth v. Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. State Rep. 894; Blackstone's Commentaries IV, 301; 20 Cyc. 1335.

4 Charge to Grand Jury, 2 Sawyer 667, Fed. Cas. 18,225; Matter of Gardiner, 31 Misc. N. Y. 364.

In the Federal courts the grand juries have the power to make presentment of offenses within their own knowledge or upon the personal knowledge of one of their members communicated to them under no sanction but his official oath.[5] It has been said that "this form of accusation has fallen into disuse since the practice has prevailed—and the practice now obtains generally—for the prosecuting officer to attend the grand jury and advise them in their investigations."[6]

§ 494. Informations. Informations may be civil or criminal in their nature. Informations which are civil in their nature have been previously considered.[1]

A criminal information is a written accusation of crime, preferred by a prosecuting officer, without a previous indictment or presentment by a grand jury.[2] At common law there were two kinds of criminal informations. The first, which was for offenses immediately against the King was filed by the Attorney General *ex officio* and without leave of the court. The second was for offenses against private individuals and was exhibited by masters of the crown on the part of private prosecutors without leave of the court.[3] By a statute passed in the reign of William and Mary,[4] as construed by the courts, an information exhibited by a master of the crown could not be filed without leave of court nor unless supported by the affidavit of the person at whose suit it was brought.[5]

The Revised Statutes provide that "all crimes and offenses committed against the provisions of chapter seven, title

5 U. S. v. Kilpatrick, 16 Fed. 765, 773; Com. v. Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302 (followed in Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318); Com. v. Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; McCullough v. Com., 67 Pa. St. 30; Grand Jury v. Public Press, 4 Brewst. (Pa.) 313; Lloyd's Case, 3 Pa. L. Rep. 188; Charge to Grand Jury, 3 Pittsb. (Pa.) 174; Com. v. Porter, 10 Phila. (Pa.) 217; Com. v. Jadwin, 2 L. T. N. S. (Pa.) 13; Com. v. Towles, 5 Leigh (Va.) 743; U. S. v. Kilpatrick, 16 Fed. 765. See Blaney v. State, 74 Md. 153, 21 Atl. 547.

6 Charge to Grand Jury, 2 Sawy. 667, Fed. Cas. No. 18,225.

§ 494. 1 *Supra*, § 131.

2 Blackstone, IV, 308.

3 Bacon's Abridgement, III, 635.

4 IV and V William and Mary, c. 18.

5 Comyn's IV, 558, note d; Weeks v. U. S., C. C. A., 216 Fed. 292, 297.

'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by a District Attorney.''[6] These informations seem to correspond to those filed in England by the Attorney General.[7]

After the statute of the third year of the reign of Henry VII, until the abolition of the Court of Star Chamber under Charles I, informations became restricted in practice to that court, and were cause of great oppression ''so as continually to harass the subject and shamefully enrich the crown.''[8] Their misuse in this court, where there was no trial by jury and the fact that no action by a grand jury was required for their presentment created a prejudice against them in England and in this country as well.[9]

The Fifth Amendment ordains: ''No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.'' This forbids the institution of a criminal prosecution by information, in any case where the crime is punishable by imprisonment at hard labor,[10] or by imprisonment in a penitentiary with or without hard labor.[11] Offenses which are not capital, nor infamous, may be prosecuted by information.[12] Such are cases where the offense is not punishable by imprisonment in a penitentiary, or by imprisonment elsewhere, with hard labor.[13] A prosecu-

6 U. S. R. S., § 1022.

7 Bishop's Criminal Procedure, § 144; Clark on Criminal Procedure, pp. 128, 129; Weeks v. U. S., C. C. A., 216 Fed. 292, 297. But see Blackstone's Commentaries IV, 309, and cases to which reference is made in Weeks v. U. S., C. C. A., 216 Fed. 292, 296.

8 Blackstone's Commentaries IV, 310.

9 Wilson's Lectures before the University of Pennsylvania; Wilson's Works (Andrew's Ed.) 450; Weeks v. U. S., C. C. A., 216 Fed. 292, 295.

10 *Ex parte* Wilson, 114 U. S. 417, 29 L. ed. 89.

11 Mackin v. U. S., 117 U. S. 348, 29 L. ed. 909.

12 U. S. v. Maxwell, 3 Dillon, 275, Fed. Cas. No. 15,750; U. S. v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16,273; U. S. v. Block, 4 Sawyer, 211, Fed. Cas. No. 14,609; U. S. v. Baugh, 1 Fed. 784. But see U. S. v. Joe, 4 Chicago Legal News, 105, Fed. Cas. No. 15,478.

13 U. S. v. Baumert, 179 Fed. 735.

tion for a violation of the Prohibition law,[14] or of the Pure Food and Drugs Act,[15] may be by information.[16]

The better opinion seems to be that leave of the Federal court is not required before the filing of an information.[17] It has been held, however, that an information cannot be filed without leave of the court;[18] and the court, before granting leave, may require the prosecutor to bring the accused before the court to show cause, if cause there be, against the filing of the information.[19] The body of an information must be drawn with as much precision as if it were an indictment.[20] Its allegations as to the defense should be so certain and specific as fairly to inform the defendant of the crime charged and to make the judgment a complete defense to a second prosecution for the same cause.[21] An information was held to be defective when it set forth the effect of a material document without reciting any of the contents thereof.[22] In an information charging an interstate shipment in violation of the Pure Food and Drugs Act,[23] an averment that the false statements were applied by the defendant to the article in question knowingly and in wanton disregard of their falsity was held to be sufficient as regards the fraud.[24]

The body of an information must be drawn with as much precision as if it were an indictment.[25] The facts may be alleged upon information and belief, but if stated to be made upon the oath of persons whose affidavits are annexed the allegations are insufficient unless the affidavits are sufficient to support them.[26]

14 Act of Oct. 28, 1919, ch. 41, St. at L. 315.

15 Act of June 30, 1906, ch. 3915, 34 St. at L. 768, Comp. St., § 8718; U. S. v. Quaritius, 267 Fed. 227.

16 Weeks v. U. S., C. C. A., 216 Fed. 292, affirming U. S. v. Weeks, 225 Fed. 1017.

17 Weeks v. U. S., C. C. A., 216 Fed. 292, 297; Abbott Bros. Co. v. U. S., C. C. A., 242 Fed. 751.

18 U. S. v. Smith, 40 Fed. 755. See U. S. v. Maxwell, 3 Dillon, 275, Fed. Cas. No. 15,750.

19 U. S. v. Smith, 40 Fed. 755; *infra*, §§ 501-505.

20 Weeks v. U. S., C. C. A., 216 Fed. 292, 295.

21 Simpson v. U. S., C. C. A., 241 Fed. 841.

22 U. S. v. Watson, 17 Fed. 145.

23 Act of June 30, 1906, § 8, as amended Aug. 23, 1912 and March 3, 1913, 34 St. at L. 771, 37 St. at L. 416, 37 St. at L. 732, Comp. St., § 8724.

24 Dr. J. H. McLean Medicine Co. v. U. S., C. C. A., 253 Fed. 694.

25 Kelly v. U. S., C. C. A., 250 Fed. 947. See *supra*, §§ 136, 137.

26 U. S. v. Schallinger Produce Co., 230 Fed. 290.

An information was held to be defective when it set out the effect of a material document without reciting any of the contents of the same.[27] A prayer for any specified penalty or for judgment is not essential to the validity of an information.[28]

The authorities are in conflict as to whether an information must be supported by an affidavit showing probable cause for the prosecution, arising from facts within the knowledge of the affiant. The better opinion is that such an affidavit is not required,[29] unless the information is used to support an arrest.[30] It has been held, however, that an affidavit is indispensable in every case[31] unless the information is supported by the depositions of witnesses taken upon a preliminary examination,[32] or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient.[33] An affidavit upon information and belief is sufficient.[34] It has been held that such an affidavit cannot be taken before a notary public,[35] and suggested that when taken before a notary, a County Clerk's certificate of his appointment is required.[36] An objection to the omission of an affidavit or to an irregularity in the verification must be taken specially.[37] It cannot be raised for

27 U. S. v. Watson, 17 Fed. 145.

28 Standard Oil Co. v. Missouri, 224 U. S. 270, 285, 56 L. ed. 760, 769; Creekmore v. U. S., C. C. A., 237 Fed. 743.

29 U. S. v. Baumert, 179 Fed. 735, 742; Weeks v. U. S., C. C. A., 216 Fed. 292; Kelly v. U. S., C. C. A., 250 Fed. 947; State v. Smith, 114 La. 322, 38 So. Rep. 204; State v. Guglielmo, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976; Territory v. Cutinola, 4 N. M. (Gild.) 160, 14 Pac. 809. *Contra* Dictum in U. S. v. Morgan, 222 U. S. 274, 282, 32 Sup. Ct. 81, 82, 56 L. ed. 198.

30 Weeks v. U. S., C. C. A., 216 Fed. 292, 300; U. S. v. Polite, 35 Fed. 58; Johnston v. U. S., C. C. A., 87 Fed. 187, *supra*, § 485.

31 U. S. v. Tureaud, 20 Fed. 621; U. S. v. Polite, 35 Fed. 58; Lustig v. People, 18 Colo. 217, 32 Pac. 275; State v. Gleason, 32 Kan. 245, 4 Pac. 363; Myers v. People, 67 Ill. 503; Eichenlaub v. State, 36 Ohio St. 140; De Graff v. State, 2 Okl. Cr. 519, 103 Pac. 538; Thornberry v. State, 3 Tex. App. 36; State v. Boulter, 5 Wyo. 236, 39 Pac. 883.

32 U. S. v. Polite, 35 Fed. 58; U. S. v. Smith, 40 Fed. 755; U. S. v. Wells, 225 Fed. 320; U. S. v. Quaritius, 267 Fed. 227. See U. S. v. Morgan, 222 U. S. 274, 282, 32 Sup. Ct. 81, 56 L. ed. 198.

33 U. S. v. Polite, 35 Fed. 58.

34 Creekmore v. U. S., C. C. A., 237 Fed. 743.

35 U. S. v. Schallinger Produce Co., 220 Fed. 290.

36 U. S. v. Baumert, 179 Fed. 735.

37 Simpson v. U. S., 241 Fed. 841.

the first time upon writ of error.[38] It seems that one remedy, when an information is filed without the proper affidavits, is by a motion to quash it.[39]

Otherwise, proceedings upon information are similar to those upon indictment.[40]

§ 495. Indictments. The Fifth Amendment ordains: That "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."[1] It has been said that this intends not merely an indictment in form, but a valid indictment found and presented according to the settled usage and established mode of proceedure.[2]

An indictment is a written accusation of one or more persons of a crime or misdemeanor, which is preferred to and presented upon oath by a grand jury.[3] The Revised Statutes regulate indictments in the courts of the United States as follows: "No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors."[4] The indictment need not allege that it was found by twelve grand jurors.[5] It is the safer practice for the defendant to move to quash the indictment, when he objects to the same on the ground that twelve jurors did not concur therein.[6] It has been held that, when the defendant pleads not guilty and goes to trial upon the

38 Ibid.

39 U. S. v. Polite, 35 Fed. 58.

40 Weeks v. U. S., C. C. A., 216 Fed. 292, 295; Blackstone's Commentaries, IV, 310.

§ 495. 1 See *supra*, § 381i; Burchett v. U. S., C. C. A., 194 Fed. 821.

2 Renigar v. U. S., C. C. A., 26 L.R.A. (N.S.) 683, 172 Fed. 646.

3 Blackstone, IV, 302; U. S. v. London, 176 Fed. 976. An indictment may be presented by a Grand Jury without a preliminary complaint or arrest. U. S. v. Baumert, 179 Fed. 735. It has been held that the submission of an indictment to a Grand Jury and the examination of witnesses before them in relation to the same, are no part of criminal proceedings against the accused within the meaning of the Fifth Amendment, U. S. v. Price, 163 Fed. 904; but that they and the indictment are included within the phrase, "Any suit or proceeding" in § 299 of the Judicial Code, 36 St. at L. 1087.

4 U. S. R. S., § 1021.

5 U. S. v. Laws, 2 Lowell 115, Fed. Cas. No. 15,579.

6 *Re* Wilson, 140 U. S. 575, 35 L. ed. 513. *Cf.*, § 515, *infra*.

merits, the objection that twelve competent jurors did not concur in the indictment is waived.[7] Such an objection cannot be raised collaterally by *habeas corpus* after conviction.[8] "In prosecutions for perjury committed on examination before a naval general court-marshal, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court."[9] "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."[10] "No indictment found and presented by a grand jury in any District or Circuit or other Court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."[11] The description of a man by the initials of his christian name only is a defect in the indictment, of which advantage may be taken by a plea in abatement, unless the grand jury allege that his name is unknown to them otherwise than as set forth.[12] A defendant may be described in the indictment under one name, or otherwise called another name, or *alias* another name.[13]

§ 496. Captions of indictments. The caption of an indictment is a formal statement of the proceedings which describes the court where the indictment was found; the time and place of the finding thereof and the grand jurors who made the finding.[1] It should also state that the grand jurors were sworn,

7 Ibid.

8 Ibid.

9 U. S. R. S., § 1023.

10 U. S. R. S., § 1024.

11 U. S. R. S., § 1025.

12 U. S. v. Upham, 43 Fed. 68; *infra*, § 516. A description of the defendants who are named as doing business under a certain firm name and style does not prevent the indictment from being against such individuals. Schraubstadter v. U. S., C. C. A., 199 Fed. 568.

13 U. S. v. Polite, 35 Fed. 58.

§ 496. 1 Harrington v. U. S., C. C. A., 267 Fed. 97; 22 Cyc. 228.

if such was the case.[2] It is part of the record.[3] It is not part of the indictment.[4] It is different from the introduction to the indictment, which is a part thereof and may supplement the subsequent averments.[5] Statements in the caption, when referred to in the body of the indictment may cure omissions[6] but not unless there is such a reference.[7]

An amendment to the caption of an indictment is immaterial and not prejudicial.[8] A clerical error in the caption of an indictment, such as a mistake in the year of the term when the record shows that the grand jury was in fact impaneled in the current year,[9] a recital that the indictment was found in the Circuit Court of the United States for a specified district when in fact the grand jury was impaneled in the District Court of such district,[10] an omission of anything to show the organization or composition of the court or who were present as constituent parties thereof, when the indictment was returned[11] and an omission of any express recital that twelve jurors concurred in the finding,[12] may be disregarded.

§ 497. Body of indictment. An indictment must allege every essential element of the crime charged.[1]

2 Burchett v. U. S., C. C. A., 194 Fed. 821.

3 Ibid.

4 Harrington v. U. S., C. C. A., 267 Fed. 97.

5 Ibid.

6 U. S. v. Boyden, 1 Lowell, 266, 24 Fed. Cas. No. 14,632; Commonwealth v. Edwards, 4 Gray (Mass.) 1; Commonwealth v. Fisher, 7 Gray (Mass.) 492; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; State v. Buralli (Nevada), 71 Pac. 532; 22 Cyc. 239.

7 U. S. v. Howard, 132 Fed. 325.

8 Gardes v. U. S., C. C. A., 87 Fed. 172.

9 U. S. v. Bornemann, 35 Fed. 824.

10 Ledbetter v. U. S., C. C. A., 108 Fed. 52.

11 Caha v. U. S., 152 U. S. 211, 38 L. ed. 415.

12 Ibid.

§ 497. 1 U. S. v. Potter, 56 Fed. 83. The statute provides that an indictment is not invalidated by a defect in form, U. S. R. S., § 1025; quoted *supra*, § 495; Renigar v. U. S., C. C. A., 172 Fed. 646. An indictment charging perjury before "a competent tribunal, to wit, before the said United States District Clerk for the Northern District of Texas," is not to be vitiated by the clerical mistake in using the word "clerk," instead of "court." Hogue v. U. S., C. C. A., 192 Fed. 918. The statute does not validate an indictment, which omits any matter of substance, but is applicable where the only defect of which com-

It is an essential element of due process of law that a man shall have notice of the charge or claim against him, not only sufficient to inform him that some charge or claim has been made, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense.[2] When a man is indicted, the presumption is that he is innocent, and consequently that he is ignorant of the facts of which the pleaded founds his charges.[3] The sufficiency of an indictment must be tested on the presumption that the defendant has no knowledge of the facts therein charged against him.[4] It is essential to the sufficiency of an

plaint is made, is that some element of the offense is stated loosely and without technical accuracy. Dunbar v. U. S., 156 U. S. 185, 39 L. ed. 390.

2 U. S. v. Aviles, 222 Fed. 474; Fontana v. U. S., C. C. A., 262 Fed. 283.

3 Fontana v. U. S., C. C. A., 262 Fed. 283.

4 Ibid.; Miller v. U. S., C. C. A., 133 Fed. 337, 341; Maftzger v. U. S., C. C. A., 200 Fed. 494, 502; U. S. v. Britton, 107 U. S. 665, 669, 670, 2 Sup. Ct. 512, 27 L. ed. 520; U. S. v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. ed. 516; Miller v. U. S., C. C. A., 133 Fed. 337, 341; Armour Pkg. Co. v. U. S., C. C. A., 153 Fed. 1, 16, 17; Etheredge v. U. S., C. C. A., 186 Fed. 434; Winters v. U. S., C. C. A., 201 Fed. 845, 848; Horn v. U. S., C. C. A., 182 Fed. 721, 722; Fontana v. U. S., C. C. A., 262 Fed. 283, 285.

"Sometimes a statute, either through embracing a great many offenses of the same class, or for some other reason, is so general in its terms that the indictment must allege many particulars which the statute omits." U. S. v. Cruikshank, 92 U. S. 542, 557, 23 L. ed. 589.

U. S. v. Potter, 56 Fed. 83, 88, 89, 90, 91, per Putnam, J.:

"It is not sufficient that the pleader state merely the facts from which an offense can be implied, or only so many of the essential elements as in the ordinary experiences of life, or even in a statute, might suggest all the other elements; but he must state in terms everything necessary to constitute a criminal act. For example, as is well known, there are no common-law offenses against the Federal authority; so that theft on shipboard on the open seas would not be punishable without a statute providing for it. It would be sufficient that such a statute set out in terms that larceny on shipboard on the high seas should be punishable, with a certain penalty named; but every legal mind would at once admit that, although this would be sufficient in the statute, an indictment which alleged merely that the person accused committed larceny on board a certain ship, naming it, on the high seas, embracing the entire phrascology of the statute, but without details of the property stolen and of its own-

indictment; that it set forth the facts which the pleader claims constitutes the alleged offense, so distinctly as to advise the accused of the charge which he has to meet, to give him a fair

ership, and the other usual details, would be wholly insufficient. So, also, there are certain offenses, especially those arising under the revenue laws, which are punishable independently of the intent; but generally there can be no crime unless there is a criminal purpose. Congress, however, in declaring offenses, does not always note this distinction in the terms of the statute. It sometimes prohibits the act and declares the penalty in quite the same terms, whether as a part of the revenue laws, where the intent is not always important, or as part of the general criminal code, where it is essential; but in the latter case the courts understand that the guilty purpose is an element which must be set out in the indictment, although not necessarily in the statute.'' Citing U. S. v. Carll, 105 U. S. 611, 26 L. ed. 1135. ''These are a few illustrations out of many which might be made. They are sufficient to establish the proposition that, while it is ordinarily enough that the indictment declares an offense in the language of the statute, as has many times been said by all the courts, this is not universally true, and does not excuse the prosecutor from setting out every essential element constituting the crime. In order to properly inform the accused of the 'nature and cause of the accusation,' within the meaning of the Constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense.'' . . . ''In addition to these fundamental principles, the force of which all admit, there have been certain precedents, including precise forms of expression, some of them highly technical, in use for so long a period, not only with reference to offenses long familiar to the law, but also with reference to new offenses to which they can be applied, that they have come to have more or less the force of law. Some of them are undoubtedly the relics of what was once essential, but now unessential. Others, perhaps, were the mere fashion of the times, re-

opportunity to prepare his defense or to demur if he is of the opinion that no offense is set forth, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same cause, and so clearly that the court may be able to determine whether or not the facts therein stated are sufficient to support a conviction.[5] All that is necessary is: that the indictment should charge the defendants with the commission of acts, which are, by a law of the United States, made criminal and punishable; and that it contain a sufficient statement of the particular facts to identify the offense so that the defendant may intelligently prepare his defense and plead a judgment in bar of another prosecution, and that it will enable the court to judge whether the acts alleged amount to a crime in law.[6]

peated so often that they are now in the mouth of every pleader. Some of them, to the well-trained legal mind, seem to be wholly unessential, the omission of which ought not prejudice any; yet, in view of the fact that ours is a government of laws, and not of men, and of the further fact that, when the judiciary and the courts pull away from well-known landmarks, they are apt to enter a field where their only guides are the varying individual and sometimes crude opinion of different judges, or mere judicial discretion, liable to run into a kind of oppression and injustice most detestable, because most insidious, the courts ordinarily adhere to these forms, precedents, and expressions until common consent is united against them, or the legislature has expressly interfered. . . . With reference to all the principles I have stated, there seems to be no distinction concerning either the rules applicable to the construction of the statutes, or the requisites of indictments, on account of the severity of the punishment inflicted, except in behalf of capital offenses, or those involving the liability of imprisonment for life, and possibly in behalf of felonies at common law,'' citing U. S. v. Britton, 108 U. S. 192, 27 L. ed. 703.

[5] Rosen v. U. S., 161 U. S. 29, 40 L. ed. 606; Price v. U. S., 165 U. S. 311, 41 L. ed. 727; U. S. v. Goggin, 1 Fed. 49; *Re* Benson, 58 Fed. 962; Knauer v. U. S., C. C. A., 237 Fed. 8; St. Louis Merchants' Bridge T. Ry. Co. v. Schuerman.

[6] Whitehead v. U. S., C. C. A., 245 Fed. 385, 390, per Batts, J.:

''Most of the attacks upon the indictment are apparently predicated upon the postulate that an indictment requires a character of English composition entirely different from that used for any other purpose, and that, in a determination of its meaning, all the ordinary rules of interpretation are abrogated. With reference to every other instrument which comes before a court an effort is made to ascertain the meaning intended by the writer. As to an indictment it is insisted that every possible effort should be made to di-

At the present stage of jurisprudence an indictment should

vest it of meaning. A word too many avoids it; a word omitted is fatal. If a word or clause may be given a possible meaning antagonistic to another word or clause, that meaning must be given rather than an obvious meaning which would be consistent.

"Even when perversion of the language is not undertaken, perfection of expression is insisted upon. Many English words have more meanings than one, and a writer whose thoughts are entirely clear and logical must be content sometimes to have a question raised as to the meaning of the language in which he undertakes to give them expression. There is little in literature beyond the reach of the hypercritical. The Lord's Prayer and the Commandments have not escaped. One who can find eighty-five objections to the indictment in this case could probably suggest improvements in the Gettysburg speech. It is not quite reasonable to demand of prosecuting attorneys that they should show a talent for lucid and accurate expression not expected of any other person. We shall decline to give aid in the maintenance of rules so manifestly in conflict with good sense and so potently subversive of efficient administration of the law. The time of a court may be more profitably used than in the perpetuation of absurdities.

"The objections which may properly be urged to the indictment are not such as may be charged to the representative of the government who drew the indictment. As heretofore stated, the indictment covers ninety-one printed pages. Every essential fact could probably have been stated in one-tenth of that space, except that it was conceived necessary to follow well established forms and time-honored phraseology. It is to be regretted that prosecuting officers cannot feel safe in so drawing an indictment as to make it a simple and straightforward statement of the facts upon which the government depends for conviction. It is to be regretted, too, that the useless repetition in the counts cannot be obviated. Each of the eighty-five objections to the indictment is lacking in merit. But if it had been suggested that the charges against defendants are obscured by excessive verbiage the proposition would be considered with sympathy because of inherent merit and overruled with regret because the forms used are sustained, perhaps required, by precedent.

"But if we have little sympathy with the effort to defeat the law by verbal gymnastics, there is every inclination to see that defendants are not deprived of any substantial right by any technical rule. On this account we have examined all the assignments, notwithstanding some of the objections to the indictment were not properly raised in the trial court, and notwithstanding counsel for the government have made exceptions to the assignments and brief that may be meritorious.

"On the oral submission of the cause counsel for defendants were called upon to point out wherein any harm or disadvantage or prejudice had resulted to defendants from the assumed defects in the indictment. Nothing more specific was in-

be construed liberally and not technically.[7] It need not aver evidence nor the means by which the crime was accomplished.[8]

The crime should be charged directly and not by inference[9] nor by recital;[10] but such an objection should be raised specifically before the trial.[11] In an indictment for a misdemeanor an allegation may be made in the participial form.[12] An allegation that defendant "had" devised a fraudulent scheme is a sufficient averment that he did devise such scheme.[13]

There should be no abbreviations[14] except possibly such as are of use in common parlance. It is ordinarily sufficient to describe money in general terms as so many dollars and cents.[15]

dicated than that the defendants had been deprived of legal rights. If they were deprived of a legal right by any ruling, the case should be reversed. They are entitled to be tried in accordance with law. They are entitled, however, to no more than a trial by law as the law is. They cannot invoke the law as it might have been, if the tendency to permit absurd technicalities to defeat the purposes of the law had not been checked by persistent public protest and stopped by tardy but wise legislation. In some of the states it is still possible for an omitted letter or a misspelled word to cancel a judgment of conviction. But this court is given statutory authority to observe the dictates of common sense (Rev. Stat., sec. 1025, Comp. Stat., 1916, sec. 1691).

"Not infrequently unsound propositions have become so incorporated into the jurisprudence as developed by the courts that they have become rules of property rights. They become the basis of legal advice. The lawyer considers it safer to follow a poor opinion than a good reason. In such a case disregard of or change in the rules as applicable to past transactions might bring about unjust and inexcusable results. But no one ought to be held to have a vested right in the veteran absurdities of criminal procedure; no one should be permitted to plead that he would not have violated the laws of his country except for his confidence that foolish and illogical rulings would continue to be observed, whereby he would have acquired immunity."

7 Mark Yick Hee v. U. S., C. C. A., 223 Fed. 732; U. S. v. U. S. Brewers' Ass'n, 239 Fed. 163. Ibid.; Stokes v. U. S., C. C. A., 264 Fed. 18.

8 Fontana v. U. S., C. C. A., 262 Fed. 283.

9 Johnston v. U. S., C. C. A., 87 Fed. 187; Bartlett v. U. S., C. C. A., 106 Fed. 884; McKenna v. U. S., C. C. A., 127 Fed 88.

10 Dyar v. U. S., C. C. A., 186 Fed. 614.

11 Ibid.

12 Pooler v. U. S., C. C. A., 127 Fed. 509.

13 Wilson v. U. S., C. C. A., 190 Fed. 427.

14 U. S. v. Reichert, 32 Fed. 142.

15 McBride v. U. S., C. C. A., 101 Fed. 821.

The highest degree of certainty is not required.[16] Certainty to a common intent is sufficient.[17] It is the duty of the courts to construe indictments liberally and not technically.[18] Where the statute provides a punishment for a crime known to the common law without defining it, the indictment therefor should contain averments setting forth the common law ingredients thereof.[19] If the crime was unknown to the common law and is originated by statute, the indictment is ordinarily sufficient if the averments are in the language of the statute; provided that such language, according to the natural import of the words, is fully descriptive of the offense;[20] unless general or technical[21] or generic[22] words or phrases are used. Where such words are used, the indictment must be so specific that a defendant of ordinary understanding may comprehend what is charged.[23] When words or terms of art, which have a technical meaning at common law are used in the statutory description, the indictments should recite them since they are the only terms to express an apt and legal language the nature and character of the crime.[24] An innuendo cannot change or enlarge the sense of expressions beyond their usual meaning and acceptations. "It may serve as an explanation, but not as a

16 Finnegan v. U. S., C. C. A., 231 Fed. 561.

17 Ibid.

18 Tapack v. U. S., C. C. A., 220 Fed. 445; Jelke v. U. S., C. C. A., 255 Fed. 264; Whitehead v. U. S., C. C. A., 245 Fed. 385, 388, 390-392, per Batts, J.:

"Embellished with an erudition almost innocuous because almost obsolete and expressed with a clarity characteristic of the dialectical tergiversations of the medieval theological controversialists, some of the objections of the indictment and the argument in their support, involve process of mental ratiocination not easily within the capacity of persons accustomed to deal with the law in its practical phases only."

19 Ackley v. U. S., C. C. A., 200 Fed. 217.

20 Ackley v. U. S., C. C. A., 200 Fed. 217; Jelke v. U. S., C. C. A., 255 Fed. 264.

21 U. S. v. Staats, 8 How. 41, 44, 12 L. ed. 979; Potter v. U. S., 155 U. S. 438, 39 L. ed. 214; Ackley v. U. S., C. C. A., 200 Fed. 217; Foster v. U. S., C. C. A., 253 Fed. 481; Collins v. U. S., C. C. A., 255 Fed. 609.

22 Knauer v. U. S., C. C. A., 237 Fed. 8.

23 Potter v. U. S., 155 U. S. 438, 39 L. ed. 214; Ackley v. U. S., C. C. A., 200 Fed. 217.

24 U. S. v. Staats, 8 How. 41, 44, 12 L. ed. 979.

substitute."[25] But a word may have a technical meaning in pleading indictments without possessing one in civil cases.[26] In such a case, its use in the latter would be insufficient.[27] In a cases of entries in account books, it is the safer practice to aver by innuendo what they purported to show and in substance indicated.[28]

Ordinarily, conclusions of law are insufficeint and the facts should be alleged so that the indictment sets forth an unlawful act.[29] Thus, it is insufficient to charge that certain importations were "contrary to law,"[30] or that an officer of a national bank "willfully misapplied its funds,"[31] or that a statutory notice was given to the "proper officers" of certain corporations;[32] or that a quarantine was "duly and legally established" by the Secretary of Agriculture.[33]

The allegations that a certain publication was "obscene, lewd and lascivious,"[34] and that a ship was fitted out for the slave trade[35] are sufficient allegations of fact.

Where the statute provides that several things connected by the disjunctive "or" shall constitute a crime, the indictment should connect them by the conjunctive "and" before evidence can be admitted as to more than one act,[36] but if the meaning is clear a pleading in the disjunctive is not fatal.[37]

Where the indictment contains several counts, one may be sufficient which refers to a prior count for a statement of some of the facts that it sets forth,[38] although the count to which it

25 Nave-M'Cord Mercantile Co. v. U. S., C. C. A., 182 Fed. 46, 48.

26 Andrews Institute v. N. Y. Steam Co., C. C. A., 266 Fed. 872, per Hough, J.

27 Ibid.

28 U. S. v. Britton, 107 U. S. 655, 663, 27 L. ed. 520.

29 Keck v. U. S., 172 U. S. 435, 43 L. ed. 505.

30 Ibid.

31 U. S. v. Britton, 107 U. S. 655, 669, 27 L. ed. 520.

32 U. S. v. El Paso & N. E. R. R. Co., 178 Fed. 846.

33 Ibid.

34 Konda v. U. S., C. C. A., 166 Fed. 91.

35 U. S. v. Gooding, 12 Wheaton 461, 473, 6 L. ed. 693.

36 Potter v. U. S., 155 U. S. 438, 39 L. ed. 214; Ackley v. U. S., C. C. A., 200 Fed. 217.

37 Stockslager v. U. S., C. C. A., 116 Fed. 590; Samuels v. U. S., C. C. A., 232 Fed. 536.

38 Bartholomew v. U. S., C. C. A., 171 Fed. 902; Doe v. U. S., C. C. A., 253 Fed. 903.

refers is barred by the statute of limitations [39] or is otherwise insufficient.[40]

It is the safer practice always to use the language of the statute in charging a statutory offense; [41] but that is not required if the averments bring the charge within the true meaning of the act.[42]

Statutes need not be pleaded since the court takes judicial notice of them.[43] The same is true of the rules and regulations of the Executive Department, which are authorized by statute,[44] but if the indictment undertakes to set forth the statute upon which it is based by a reference to its title, chapter, or otherwise; a variance might be fatal.[45]

Where the offense is charged as committed with reference to two persons, who are named, and proved as to one of them alone, the variance is not fatal.[46] A citation of a statute on the margin of an indictment is not a part of the indictment itself and does not limit the crime to one described in that statute alone; but the indictment will be good if it states an offense embraced in any statute then in force.[47]

The averment that an offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," although customary is a mere conclusion of law, the omission of which is a matter of form and immaterial.[48] A prayer is not essential to the validity of an indictment.[49]

§ 497a. Pleading matters of inducement and collateral matters. Matters of inducement may ordinarily be set forth in general terms.[1] Thus, it is sufficient in an indictment against a trustee in bankruptcy for official misconduct to aver that he

39 U. S. v. Ridgway, 199 Fed. 286.

40 Ibid.

41 Potter v. U. S., 155 U. S. 438, 39 L. ed. 214.

42 Lemon v. U. S., C. C. A., 164 Fed. 953.

43 Bridgeman v. U. S., C. C. A., 140 Fed. 577, *supra*, § 329.

44 Caha v. U. S., 152 U. S. 211, 38 L. ed. 418, *supra*, § 329a.

45 U. S. v. Goodwin, 20 Fed. 237.

46 Bennett v. U. S., C. C. A., 194 Fed. 630.

47 Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. ed. 509.

48 Frisbie v. U. S., 157 U. S. 160, 39 L. ed. 657.

49 Fisher v. U. S., 1 Oklahoma 252.

§ 497a. 1 Blake v. U. S., C. C. A., 71 Fed. 286; Kerreh v. U. S., C. C. A., 171 Fed. 366.

was "duly appointed" without setting forth or describing his election or the order of his appointment.[2] So in an indictment for assaulting an officer while engaged in serving process it is sufficient to describe the warrant which he was engaged in serving as "duly issued."[3]

Collateral matters need not be described with as much particularity as the gist of the offense.[4] In an indictment for a conspiracy to commit an unlawful act the object of the conspiracy need not be described as specifically as the conspiracy itself.[5] In an indictment for the mailing of letters in execution of a fraudulent scheme, the description of the fraud need not be as explicit as that of the letters mailed.[6] In a count based upon a statute forbidding the transportation of property by any device for less than the lawful rate, the device need not be particularly described.[7] In a count for bribery to influence official action upon leases, the leases need not be set forth in detail.[8] If it is necessary to plead a negative in the description of a collateral matter general terms may be used.[9]

§ 497b. Pleading negatives in indictments. When the statutory description of the crime contains exceptions, such exceptions must be negatived in the indictment;[1] but this is only necessary when the exception is such as to render its negation an essential part of the definition of the offense.[2] The language creating the offense is so completely separable from the exception that the essential ingredients of the offense may be

2 Kerrch v. U. S., C. C. A., 171 Fed. 366.

3 Blake v. U. S., C. C. A., 71 Fed. 286.

4 Salla v. U. S., C. C. A., 104 Fed. 544; Ewing v. U. S., C. C. A., 136 Fed. 53; Van Gesner v. U. S., C. C. A., 153 Fed. 46; Thomas v. U. S., C. C. A., 156 Fed. 897; Whitehead v. U. S., C. C. A., 245 Fed. 385.

5 Ibid., *infra*, § 506d.

6 Brooks v. U. S., C. C. A., 146 Fed. 223; Whitehead v. U. S., C. C. A., 245 Fed. 385. See *infra*, § 506a.

7 Armour Packing Co. v. U. S., C. C. A., 153 Fed. 1.

8 Sharp v. U. S., C. C. A., 138 Fed. 878.

9 Ewing v. U. S., C. C. A., 136 Fed. 53; Whitehead v. U. S., C. C. A., 245 Fed. 385.

§ 497b. 1 U. S. v. Moore, 11 Fed. 248; U. S. v. Nelson, 29 Fed. 202; U. S. v. Wood, 159 Fed. 187, against the master of a vessel for knowingly bringing a Chinese within the United States and landing or attempting to land him "in contravention of the provisions of this act." Act of Sept. 13, 1888, ch. 1015, § 9, 25 St. at L. 478, Comp. St. § 4310.

2 Shelp v. U. S., C. C. A., 81 Fed. 694.

accurately and clearly defined without any reference to the exception, it need not be negatived thereto, but it is a matter of defense.[3] There is no need of negativing an exemption.[4]

Where the exception or proviso is in a subsequent clause to that defining the offense, or is in a subsequent statute, it need not be negatived.[5]

When fraudulent representations, which are averred, are collateral to the gist of the offense, which is the use of the mails in the execution of a fraudulent scheme, denials of the truth of fraudulent representation may be made by negative pregnant[6] or conjunctively,[7] or in literal negations.[8]

§ 497c. Allegations as to time in indictments. The indictment must allege the offense as of a day certain;[1] except in cases of misdemeanors and offenses of omission rather than of commission.[2] In the case of a misdemeanor, an allegation of the commission "on or about" a specified date is sufficient.[3]

Allegations of time should be made with approximate accuracy; but, when they do not apparently bring the case within the bar of the statutes of limitations,[4] and the crime is not one which must be committed after a certain date,[5] or upon a certain day of the week, or in certain calendar months,[6] or within a limited period,[7] in which cases time is the essence of the offense and corresponding proof,[8] thereof must be made, they are usually disregarded;[9] even, it has been held, when they

3 U. S. v. Carney, 228 Fed. 163.

4 Ibid.

5 U. S. v. Moore, 11 Fed. 248; U. S. v. Nelson, 29 Fed. 202.

6 Horn v. U. S., C. C. A., 182 Fed. 721; Whitehead v. U. S., C. C. A., 245 Fed. 385, 389. See Hardwick v. U. S., C. C. A., 257 Fed. 505.

7 Whitehead v. U. S., C. C. A., 245 Fed. 385, 389: "Whatever may be the technical learning with reference to the negations in indictments for obtaining money by false pretention, perjury, and like offenses, there is no present occasion for its application."

8 Ibid.

§ 497c. 1 U. S. v. Gaag, 237 Fed. 728.

2 U. S. v. Smith, Fed. Cas. No. 16,338; U. S. v. Gaag, 237 Fed. 728.

3 Bryant et al. v. U. S., C. C. A., 257 Fed. 378, an indictment for seditious conspiracy.

4 U. S. v. Conrad, 59 Fed. 458.

5 U. S. v. Gaag, 237 Fed. 728.

6 Ibid.; Bishop's Criminal Procedure, I, § 399; a different date from that alleged in the indictment, if the same day of the week, may be proved.

7 U. S. v. Gaag, 237 Fed. 728.

8 Ibid.

9 U. S. v. Potter, 56 Fed. 83; Rieger v. U. S., C. C. A., 107 Fed. 916. "On principle, allegations of

are inconsistent, and repugnant.[10] A charge that an offense was committed "on the —— day" of a month and year named is not defective where any day of that month is prior to the finding of the indictment and within the period of limitation, unless time is of the essence of the offense.[11] It has been held that an allegation that an overt act took place between two specified days is not proved by evidence of an act on the latter day, the word inclusive not having been used.[12]

Perjury need not be proved on the date laid in the indictment;[13] but when committed in reference to depositions, affidavits, or records, and the date of these differ from the date in the indictment they are construed to be different papers and there is a variance.[14]

Where a crime consists of several contemporaneous elements, the indictment must show that such elements coexisted.[15]

Since in the United States time is never designated by the year of the reign of an English King, the year may be described by arabic figures without the prefix A. D. or *anno domini*.[16]

The words "then and there" are not uncertain, nor repugnant because in one place they may refer to the whole of a day and in another to only one incident thereof.[17]

§ 497d. Allegations of place in indictments. The indictment must show that the offense was committed within the district.[1]

time in criminal pleadings ought to be made with approximate accuracy; yet, by authority of a practice which has now continued so long that it must be yielded to, time need not be proved as stated and these allegations touching it are the most useless portions of criminal pleadings." U. S. v. Potter, 56 Fed. 83, 95, per Putnam, J.; Younge v. U. S. C. C. A., 242 Fed. 788; Fontana v. U. S., C. C. A., 262 Fed. 283; MacKnight v. U. S., C. C. A., 263 Fed. 833.

10 U. S. v. Jackson, 2 Fed. 502; Adams v. U. S., C. C. A., 246 Fed. 830. See *supra*, § 497. *Contra*, U. S. v. Potter, 56 Fed. 83.

11 U. S. v. Conrad, 59 Fed. 458; U. S. v. Howard, 132 Fed. 325; Younge v. U. S., C. C. A., 242 Fed. 788.

12 U. S. v. Baker, 243 Fed. 746.

13 Matthews v. U. S., 161 U. S. 500, 40 L. ed. 786; affirming U. S. v. Matthews, 68 Fed. 880.

14 Ibid.

15 U. S. v. Simmons, 96 U. S. 360, 24 L. ed. 819.

16 Peters v. U. S., C. C. A., 94 Fed. 127, 36 C. C. A. 105.

17 U. S. v. Potter, 56 Fed. 83. See Shaw v. U. S., C. C. A., 165 Fed. 174.

§ 497d. 1 U. S. v. Marx, 122 Fed. 964; *infra*, § 525.

An indictment for murder must allege the place of the death of the person murdered.[2] Where the criminality of language depends upon its probable effect the indictment should aver the place where it was spoken, and the attendant circumstances.[3]

The place where a conspiracy was formed need not be alleged if the indictment is found in a district where an overt act therein alleged was committed.[4]

It was held that an indictment was bad which alleged that the defendants had conspired at two specified places in different districts; since the pleading did not show in which the offense charged was committed.[5]

§ 497e. Allegations of intent in indictments. When the statute makes the criminality depend upon scienter, knowledge or intent, such knowledge,[1] or intent, as the case may be, must be averred.[2] Otherwise it is said not.[3]

In indictments for crimes which are felonies at common law and in statutory crimes of which a felonious intent is an essential part, the adverb "feloniously" must be used.[4] When a statute creating a new offense uses the word, felony, to describe the punishment rather than the crime, the adverb need not be pleaded.[5]

The law presumes an intent on the part of the defendant to do the things which are the natural result of his wrongful acts.[6] It has been said that there is no need of specifically charging a

2 Ball v. U. S., 140 U. S. 118, 35 L. ed. 377.

3 Fontana v. U. S., C. C. A., 262 Fed. 283. *Contra*, Grubl v. U. S., C. C. A., 264 Fed. 44.

4 Hyde v. U. S., 225 U. S. 347, 56 L. ed. 1114; Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136.

5 U. S. v. Mar, 122 Fed. 964.

§ 497e. 1 U. S. v. Carll, 105 U. S. 611, 26 L. ed. 1135; U. S. v. Slenker, 32 Fed. 691. Such an allegation is essential in an indictment for desertions under Act of May 18, 1917, 40 St. at L. 80, §§ 1-15, Comp. St., §§ 2044a-2044k.

2 Luckenbach S. S. Co. v. W. R. Grace & Co., C. C. A., 267 Fed. 681; U. S. v. Conant, 9 Reporter, 36, 25 Fed. Cas. No. 14,844; U. S. v. Jackson, 2 Fed. 502; U. S. v. Jackson, 25 Fed. 548.

3 U. S. v. Jackson, 25 Fed. 548.

4 Bannon v. U. S., 156 U. S. 464, 39 L. ed. 494; Wood v. U. S., C. C. A., 204 Fed. 55.

5 U. S. v. Staats, 8 Howard 41, 12 L. ed. 979.

6 Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465; Neall v. U. S., C. C. A., 118 Fed. 699; Billingsley v. U. S., C. C. A., 178 Fed. 653.

criminal intent when facts are set forth from which an intent is clearly implied.[7]

When language does not constitute a crime, if uttered under some circumstances, but does, if uttered under others, it is not enough for an indictment to charge that the language was used with intent to violate the law.[8]

The indictment must show that the intent charged was in the mind of the defendant and not use language from which it might be deduced that it was in the mind of a third party only.[9]

The adverb "feloniously" need not be repeated with each verb when the verbs are joined conjunctively.[10] Where an indictment for murder contains a charge of an assault followed by a description of the acts of which the assault consisted, alleging that these were committed "feloniously and with malice aforethought." It is sufficient, although this phrase is not immediately used in the allegation of an assault.[11]

Equivalents of the adverbs contained in the statutory description of the crime may be used.[12] An indictment alleging that an act was done "knowingly, willfully, unlawfully and feloniously" sufficiently charges criminal intent.[13] The word "wanton" includes all willful acts or conduct which is reckless of its consequences.[14] It has been held that fraudulently is implied by the use of the phrase "corruptly and willfully."[15] It has been said that the words "feloniously" and "unlawfully" will supply the place of the word "willfully."[16]

"Willfully" describes the conduct of a man who either intentionally disregards the law or is clearly indifferent to its requirements.[17]

7 Bridgeman v. U. S., C. C. A., 140 Fed. 577.

8 Fontana v. U. S., C. C. A., 262 Fed. 283.

9 U. S. v. Gooding, 12 Wheaton, 461 L. ed. 693.

10 St. Clair v. U. S., 154 U. S. 134, 38 L. ed. 936.

11 Holt v. U. S., 218 U. S. 245, 54 L. ed. 1021.

12 Nickell v. U. S., C. C. A., 161 Fed. 702; Tapack v. U. S., C. C. A., 220 Fed. 445; Van Gesner v. U. S., C. C. A., 153 Fed. 46.

13 Stephens v. U. S., C. C. A., 262 Fed. 957.

14 Alaska Packers' Ass'n v. U. S., C. C. A., 244 Fed. 710.

15 Wechsler v. U. S., C. C. A., 158 Fed. 579.

16 Howenstein v. U. S., C. C. A., 263 Fed. 1.

17 Chicago St. P. M. & O. Ry. Co. v. U. S., C. C. A., 162 Fed. 835;

"Unlawful" means not lawful.[18] It does not necessarily mean contrary to law.[19] An allegation that an act was done "unlawfully, fraudulently, corruptly and feloniously" is not equivalent to an averment that it was committed knowingly.[20]

It seems that an omission of the requisite adverb is a defect in form, which is cured if the point is not taken until after the trial.[21]

§ 497f. Pleading documents in indictments. A document or other written instrument, to which reference is made in the indictment should ordinarily be set forth *verbatim*, if it is part of the gist of the offense.[1] When the paper is connected with the offense collaterally, a general description thereof is sufficient.[2] In an indictment for a misapplication of the assets of a bank by means of a promissory note,[3] or for making a fraudulent claim based upon a false writing,[4] or for embezzling a letter containing a check,[5] or for larceny of a paper;[6] a substantial description of the paper is all that is required.

In a count charging the making of a false entry in the report of a national bank the date of the report, the names of those who signed or verified it and the date and substance of the entry seem to be sufficient.[7]

When the tenor of a paper is set forth it controls any other description thereof.[8] An averment that a document is "of tenor in substance as follows" is not contradictory nor are the words "tenor" and "in substance" repugnant.[9] The

U. S. v. Stockyards Terminal Ry. Co., C. C. A., 178 Fed. 19; St. Louis Merchants' Bridge Terminal Ry. Co. v. U. S., C. C. A., 209 Fed. 600.

18 MacDaniel v. U. S., C. C. A., 87 Fed. 321.

19 Ibid.

20 U. S. v. Kelsey, 42 Fed. 882.

21 Rosen v. U. S., 161 U. S. 29.

§ 497f. 1 Grimm v. U. S., 156 U. S. 604, 39 L. ed. 550; U. S. v. Noelke, 1 Fed. 426; Shepard v. U. S., C. C. A., 160 Fed. 584.

2 Rosencrans v. U. S., 165 U. S. 257, 41 L. ed. 708; Whitehead v. U. S., C. C. A., 245 Fed. 385, 390.

3 Rieger v. U. S., C. C. A., 107 Fed. 916.

4 Bridgeman v. U S,, C. C. A., 140 Fed. 577.

5 Rosencrans v. U. S., 165 U. S. 257, 41 L. ed. 708.

6 Jones v. U. S., 27 Fed. 447.

7 Cochran v. U. S., 157 U. S. 286, 39 L. ed. 704; Harper v. U. S., C. C. A., 170 Fed. 385.

8 U. S. v. Marcus, 53 Fed. 785.

9 Whitehead v. U. S., C. C. A., 245 Fed. 385, 390.

words "in substance" modify the word "tenor" and indicate that the contract is substantially as set forth in the indictment. which is consequently not thereby vitiated.[10]

Voluminous documents need not be set forth in full, where their substance is alleged.[11] "To encumber indictments with voluminous documents, of which only small portions are needed for informing the accused or the court of the particularity and identity of the offense charged, tends to increase the mass of pleadings to an embarrassing extent without apparent advantage, and subjects the prosecutor to great danger of variance in unimportant details, to the defeat of justice."[12]

When a paper contains indecent and obscene language, which it is not proper to spread upon the records of the court, such language can be omitted, provided the crime charged is so described as reasonably to inform the accused of the nature of the charge; and, in such a case, he may apply to the court before trial for a bill of particulars,[13] showing what parts of the paper are charged by the prosecution as being obscene.[14]

§ 497g. Bad grammar and spelling in indictments. An indictment is not vitiated by bad grammar,[1] nor by bad spelling[2] if the meaning is clear; nor by a solecism sanctioned by usage, the meaning of which is plain.[3]

§ 497h. Proper names in indictments. The defendant must be named in the indictment.[1] His Christian or given name, as

10 Ibid.

11 U. S. v. French, 57 Fed. 382, 390.

12 Ibid.

13 See *infra*, § 522.

14 Rosen v. U. S., 161 U. S. 29, 40 L. ed. 606; Price v. U. S., 165 U. S. 311, 41 L. ed. 727; Dunlop v. U. S., 165 U. S. 486, 41 L. ed. 799; Bartell v. U. S., 227 U. S. 427, 57 L. ed. 583. A count giving the date of a letter and the first and closing sentences thereof, without the name of the person to whom it was addressed, was held to be sufficient; but not one which stated no more than that the letter was "of a certain filthy and indecent character, that it contained a certain article, designed, adapted and intended for preventing conception, and calculated to be used for and applied for an indecent and immoral purpose," without indicating even the date of the letter or the character of the article, whether it was a drug or a mechanical device. Winters v. U. S., C. C. A., 201 Fed. 845, 846, 847.

§ 497g. 1 Hume v. U. S., C. C. A., 118 Fed. 689, 695.

2 McCarty v. U. S., C. C. A., 101 Fed. 113, 114.

3 U. S. v. Howell, 11 Wall. 432, 436, 20 L. ed. 195.

§ 497h. 1 U. S. v. Upham, 43 Fed. 68; U. S. v. Doe, 127 Fed. 982.

well as his surname, should be included.[2] If the Christian name is unknown to the grand jury, he may be designated by the initials or by such other name as is known to them,[3] or the Christian name may be omitted. The true name of the defendant is not essential if he is designated as he has been known by others.[4] There must be a sufficient description of the defendant clearly to identify him.[5] An indictment charging "John Doe, Chinese person, whose true name is to the grand juror aforesaid unknown," was held to be void for insufficiency of description.[6]

Third persons to whom reference is made in the indictment should be described by their names,[7] or if the names are unknown, the indictments should so state.[8] A person may be described by a name by which he was known.[9] If he has been known by several names that should be selected which he bore at the time named in the indictment.[10] Where the name proved is *idem sonans* with that stated in the indictment, the variance is immaterial.[11]

When the indictment refers to a company or association, it should state whether this is a partnership, then giving the names of the partners, or a corporation;[12] but an objection upon this ground should be raised by special demurrer.[13] If not, it will be disregarded.[14] The omission of the words designating its location from the name of a corporation is not a prejudicial error where the indictment identifies the location of the com-

2 U. S. v. Upham, 43 Fed. 68.

3 Ibid.

4 U. S. v. Janes, 74 Fed. 543.

5 U. S. v. Doe, 127 Fed. 982.

6 Ibid.

7 U. S. v. Simmons, 96 U. S. 360, 24 L. ed. 819.

8 Ibid. But see U. S. v. Preth, C. C. A., 251 Fed. 946.

9 Bird v. U. S., 187 U. S. 119, 47 L. ed. 100.

10 Ibid.

11 Canady for Kennedy, James v. U. S., C. C. A., 170 Fed. 942; Faust for Foust, Faust v. U. S., 163 U. S. 452, 41 L. ed. 224; Krowder for Krower, Alexis v. U. S., C. C. A., 129 Fed. 60; Lumby for Lombard, Rogers v. U. S., C. C. A., 214 Fed. 981. It was held that there was no fatal variance between the names of Opal Clark and Jeanette Clark. Bennett v. U. S., 227 U. S. 333, 57 L. ed. 521; affirming C. C. A., 194 Fed. 630.

12 U. S. v. Larkin, C. C. A., 107 Fed. 697, 701. *Contra*, Morris v. U. S., C. C. A., 229 Fed. 516, 520.

13 U. S. v. Larkin, C. C. A., 107 Fed. 697.

14 Ibid.

pany,[15] neither is it a prejudicial error to describe a railroad company by the name of its lessor.[16]

When it is proved, that the names alleged to be unknown, were in fact known by the grand jury, there is a fatal variance.[17] The burden of proof is upon the defendant to show such knowledge on the part of the grand jurors;[18] but if the indictment shows such knowledge conclusively it is fatally repugnant.[19] Upon an indictment for conspiracy such an objection is disregarded.[20]

§ 497i. Repugnancy in indictments. A repugnancy vitiates the indictment if it is contained in the description of the substance of the offense charged.[1] Otherwise it may be rejected as surplusage.[2]

Repugnancy in allegations of time is rarely fatal.[3] Repugnancy consists in two inconsistent allegations which destroy the effect of each other.[4]

Indictments were bad for repugnancy when they charged without further averments, that the defendant purchased his shares of stock in a national banking association and held them in trust for the association,[5] that he forged a draft of the United States by forging an endorsement thereupon;[6] that he conspired to conceal from himself as trustee in bankruptcy assets of the bankrupt;[7] but not that the defendants conspired to defraud certain persons "by dealing and pretending to deal in what is commonly called green articles, and Spurious Treasury notes."[8] A solecism sanctioned by usage, which when lit-

15 Putnam v. U. S., 162 U. S. 687.

16 Hoke v. U. S., 227 U. S. 308, 324.

17 U. S. v. Reilly, 74 Fed. 210.

18 Coffin v. U. S., 156 U. S. 432, 39 L. ed. 431; Jacobs v. U. S., C. C. A., 161 Fed. 694; Roberts v. U. S., C. C. A., 248 Fed. 873.

19 Larkin v. U. S., C. C. A., 107 Fed. 697.

20 Jones v. U. S., C. C. A., 179 Fed. 584.

§ 497i. 1 Lehman v. U. S., C. C. A., 127 Fed. 41, 45.

2 Ibid.; *infra*, § 497j.

3 Adams v. U. S., C. C. A., 246 Fed. 830; *supra*, § 497e.

4 Lehman v. U. S., C. C. A., 127 Fed. 41, 45.

5 U. S. v. Britton, 107 U. S. 665, 669, 27 L. ed. 520.

6 Ibid.

7 De Lemes v. U. S., C. C. A., 91 Fed. 497.

8 Lehman v. U. S., C. C. A., 127 Fed. 41, 45.

erally analyzed contains a repugnancy; but which, by supplying an ellipsis that naturally suggests itself, is readily comprehensible; does not vitiate an indictment.[9] Such are the expressions, "false diamonds,"[10] "counterfeited United States note,"[11] "spurious Treasury notes."[12]

Such a defense cannot be raised for the first time upon a writ of error.[13]

§ 497j. Surplusage in indictments. Surplusage does not vitiate an indictment.[1] It may be disregarded and need not be proved.[2] But when there is a needless specification of a place, this should be proved; since otherwise the accused might have been misled in preparing his defense.[3]

The courts have treated as surplusage: unnecessary charges of intent,[4] or that an act was performed feloniously,[5] a reference to several sections of a statute, only one of which applied, when the count stated facts sufficient to constitute a crime without any reference;[6] the words "so" and "aforesaid" in the introduction to a count "and so the grand jurors do further present as aforesaid."[7]

§ 498. Signature of indictments. The proper practice is for the District Attorney of the United States, for the district where an indictment is found, to sign the same; for otherwise there is nothing to show the court that he authorizes the criminal prosecution. "There appears to be no power, by statute or usage, conferred on the courts of the United States to recognize a suit, civil or criminal, as legally before them in the name of the United States, except the same is instituted and prosecuted by a District Attorney legally appointed and com-

9 U. S. v. Howell, 11 Wall. 432, 436, 20 L. ed. 195.

10 Ibid.

11 Ibid.

12 Lehman v. U. S., C. C. A., 127 Fed. 41, 45.

13 Sims v. U. S., C. C. A., 121 Fed. 515..

§ 497j. 1 Hall v. U. S., 168 U. S. 633, 42 L. ed. 607; U. S. v. Moody, 164 Fed. 269; Davey v. U. S., C. C. A., 208 Fed. 237; Finnegan v. U. S., C. C. A., 231 Fed. 561; U. S. v. Ford, 263 Fed. 449; Nichamin v. U. S., C. C. A., 263 Fed. 880.

2 Ibid.

3 Naftzger v. U. S., C. C. A., 200 Fed. 494, 497; State v. Crogan, 8 Iowa 523.

4 Nichamin v. U. S., C. C. A., 263 Fed. 880.

5 Davey v. U. S., C. C. A., 208 Fed. 237.

6 U. S. v. Ford, 263 Fed. 449.

7 Finnegan v. U. S., C. C. A., 231 Fed. 561.

missioned conformably to the statute."[1] It has been said: "The signature of a District Attorney constitutes no part of an indictment, and is only necessary as evidence to the court that he is officially prosecuting the delinquents conformably to the duty imposed upon him by statute."[2] Where the objection appeared not to have been specially taken by demurrer, or otherwise, before the trial, it was held that the signature of the Assistant United States Attorney was sufficient.[3] The absence of any signature to the indictment, which was returned at a time when the office of District Attorney was vacant, was held to be no ground for a motion in arrest of judgment, when the case had been duly prosecuted by the officer subsequently appointed.[4]

§ 499. Indorsements of indictments. The indictment should be endorsed with the words "a true bill," and the endorsement signed by the foreman of the grand jury.

In England, this was essential to the validity of the document. "The endorsement is parcel of the indictment and the perfection of it."[1] There the practice was, when the grand jury refused to find an indictment, to endorse thereupon "ignoramus," or sometimes, in place of the latter, "not found"; and all the bills presented to them were returned to the court. "In this way the endorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal endorsement loses its essential character."[2] The

§ 498. [1] U. S. v. McAvoy, 18 How. Pr. 380, 382, 4 Blatchf. 418, Fed. Cas. No. 15,654, per Betts, J.

[2] U. S. v. McAvoy, 18 How. Pr. 380, 382, 4 Blatchf. 418, Fed. Cas. No. 15,654, per Betts, J.

[3] Caha v. U. S., 152 U. S. 211, 221, 38 L. ed. 415, 419.

[4] U. S. v. McAvoy, 18 How. Pr. 380, 4 Blatchf. 418, Fed. Cas. No. 15,654.

§ 499. [1] King v. Ford, Yelverton, 99.

[2] Frisbie v. U. S., 157 U. S. 160, 163, 39 L. ed. 657, 658, per Brewer, J.

statute upon which the indictment is founded is often endorsed thereupon.[3] This is convenient,[4] and in case of doubt, might possibly be as assistance in determining what statute was charged to have been violated.[5] Such an entry cannot enlarge or limit the effect of the indictment.[6]

The history of the case is sometimes endorsed upon the indictment, either by the prosecutor or the clerk, so as to show what decisions have been made by the court and the result of previous trials before juries. The inspection of such an endorsement by the jury may be a ground for a new trial.[7]

Where the objection was not taken by demurrer, it was held that the omission of the endorsement was a defect of form, which did not invalidate the indictment.[8] In case of a capital offense, it is the usual custom to endorse, upon the indictment, the list of the witnesses for the prosecution, which the Revised Statutes require shall be delivered to the defendant.[9] Such an omission is a defect in form, which is waived when the objection thereto is not raised until after the trial.[10]

§ 499a. Margin of indictments. It is sometimes the custom of a public prosecutor or his assistants to make memoranda upon the margins of indictments, for convenience of reference. This is often done to indicate by what statute the indictment is supported. Such marginal memoranda are no part of an indictment.[1] A reference upon the margin to a statute does not preclude the Government from sustaining the indictment under any statute within which it is brought by its allegations.[2]

§ 500. Duplicity in indictments. No single count in an indictment can be duplex; that is, charge two distinct and separate crimes.[1]

3 U. S. v. Nixon, 235 U. S. 231, 235, 59 L. ed. 207.

4 Ibid.

5 Ibid.; U. S. v. Morgan, C. C. A., 148 Fed. 189, 191.

6 U. S. v. Nixon, 235 U. S. 231, 235, 59 L. ed. 207.

7 Ogden v. U. S., C. C. A., 112 Fed. 523.

8 Frisbie v. U. S., 157 U. S. 160, 39 L. ed. 657. See U. S. v. Cornell, 2 Mason, 91 Fed. Cas. No. 14,868.

9 U. S. R. S., § 1033; quoted *supra*, § 482.

10 Fisher v. U. S., 1 Oklahoma 252. See Hickory v. U. S., 151 U. S. 303, 307, 38 L. ed. 170, 173.

§ 499a. 1 Williams v. U. S., 168 U. S. 382, 42 L. ed. 509.

2 Ibid.

§ 500. 1 U. S. v. Patty, 2 Fed. 664; John Gund Brewing Co. v. U. S., C. C. A., 204 Fed. 17; Ammerman v. U. S., C. C. A., 216 Fed.

The reason for the rule against duplicity is that the verdict must be an entirety and that the jury cannot split a count in an indictment and find the accused guilty of a part and not guilty of the rest.[2]

Separate criminal acts committed in a single transaction may be split into as many counts as the prosecutor thinks necessary; so that if the facts as proved are insufficient for conviction of one count the Government may have the benefit of them upon another charge to which they are applicable.[3]

The section of the Revised Statutes concerning the joinder of several charges in separate counts, in the same indictment,[4] does not qualify the rule as it prevailed at common law with reference to the uniting of charges in the same indictment in different counts, or the charging as a single offense in one count, a single act or transaction, which might also be treated as involving several distinct offenses.[5] The prosecutor is at liberty to charge in a single count as a single offense a single act or transaction in violation of law, although that act involves several similar violations of law with respect to several different persons.[6] Where the statute creating an offense enumerates several things by the use of the disjunctive, "or," an indictment which charges two or more thereof, joined with the conjunctive "and" is not bad for duplicity.[7]

It is *not* duplicitous to charge in a single count the doing of an act and causing the same to be done;[8] the doing and the attempting to do the same act;[9] nor a single conspiracy to

326; Lewellen v. U. S., C. C. A., 223 Fed. 18; U. S. v. Gradwell, 234 Fed. 446; U. S. v. Blakeman, 251 Fed. 306.

2 State v. Smith, 61 Maine 386; approved by Hough, J.; U. S. v. McAndrews & Forbes Co., 149 Fed. 823, 832.

3 U. S. v. Dickinson, 2 McLean, 328; Fed. Cas. No. 14,958; U. S. v. Howell, 65 Fed. 402; Regina v. Truman, 8 Car. & P. 727; Orth v. U. S., C. C. A., 252 Fed. 566.

4 U. S. R. S., § 1024; quoted *infra*, § 501.

5 U. S. v. Scott, 74 Fed. 213, 216, per Taft, J.; U. S. v. Heinze, 161 Fed. 425.

6 U. S. v. Scott, 74 Fed. 213, 215, per Taft, J.; and cases there cited.

7 Ackley v. U. S., C. C. A., 200 Fed. 217; Simpson v. U. S., C. C. A., 229 Fed. 940; U. S. v. Dembowski, 252 Fed. 894; Boone v. U. S., C. C. A., 257 Fed. 963.

8 U. S. v. Janes, 74 Fed. 543, 545; Murray v. U. S., C. C. A., 247 Fed. 874.

9 U. S. v. Dembowski, 252 Fed. 894.

commit several distinct offenses,[10] nor the performance of several acts to accomplish the same result;[11] nor the performance of a single act which has several objects, all of which the count describes,[12] or which has several characteristics,[13] each of which make it criminal under the same statute, or the description of which discloses a crime under a different statute;[14] nor, it has been held, several contemporaneous acts, which constitute one transaction, forbidden by the same statute, although each of them might be the foundation of a separate count.[15]

A count charging the introduction of intoxicating liquors into "Indian territory" together with their introduction into the "Indian country";[16] a count charging the carriage of intoxicating liquor into the "Indian country" from without the "Indian country" and from without the State of Oklahoma;[17] a count charging defendant with conspiracy to evade the payment of the Federal tax upon persons engaged in the liquor trade and also with conspiracy to violate the statute prohibiting shipments of C. O. D. and the collection of purchase price by carriers;[18] are each of them *bad* for duplicity.[19] It has been held to be duplicitous to charge in a single count as part of a conspiracy to corrupt voters at an election of a representative in Congress, charges of corruption of voters to influence votes for State offices.[20] A count is bad for duplicity which alleges that on a certain day, and on each and every secular day between the end of that month and a specified day more than two months later, the defendant deposited in a specified post-office, to be sent by mail, five hundred printed circulars concerning a lottery, duly addressed and postpaid, directed to divers persons beyond the limits of the district.[21]

10 John Gund Brewing Co. v. U. S., C. C. A., 206 Fed. 386.

11 Connors v. U. S., 158 U. S. 408, 39 L. ed. 1033; Crain v. U. S., 162 U. S. 625, 40 L. ed. 1097.

12 U. S. v. Patty, 2 Fed. 664; Clark v. U. S., C. C. A., 211 Fed. 916.

13 Burton v. U. S., C. C. A., 142 Fed. 57.

14 Miller v. U. S., C. C. A., 133 Fed. 337, 341.

15 U. S. v. Patty, 2 Fed. 664; U. S. v. Heinze, 161 Fed. 425; Clark v. U. S., C. C. A., 211 Fed. 916.

16 Ammerman v. U. S., C. C. A., 216 Fed. 326.

17 Ibid.

18 Lewellen v. U. S., C. C. A., 223 Fed. 18.

19 John Gund Brewing Co. v. U. S., C. C. A., 204 Fed. 17.

20 U. S. v. Gradwell, 234 Fed. 446.

21 U. S. v. Patty, 2 Fed. 664.

A count is *not bad* for duplicity which charges that on the same day defendant deposited in the post-office, to be sent by mail, a number of circulars concerning the same matter;[22] nor a number of the same obscene books;[23] although each of these was separately addressed to a different person, which charges that defendant did "make, counterfeit, forge and cause to be made, counterfeited, and forged, a certain affidavit," &c., for the purpose of defrauding the United States;[24] nor one, that defendant procured a false affidavit to be presented to the pension office in a pension case;[25] nor, under the White Slave Traffic Act,[26] a count that two women were transported at the same time, for the same immoral purposes, from one State into another,[27] nor a count which charges several offenses under the same statute but limits them to a single act.[28] Nor a count charging that the defendant made illegal purchases from the Quartermasters Department during certain months.[29]

When an indictment sufficiently charges, a count to commit an offense penalized by statute, and also avers, that the conspiracy was to defraud the United States without any specification of the fraud, the latter averment should be disregarded as surplusage and such count should not be duplicitous.[30] It has been held that a person accused of violating the civil service law[31] by receiving or soliciting contributions for political pur-

22 Ibid.

23 Clark v. U. S., C. C. A., 211 Fed. 916.

24 Crain v. U. S., 162 U. S. 625, 40 L. ed. 1097. See U. S. v. Hall, 14 Fed. 324.

25 U. S. v. Hansee, 79 Fed. 303.

26 Act of June 25, 1910, ch. 395, 36 St. at L. 825.

27 U. S. v. Westman, 182 Fed. 1017.

28 U. S. v. Bopp, 237 Fed. 283. Counts of an indictment charging that defendants "did knowingly . . . receive, conceal, and facilitate the transportation and concealment of opium prepared for smoking; that is to say, the said defendants did . . . take the said opium prepared for smoking in an automobile to a certain point, . . . and then and there did secrete and hide the said opium" was, since, if the receiving, concealing, and facilitating the transportation and concealment constituted separate crimes, the general words were qualified and limited by what followed.

29 Eisenberg v. U. S., C. C. A., 261 Fed. 598.

30 Sugar v. U. S., C. C. A., 252 Fed. 79, affirming U. S. v. Sugar, 243 Fed. 423.

31 Act of January 16, 1883, § 11, 22 St. at L. 403.

poses from employees in the Internal Revenue, may be charged in a single count, when the offense was committed by a single act or series of acts at the same time and place.[32] It has been held that a count in an indictment charging a person with seizing, carrying away and secreting a ballot box, aiding and assisting in the seizure, carrying away and secretion of the same, and counseling, advising and procuring the seizure, carrying away and secreting thereof, was not bad for duplicity, the objection being not made until after verdict; since it charged but a single offense, the unlawful interference with the officers of the election in the discharge of their duties;[33] and that a denial of a motion to require a more restricted or specific statement of the particular mode in which the defense charged was committed would not justify a reversal, unless it appeared that the substantial rights of the accused were prejudiced.[34]

A duplicity in the indictment is no ground for a motion in arrest of judgment.[35] Nor is it raised by a general demurrer.[36] It has been said that it should be raised by a motion to elect.[37] The objection is waived by going to trial without objection.[38] The subject of duplicity in indictments under the national banking laws is subsequently discussed.[39]

The defect of duplicity cannot be cured by striking out part of the duplex count,[40] nor by entering a *nolle pros* upon part thereof.[41]

§ 501. Joinder of counts. By the Revised Statutes, "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indict-

32 U. S. v. Scott, 74 Fed. 213.

33 Connors v. U. S., 158 U. S. 408, 39 L. ed. 1033.

34 Connors v. U. S., 158 U. S. 408, 39 L. ed. 1033.

35 Pooler v. U. S., C. C. A., 127 Fed. 509, 62 C. C. A. 307; Wells v. U. S., C. C. A., 257 Fed. 605.

36 Pooler v. U. S., C. C. A., 127 Fed. 509, 515.

37 U. S. v. Louisville & N. R. Co., 165 Fed. 936, § 41; *infra*, § 503.

38 Lemon v. U. S., C. C. A., 164 Fed. 953.

39 *Infra*, § 506.

40 U. S. v. Dembowski, 252 Fed. 894.

41 Ibid.

ments are found in such cases, the court may order them to be consolidated.'' [1]

This authorizes the consolidation of indictments against several defendants.[2] Under this section distinct offenses,[3] which arise out of the same transaction,[4] although committed at different times,[5] and although some are felonies and others misdemeanors [6] may be joined in one indictment; but not if the felonies are capital offenses.[7] Counts may be joined for committing a crime and for aiding and abetting in the commitment thereof; [8] for committing a misdemeanor and conspiring to commit it.[9] It has been held that the following counts may be joined in the same indictment: Charges of felonies and misdemeanors forbidden by the same section of the Revised Statutes; thereamongst, that in relation to stamps upon cigar boxes,[10] that forbidding the use of the mails in furtherance of a lottery; [11] a charge of sending non-mailable matter in the form of a closed and directed letter and also of depositing in the mail an envelope on which non-mailable matter was written, both acts being directed against the same person; [12] of depositing with an ex-

§ 501. [1] U. S. R. S., § 1024. ''If it is suggested that thirty-two different transactions, each alike obnoxious under this penal statute, should not be accumulated upon the head of the offender at one time, it can be answered that the law-making power has taken a different view on that subject. It can, however, also be answered, both on reason and on authority, that it would manifestly be far more oppressive to the offender to torture him with thirty-two consecutive trials on thirty-two separate indictments than to combine them as the statute permits, and subject him to only one trial.'' Gardes v. U. S., C. C. A., 87 Fed. 172, 174, 175, per McCormick, C. J.

[2] Emanuel v. U. S., C. C. A., 196 Fed. 317. See *infra*, § 504.

[3] *Re* Lange, 13 Blatchf. 546; U. S. v. Mills, 15 Int. Rev. Rec. 18; U. S. v. Peterson, 1 W. & M. 305; U. S. v. Stetson, 3 W. & M. 164; U. S. v. Burns, 5 McLean, 23; and authorities cited *infra*. See *infra*, § 504.

[4] U. S. v. Jacoby, 12 Blatchf. 491; and authorities cited *infra*, § 505.

[5] U. S. v. Wentworth, 11 Fed. 52; and authorities cited *infra*, § 505.

[6] U. S. v. Ridgway, 199 Fed. 286; Phillips v. U. S., C. C. A., 264 Fed. 657.

[7] U. S. v. Sharp, Peters C. C. 131.

[8] Rooney v. U. S., C. C. A., 203 Fed. 928.

[9] U. S. v. Davis, 103 Fed. 57; Steigman v. U. S., C. C. A., 220 Fed. 63.

[10] U. S. R. S., § 3397.

[11] U. S. v. Jacoby, 12 Blatchf. 491; U. S. R. S., § 1024; U. S. v. Ridgway, 199 Fed. 286; Glass v. U. S., C. C. A., 222 Fed. 773.

[12] U. S. v. Davidson, 244 Fed. 523.

press company for transportation several copies of the same obscene book;[13] of violations of the oleomargarine laws;[14] of charges of embezzlement by the same officer,[15] or employees,[16] different violations of the Act of Dec. 17, 1914, forbidding the importation the manufacture and the sale of opium or coca or any compound derivative or preparation thereof;[17] a charge of a crime with a charge of inciting such crime,[18] or of a conspiracy to commit it, or relating to the same transactions;[19] such as two murders, committed at the same place on the same day with the same instrument,[20] riot and assault and battery,[21] simultaneous burglary and larceny.[22]

The joinder of distinct felonies and also of felonies of different grades, which are connected together,[23] charges of offenses which have different punishments,[24] bigamy and adultery charged as committed on the same day with the same woman,[25] charges of having counterfeit money in the defendant's possession at different times within a short period of time,[26] a count for counterfeiting money and aiding and assisting others in so doing, with another alleging that he caused and procured others so to do.[27] The charge of feloniously taking gold metal from the mint with that of the felonious taking and embezzlement of metals at the mint, committed to the defendant's charge.[28] Charges of the transmission of several false papers to the pension office upon an application for bounty land;[29] but it was held these cannot

13 Clark v. U. S., C. C. A., 211 Fed. 916.

14 Kreuzer v. U. S., 254 Fed. 34.

15 Foster v. U. S., C. C. A., 256 Fed. 207.

16 U. S. v. Brent, 17 Int. Rev. Rec.

17 Ch. 1, § 1, 38 St. at L. 185; Wallace v. U. S., C. C. A., 243 Fed. 300.

18 U. S. v. Peterson, 1 W. & M. 305.

19 U. S. v. Dickinson, 2 McLean, 325; U. S. v. Spintz, 18 Fed. 377.

20 Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208.

21 U. S. v. McFarlane, 1 Cranch C. C. 163.

22 *Ex parte* Peters, 12 Fed. 461 (2 McCrary, 403); Morris v. U. S., C. C. A., 229 Fed. 516.

23 U. S. v. Bickford, 4 Blatchf. 337.

24 U. S. v. Bennett, 17 Blatchf. 357 (offenses under U. S. R. S., § 5431, with those under § 5434).

25 U. S. v. West, 7 Utah, 437.

26 U. S. v. Howell, 65 Fed. 402 (between the dates May 21st and June 22d of the same year).

27 U. S. v. Burns, 5 McLean 23.

28 U. S. v. Jones, 69 Fed. 973.

29 U. S. v. Bickford, 4 Blatchf. 337.

be joined with counts for the subornation of perjury, therewith connected.[30] A count for making, presenting or causing to be made or presented, a false claim with another, of causing to be furnished a false affidavit in support of the same claim,[31] that defendant received money "under a threat of informing and as a consideration for not informing," against a violation of the Internal Revenue law.[32]

That defendant, on or about a certain date, and at other times before, did sell, "to John Doe and Richard Roe, and to divers other persons," whose real names are unknown, "an intoxicating liquor called whiskey, to-wit, one glass, pint, quart, gallon of said liquor (the real quantity is to the grand jurors unknown)."[33] Charges of hindering voters at an election and of conspiracy to hinder them at the same election.[34] It has been held that an indictment for a conspiracy to injure and intimidate the United States marshal and his posse, and to deprive them of their constitutional right to arrest the defendant upon legal process, which avers that the result of the conspiracy was the killing of a deputy marshal, is not objectionable as charging the defendant with both conspiracy and murder.[35]

By the Act of Oct. 28, 1919, providing for the enforcement of prohibition: "In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."[36] The joinder of offenses under the national banking laws is subsequently discussed.[37]

30 U. S. v. Bickford, 4 Blatchf. 337, *infra*, § 503.

31 Ingraham v. U. S., 155 U. S. 434, 39 L. ed. 213.

32 U. S. v. Fero, 18 Fed. 901.

33 Endleman v. U. S., C. C. A., 86 Fed. 456, 30 C. C. A. 186.

34 U. S. v. Belvin, 46 Fed. 381.

35 U. S. v. Davis, 103 Fed. 457.

36 Ch. —, Title II, § 32, Comp. St., 10138½s, *infra*, § 506.

37 *Infra*, § 506.

Congress has repealed the former provision in the Revised Statutes [38] limiting to three the number of offenses committed within the same six months which should be punished upon conviction under an indictment, information, or complaint, because of mailing letters in aid of a scheme to defraud.[39]

§ 502. Misjoinder of counts. It has been held that the following counts cannot be joined in an indictment: a count for conspiracy with a count for murder.[1] A count for subornation of perjury with a count alleging the transmission of false papers to the pension office.[2] Four separate offenses: That the defendant carried on the business of retailing liquor without posting in his place the stamp denoting the payment of the special tax required by law; that he carried on the said business without having paid the special tax required by law; that he carried on the business of dealing in manufactured tobacco without posting in the place the stamp denoting the payment of the special tax required by law; that he carried on the said business without having paid the special tax required by law; the first and third offenses being misdemeanors punishable by a fine under one section of the Revised Statutes;[3] the fourth a misdemeanor punishable by a fine under another section;[4] and the second a felony punishable by a fine and imprisonment under the section last cited.[5]

It has been held to be improper, to join in the same indictment a charge of a conspiracy, on the part of the officers of the Government, under one section of the Revised Statutes,[6] with a charge of a conspiracy against private citizens under another section,[7] there being a difference in the punishment provided for in each section.[8]

[38] U. S. R. S., § 5480; Ch. 321, 35 St. at L. 1130, Comp. St., § 10385; *Re* Snow, 120 U. S. 274, 30 L. ed. 658; *Re* De Bara, 179 U. S. 316, 45 L. ed. 207; Hall v. U. S., C. C. A., 152 Fed. 420; Etheredge v. U. S., C. C. A., 186 Fed. 434; Stern v. U. S., C. C. A., 223 Fed. 762; U. S. v. Nye, 4 Fed. 888; U. S. v. McVickar, 164 Fed. 894.

[39] Criminal Code, § 215, 35 St. at L. 130, Ch. 321, Comp. St., § 10385.

§ 502. [1] U. S. v. Scott, C. C. A., 165 Fed. 172; S. C., 139 Fed. 697.

[2] U. S. v. Bickford, 4 Blatchf. 337.

[3] U. S. R. S., § 3239.

[4] U. S. R. S., § 3242.

[5] U. S. v. Gaston, 28 Fed. 848.

[6] U. S. R. S., § 3169.

[7] U. S. R. S., § 5440.

[8] U. S. v. McDonald, 3 Dillon,

Counts which allege offenses, of which but one person can be guilty, cannot be joined with others alleging that several persons committed an offense, which is in its nature several.[9]

The proper remedy for a misjoinder of counts is a motion to compel an election between them.[10] The objection cannot be raised by a motion in arrest of judgment.[11]

§ 503. Election between counts in an indictment. In all cases where the counts are of such a character or so numerous, that the offer of proof, or the submission of the issues to the jury, on each, might lead to confusion, or unduly embarrass the accused in his defense; the trial court has discretionary power to require the prosecution, either before any proof is offered, or after the proof on behalf of the Government has closed, to elect the counts upon which it will ask for a conviction.[1] This will rarely be done where the different counts are charged to be part of the same conspiracy.[2]

The denial of a motion to compel an election may be reviewed by writ of error.[3] Where the sentence did not exceed that which might have been imposed for a conviction upon a single count, it was held that the error was not prejudicial.[4]

§ 504. Joinder of defendants to indictment. Two or more may be jointly indicted for offenses arising wholly out of the same joint act or omission.[1] An indictment will lie against a corporation and its agents.[2] An indictment charging one person with the direct commission of the criminal act, and others

543 Fed. Cas. No. 15,670; distinguished, U. S. v. Van Leuven, 62 Fed. 62.

9 U. S. v. Kazinski, 2 Sprague, 7, 26 Fed. Cas. No. 15,508.

10 Phillips v. U. S., C. C. A., 264 Fed. 657; *infra*, § 503.

11 Ibid.

§ 503. 1 Gardes v. U. S., C. C. A., 87 Fed. 172, 175, 176. See Pointer v. U. S., 151 U. S. 396.

2 Wallace v. U. S., C. C. A., 243 Fed. 300.

3 Gardes v. U. S., C. C. A., 87 Fed. 172, 175, 176. *Contra*, Corbin v. U. S., C. C. A., 264 Fed. 659. See Sidebotham v. U. S., C. C. A., 253 Fed. 417.

4 Wetzel v. U. S., C. C. A., 233 Fed. 984; Nudelman v. U. S., C. C. A., 264 Fed. 942; Sidebotham v. U. S., C. C. A., 254 Fed. 417.

§ 504. 1 U. S. v. McGinnis, Abb. U. S. 120, 26 Fed. Cas. No. 15,678; Volmer v. State, 34 Ark. 487; Commonwealth v. Miller, 2 Pars. Eq. Cas. (Pa.) 480; 22 Cyc. 373.

2 N. Y. C. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 L. ed. 613, affirming 146 Fed. 298.

with aiding, abetting, counseling, commanding and inducing it, charges but one offense against all, as all are principals.[3]

Defendants cannot be jointly indicted for crimes committed at the same time, when they did not jointly act.[4]

It has been said that, to authorize a joint indictment, the duty imposed upon the defendants and violated by them must be a joint duty.[5] It has been held; that persons may be jointly indicted for signing, in their partnership name, a false return to an assessor of Internal Revenue.[6] It is improper to charge two persons in the same indictment, and in a single count, one with agreeing to receive a bribe as a member of Congress, and the other with agreeing to give such bride.[7] A judge and a clerk of an election cannot be jointly indicted for failing to sign and attest a poll ticket and to set down, at the foot thereof, the total number of persons marked "voted."[8]

§ 505. Consolidation of indictments. Where two or more indictments are found, which contain charges, all of which might have been joined in a single indictment in separate counts, the court may order them to be consolidated.[1] It has been said that the trial court has a sound discretion in deciding whether a fair and impartial trial would be prevented by a joinder, notwithstanding such joinder would be permitted by the general language of the section.[2]

"There are often circumstances which would render a uniting of several offenses unjust to a defendant, and as the old cases put it 'confound him in the making of his defense.' Whenever such a situation arises, the trial court will protect the defendant's right to a fair trial."[3]

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged

3 Ruthenberg v. U. S., 245 U. S. 480; U. S. v. Rogers, 226 Fed. 512.

4 U. S. v. Kazinski, 2 Sprague, 7, 26 Fed. Cas. No. 15,508.

5 U. S. v. Davis, 33 Fed. 621.

6 U. S. v. McGinnis, 1 Abb. U. S. 120, 26 Fed. Cas. No. 15,678.

7 U. S. v. Dietrich, 126 Fed. 664.

8 U. S. v. Davis, 33 Fed. 621.

§ 505. 1 U. S. R. S., § 1024; quoted § 501, *supra*. For a discussion of the consolidation of civil actions, see *supra*, § 472.

2 Dolan v. U. S., C. C. A., 133 Fed. 440, 446, 69 C. C. A., 274.

3 Dolan v. U. S., C. C. A., 133 Fed. 440, 446, 69 C. C. A., 274.

with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts."[4]

It was held to be improper to consolidate four indictments, two of which charged all of five defendants with assault with intent to kill two different persons on the same day; a third, all of them with arson of a dwelling house two weeks later; and a fourth, three only of them with arson of another dwelling house on the day of the assaults.[5]

Indictments may be consolidated in cases where the charges could not be joined at common law.[6] The consolidation of several indictments is proper where all the counts in all of them could have been included, in the first instance, in one indictment.[7] It has been held proper to consolidate: different charges of extortion by an officer under color of his office.[8] Indictments against the same persons for assaults, with intent to kill different persons, upon the same day, and a third indictment for arson of a dwelling house of a third man upon a different day about two weeks later.[9] Indictments against the same person for conspiracy to defraud the United States by means of illegal entries of adjacent public lands by different persons.[10] Indictments charging the same defendants with aiding and abetting different persons in the use of false certificates of citizenship at the same election.[11] Indictments for a conspiracy in restraint of trade with foreign nations and for conspiracy to prepare a military expedition against the dominions of foreign provinces, States and people.[12] Indictments for concealing smoking opium illegally imported and for illegally manufacturing smoking opium.[13] In-

4 Brimie v. U. S., C. C. A., 200 Fed. 726, 729. See Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208.

5 McElroy v. U. S., 164 U. S. 76.

6 Dolan v. U. S., C. C. A., 133 Fed. 440, 69 C. C. A. 274.

7 Turner v. U. S., C. C. A., 66 Fed. 280.

8 Williams v. U. S., 168 U. S. 382 (the indictments being under U. S. R. S., § 5481). See, also, U. S. v. Folsom, 7 New Mexico, 532.

9 McElroy v. U. S., 164 U. S. 76, 41 L. ed. 355.

10 Olson v. U. S., C. C. A., 133 Fed. 849, 67 C. C. A. 21.

11 Dolan v. U. S., C. C. A., 133 Fed. 440, 69 C. C. A., 274.

12 U. S. v. Bopp, 237 Fed. 283.

13 Charley Tay v. U. S., C. C. A., 266 Fed. 326.

dictments for the fraudulent use of the mails in pursuance of the same scheme.[14]

Where several indictments are consolidated, a general verdict is proper, and that will be sustained if any of the counts be good and charge an offense.[15] Whether, in such a case, the defendant may be sentenced to more than the maximum punishment for one of the offenses charged, depends upon the circumstances.[16] Where two indictments were tried together, but there had been no order for their consolidation, it was said that the defendant might "have been lawfully sentenced to a term of imprisonment on each indictment separately, the sentences to take effect together, or one after the other, as the court in pronouncing judgment should direct.[17]

It seems that a defendant aggrieved by the consolidation should move to quash the indictments or to compel an election.[18]

The consolidation of indictments is largely within the discretion of the trial court and will rarely be reviewed upon writ of error.[19]

§ 505a. Severance. An indictment may be severed to the extent of directing a separate trial of the charges against each defendant [1] or of separate counts against the same defendant.[2] Whether a severance should be directed rests in the discretion of the court and will rarely be reviewed.[3] When the questions presented on the trial of some defendants are materially different upon the trial of the others and it appears probable that serious antagonism will arise between them; a severance may be ordered.[4]

14 LeMore v. U. S., C. C. A., 253 Fed. 887.

15 U. S. v. Stone, 8 Fed. 232. See U. S. v. Patterson, 6 McLean, 466, Fed. Cas. No. 16,011; U. S. v. Seagrist, 4 Blatchf. 420, Fed. Cas. No. 16,245; State v. Callicutt, 1 Lea. (Tenn.) 714.

16 *Ex parte* Hibbs, 26 Fed. 421. See *Ex parte* Peters, 4 Dillon, 169, Fed. Cas. No. 11,027; U. S. v. Maguire, 3 Cent. Law J. 273, Fed. Cas. No. 15,708; *Re* Haynes, 30 Fed. 767.

17 *Re* Haynes, 30 Fed. 767, 771.

18 U. S. v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14,572; Dolan v. U. S., C. C. A., 133 Fed. 440, 446, 39 C. C. A. 274.

19 Lemon v. U. S., C. C. A., 164 Fed. 953.

§ 505a. 1 U. S. v. Rockefeller, 222 Fed. 534.

2 Dolan v. U. S., C. C. A., 133 Fed. 440, 446.

3 Ball v. U. S., 163 U. S. 662, 41 L. ed. 300.

4 U. S. v. Rockefeller, 222 Fed. 534.

§ 505b. Amendment of Indictments. There is no statutory authority for the amendment of an indictment.[1]

It has been said, that the authorization of such an amendment would be a violation of the Fifth Amendment to the Federal Constitution, since it would authorize a conviction upon an indictment which had not been found by a grand jury.[2] The court has no power to strike out part of a count in an indictment.[3] Amendment of a caption is immaterial.[4] It has been held that the Government may abandon part of a charge in a count of an indictment, when what is left sets forth a criminal offense and the defendant is not injured by such abandonment.[5] It was then said: "'Amend' means much more than 'abandonment.' It means to abandon a position and to carry the intention into effect by a change in the indictment so as to conform to the changed position. An amendment has operation as from the beginning, and relates back to the inception of the action, while abandonment simply pertains to the future." "The abandonment of some of the recitations in the indictment does not change the indictment, but it changes the proof which is offered. The effect of a abandonment can only have operation as, what is known in law, as a *nolle prosequi.*"[6]

But it has been held that the defect of duplicity cannot be cured by a *nolle prosequi* as to part of a count.[7]

The admission of a letter by the accused correcting a clerical error in a statement quoted in the indictment is not an amendment of the indictment.[8]

§ 506. Indictments for the violation of the national banking laws. The Revised Statutes provide: "No officer acting under the provisions of this Title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misde-

§ 505b. 1 U. S. v. Munday, 211 Fed. 536, 538.
2 Ibid.
3 Dodge v. U. S., C. C. A., 258 Fed. 300.
4 Gardes v. U. S., C. C. A., 87 Fed. 172.
5 U. S. v. Munday, 211 Fed. 536.
6 Ibid.; 211 Fed. 536, 539.
7 U. S. v. Dembowski, 252 Fed. 894, 898.
8 Bettman v. U. S., C. C. A., 224 Fed. 819.

meanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years."[1]

"Whoever shall mutilate, cut, deface, disfigure, or perforate with holes, or unite or cement together, or do any other thing to any bank-bill, draft, note, or other evidence of debt, issued by any national banking association, or shall cause or procure the same to be done, with intent to render such bank-bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.[2]

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company body politic or corporate, or any individual persons, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets an officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."[3]

"It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in vio-

§ 506. [1] U. S. R. S., § 5187.
[2] U. S. R. S., § 5189.
[3] U. S. R. S., § 5209.

lation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."[4]

A later statute provides: "That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."[5] The crimes named by these statutes are infamous and must be prosecuted by indictment.[6] It is the intention of the statute not to use the words "embezzle" and "wilfully misapply" as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in the actual possession of them by virtue of a trust committed to him. He may, unlawfully, abstract them from the other funds of the bank, and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of wilful misapplication.[7] Where an officer of a national bank permits a firm, of which he is a member, to overdraw its account with intent to defraud, he is punishable criminally under these sections.[8]

A charge of the embezzlement, abstraction or wilful misap-

4 U. S. R. S., § 5208.

5 Act of July 12, 1882, c. 290, 22 St. at L. 162, § 13.

6 U. S. v. DeWalt, 128 U. S. 393, 32 L. ed. 485; Sheridan v. U. S., C. C. A., 236 Fed. 305.

7 U. S. v. Northway, 120 U. S. 327, 332, 333, 30 L. ed. 664, 665, 666.

8 U. S. v. Fish, 24 Fed. 585.

plication of the funds of a national bank need not be described by the words used to describe a larceny.[9]

It is sufficient to describe the property converted as "certain monies, funds and credits of the bank of the amount and value of $5,000, a more particular description of which is to the grand jury unknown.[10] An allegation that it was held by the bank as a deposit for the sole use and benefit of a depositor and creditor thereof is not bad as charging the conversion of the property of such depositor instead of the funds of the bank.[11]

The charge that the defendant committed the acts alleged, in his capacity "as president and agent," does not vitiate the counts, which so describe him.[12] A charge that the funds alleged to have been embezzled were at the time, in the possession of the defendant, as president and agent, is sufficient.[13] A charge of facts constituting a conversion is not bad because it avers that it was done with an intent to convert the money.[14] An averment that a national bank officer wrongfully used the bank's money in his care and under his control, for the purpose of bribing certain city officials in his own interest, is a sufficient charge of an appropriation to his own use, although there was a further averment that there was an attempt to convert the money to the use of such officials, and that it was so converted.[15]

A count was held to be sufficient which charged that the president of a national bank made a certain check upon it, for a specified amount, to the order of the vice-president, and delivered the check to the latter, then knowing that the latter did not then have, on deposit with the said association, the amount specified therein; that the said defendant as vice-president, and the president of the bank caused to be paid upon such check the amount thereof, out of the moneys of the association, in excess of all amounts which the vice-president was then entitled to draw out of the moneys, funds and credits of the association; that those two officers then intended that the vice-presi-

9 U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664.

10 Sheridan v. U. S., C. C. A., 236 Fed. 305.

11 Ibid.

12 U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664.

13 Ibid.

14 Coffin v. U. S., 156 U. S. 432, 450, 39 L. ed. 481; Morse v. U. S., 161 Fed. 429, 433.

15 McKnight v. U. S., C. C. A., 97 Fed. 208.

dent should appropriate and convert, to his own use, said sum of money, although they then well knew that said sum of money was not on deposit with the association by the vice-president, and was not due and owing by and from the association to the vice-president; and that repayment thereof to the association was not in any way secured, and the vice-president had no right and title thereto.[16] So was a count charging that the accused, while President of a National Bank and by the use of the authority of his position loaned its funds to a corporation, which was known by him and not known by the bank or its directors to be hopelessly insolvent, under circumstances naturally leading to the loss of the money loaned and so resulting, with specification, all with intent to injure and defraud the bank.[17] An allegation of a wilful misapplication of the funds of a bank is insufficient, unless it is shown how the misapplication was made and that it was unlawful,[18] and made with intent to injure and

16 U. S. v. Morse, 161 Fed. 429; citing Evans v. U. S., 153 U. S. 584, 38 L. ed. 830; U. S. v. Fish, 24 Fed. 585.

17 Stout v. U. S., C. C. A., 227 Fed. 799.

18 Batchelor v. U. S., 156 U. S. 426, 39 L. ed. 478.

There, the following count was held to be *insufficient:* "And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that the said Harry F. Batchelor, on the first day of January, 1891, and at other times and dates between January 1, 1891, and July 8, 1893, was then and there the president and a director and agent of a certain national banking association, to-wit, the Stock Growers' National Bank of Miles City, theretofore duly organized and established and then existing doing business in the city of Miles City, in the circuit and district aforesaid, under the laws of the United States of America, did then and there, at the time aforesaid, within the said district, as such president, director, and agent, by virtue of such employment and while so employed, wilfully misapply forty thousand four hundred and twenty-two dollars and seventy-nine cents, of the moneys, funds, and credits then and there belonging to and the property of said association, in the manner following, to wit: That the said Harry F. Batchelor, without the knowledge or consent of the said association or the board of directors thereof, he then and there and at all times well knowing both himself and the said John W. Batchelor, hereinafter named, to be insolvent and worthless, did then and there procure of the said John W. Batchelor divers promissory notes payable to said association, some of which were endorsed by him, the said Harry F. Batchelor, but all without other or further security; with which said notes, by and through the device and pretence of discounting the same

defraud the bank or some other person, individual or corporation.[19] It is sufficient to aver that the defendant wilfully, with intent to injure and defraud the bank and without the knowledge and consent of its board of directors, for his own use and benefit and that of other persons, to the grand jurors unknown, misapplied certain of its moneys by receiving and discounting therewith a certain specified promissory note, which was not

and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time, during the period aforesaid, take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association; and thereafter in turn, by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by John W. Batchelor, or by one C. L. Merrill, he, the said Harry F. Batchelor, then and there well knowing the said notes to be inadequate security for the sums they represented, and the said notes never having with them any other security, he did then and there take up and cancel and pretend to pay to the said association the indebtedness so created to said association by John W. Batchelor as aforesaid; and did from time to time, by the fraudulent device—and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid, which they were from time to time to satisfy, to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association; all of which said sums were misapplied wilfully, and in the manner aforesaid, out of the moneys, funds and credits of said association, and converted then and there to the use, benefit and advantage of said Harry F. Batchelor, with the intention then and there had and having in him, the said Harry F. Batchelor, to injure and defraud the said association, its depositors, and other persons, corporations and firms, then doing or who might thereafter do business with the said association; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.'' A charge that the defendant, president of a national bank, ''procured'' a note to be discounted, well knowing the maker and endorser thereof to be insolvent, is insufficient, and so is the charge that he permitted a depositor indebted to the bank, whom he knew to be insolvent, to withdraw his deposit and failed to cause it to be applied to such indebtedness, when there are no allegations showing that such actions were a violation of his official duties. U. S. v. Briton, 108 U. S. 192, 27 L. ed. 703.

19 McCallum v. U. S., C. C. A., 247 Fed. 27.

secured, as he well knew, and the proceeds of which discount were wholly lost, although it does not specifically aver that he knew the signer of the note to be insolvent.[20] A charge of misapplication by unlawfully taking a credit is insufficient unless it shows that the bank was thereby injured.[21] The court may refuse to compel the prosecution to elect between counts charging conspiracy and those charging misapplication, when the facts in regard are intimately connected.[22]

When the charge is a wilful misapplication of the bank funds by buying certain shares of its stock, the statutory exception authorizing a national bank to buy its own shares when it is necessary to prevent loss upon a debt previously contracted, in good faith, must be negatived.[23] Where the indictment definitely charges the value, in lawful money of the United States, of the moneys, funds and credits of the bank misapplied, it is not defective for a failure to specify whether the misapplication was of moneys, funds or credits.[24]

Where the defendant directs a clerk employed in the bank to make a false entry, he is a principal in the offense, and the entries are in law made by him.[25] A charge that a defendant "caused" a certain entry to be made is sufficient, without an averment of the manner in which he caused.[26] An entry in a book usually means an item in an account.[27] An allegation that the defendant made a false report of the condition of the bank, "whereby, by means of a false entry therein, by him made," etc., may support a finding that he made a false entry in a re-

20 U. S. v. Heinze, 218 U. S. 532, 54 L. ed. 1139, reversing 183 Fed. 907.

21 M'Callum v. U. S., C. C. A., 247 Fed. 27.

22 U. S. v. Morse, 161 Fed. 429, 437, 438. Where the indictment charged that the president of a bank misapplied twenty-five thousand dollars of its funds, "by causing the said sum of twenty-five thousand dollars to be credited to Grant and Ward on the books of the bank," and a single entry showed a credit of one hundred and five thousand dollars to that firm, of which the jury found that twenty-five thousand dollars was a misapplication; it was held that the variance was immaterial. U. S. v. Fish, 24 Fed. 585.

23 U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520.

24 U. S. v. Heinze, 161 Fed. 425.

25 *Re* Van Campen, 2 Benedict, 419; U. S. v. Harper, 33 Fed. 471, 480.

26 McKnight v. U. S., C. C. A., 97 Fed. 208, 38 C. C. A. 115.

27 U. S. v. Morse, 161 Fed. 429.

port.[28] Where the indictment alleged that the false entries in question indicated that there was then, in the paying teller's department of the bank, a certain amount of money, when such amount was not there in fact; it was held not to be necessary that it should further allege that such amount was not in other departments of the bank.[29] In an indictment for making a false entry in the report of a national bank association, the preparation and completion of the report, the making of the false entry therein, its verification, its attestation, and its delivery to the comptroller, may be considered as simultaneous; and there is consequently, no repugnance in a failure to allege that they occurred in consecutive order.[30] An allegation that defendant "did make a certain false entry in a certain report of the said association" will not be construed to mean that the entry was an alteration made after the report was completed.[31] The omission of the signs for dollars and cents in the recital of the alleged false entries in the reports is a matter of form, which will not affect the validity of the indictment.[32] An indictment against the president of a national bank for making false entries in its books, which charges that this was done "with intent to injure and defraud the said association and certain persons to the grand jurors unknown," is sufficient so far as concerns the allegations of intent.[33] It is sufficient to aver that defendant "in a certain report of the condition" of the bank, "made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain entry," which is described as being false.[34] It is not necessary to allege that, at the time the entry was made, an examiner had been appointed.[35] The erasure of figures, and the writing of additional figures in the place of those erased, is the making of an entry.[36]

The entries must be wilfully and intentionally false. Mere clerical mistakes, or an arbitrary exercise of discretion in keep-

28 U. S. v. Bartow, 10 Fed. 874.

29 U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520.

30 U. S. v. French, 57 Fed. 382.

31 U. S. v. French, 57 Fed. 382.

32 U. S. v. Potter, 56 Fed. 83.

33 U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520; U. S. v. Potter, 56 Fed. 83, 97.

34 Cochran v. U. S., 157 U. S. 286, 39 L. ed. 704.

35 U. S. v. Britton, 107 U. S. 655, 2 Sup. Co. 512, 27 L. ed. 520.

36 U. S. v. Crecilius, 34 Fed. 30.

ing the books, which does not amount to an abuse, are insufficient to constitute an offense.[37] False entries in a statement made by a bookkeeper at the request of the bank examiner, which purports to state the balances due depositors, will not sustain an indictment; since it is the duty of the examiner, and not of the bookkeeper, to make the balances.[38] Counts charging false entries by the president in reports, which allege that the reports were made in conformity with the law and then set them out by their tenor, are bad if they fail to allege specifically that the reports were verified and attested by the cashier.[39] An averment that an officer who aided, abetted, counselled, and procured a false entry to be made by the cashier, with proper specification sufficiently charges him with accessory.[40] The criminality of a false and fraudulent entry or certificate is not cured by its subsequent ratification by the board of directors.[41]

It has been held to be proper to join charges against bank officers for making false entries in the books of a national bank, where, in some counts, the defendants are jointly charged with making false entries in the reports, and in others, the cashier is charged with making false entries in the reports and the president with aiding and abetting him therein;[42] and to join charges against officers and a customer of a national bank, where the officers are charged with embezzlement of the bank funds, and the customer with aiding and abetting them therein, and the cashier is charged with making false entries in the bank books, and the president and customer with aiding and abetting him in the same.[43] But these must be stated in different counts.[44] Counts are not duplicitous which charge that an act forbidden by the statute was committed without authority and with intent to injure or defraud the national banking association.[45] Or that an entry was made with an intent to injure and defraud the bank and the Comptroller of the Currency and any agent ap-

37 U. S. v. Allen, 47 Fed. 696.

38 U. S. v. Eqe, 49 Fed. 852.

39 U. S. v. Potter, 56 Fed. 97.

40 Boone v. U. S., C. C. A., 257 Fed. 963.

41 Simpson v. U. S., C. C. A., 229 Fed. 941.

42 U. S. v. Berry, 96 Fed. 842.

43 Gardes v. U. S., C. C. A., 87 Fed. 172.

44 U. S. v. Cadwallader, 59 Fed. 677.

45 Simpson v. U. S., C. C. A., 229 Fed. 940.

pointed to examine the banks affairs.[46] Counts were held to be bad for duplicity when they described two different entries in different parts of the same book or report, although, it seems, that they were debit and credit entries relating to the same transactions.[47]

The word "certified" in an indictment, when applied to a bank check, is sufficient without a specification of the words written or printed upon the check.[48] The word "certify" as applied to a bank check indicates that certain words have been written or printed thereupon, thereby causing an obligation of the bank to the holder of the same, and that it has passed from the bank's custody into the hands of some other person.[49] A count is sufficient which alleges that the defendant, as president of a bank, did then and there on a specified day and place, within the district and jurisdiction of the court, unlawfully, knowingly and wilfully certify a certain check, set forth in full with a description of the members of the firm which signed the same; that the said persons as copartners under the firm name and style, as aforesaid, by whom said check was then and there drawn, as aforesaid, did not then and there, to wit, at the time said check was so certified by said defendant, as aforesaid, have on deposit in said association an amount of money then and there specified in the check, as he, the said defendant, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.[50] Where an officer of a national bank certifies a check thereupon, believing, in good faith, that the drawer has a sufficient deposit, and having reasonable grounds for such belief, he cannot be convicted under the statute, although the drawer's account was, at the time, overdrawn.[51] A count is not bad for duplicity because it charges both the certification of a check, when the drawer had not on deposit an amount of money equal to the amount in the check specified, and the certification of a check before the amount thereof had

46 Boone v. U. S., C. C. A., 257 Fed. 963.

47 U. S. v. Morse, 161 Fed. 429, 437.

48 U. S. v. Heinze, 161 Fed. 425.

49 Ibid.

50 Potter v. U. S., 155 U. S. 438, 39 L. ed. 214.

51 Spurr v. U. S., 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. 812.

been regularly entered to the credit of the dealer on the books of the banking association.[52]

The particular act by which the aiding and abetting was consummated need not be set out specifically.[53] A charge that the

[52] U. S. v. Potter, 56 Fed. 83; U. S. v. Heinze, 161 Fed. 425.

[53] Coffin v. U. S., 156 U. S. 432, 448, 39 L. ed. 481, 489.

In that case the following counts were held to be sufficient: "The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-two, the said Theodore P. Haughey then and there being president of a certain national banking association, then and there known and desigated as the Indianapolis National Bank, in the city of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the said association, which were then and there under his control, with intent to convert the same to the use of the Indianapolis Cabinet Company, and to other persons, to the grand jurors unknown, in a large sum, to wit, the sum of six thousand three hundred and eighteen dollars, by then and there causing said sum to be paid out of the moneys, funds, and credits of said association, upon a check drawn upon said association by the Indianapolis Cabinet Company, which check was then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to his credit. That said Indianapolis Cabinet Company was then and there insolvent as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association with the custody, control and care of the moneys, funds, credits, and assets of said association, and the general superintendence of its affairs. And the grand jurors aforesaid do further say that Francis A. Coffin, Percival D. Coffin, and Albert S. Reed did unlawfully, wilfully, knowingly, and feloniously and with intent to injure and defraud said association, on, to wit, the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-two, aid and abet the said Theodore P. Haughey as aforesaid to wrongfully, unlawfully, feloniously, and wilfuly misapply the mon-

president of a bank aided and abetted one, who is alleged to be the cashier, in the misapplication, need not charge that the

eys, funds, and credits of said association as aforesaid, to wit, the sum of six thousand three hundred and eighteen dollars. . . . The grand jurors aforesaid, upon their oaths aforesaid do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-two, the said Theodore P. Haughey, then and there being the president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the said association, without authority of the directors thereof with intent to convert the same to the use of the Indianapolis Cabinet Company and to other persons, to the grand jurors unknown, in a large sum, to wit, the sum of three thousand nine hundred and sixty dollars and eighty-four cents, by then and there paying and causing said sum to be paid out of the moneys, funds, and credits of said association upon certain divers checks drawn upon said association by the Indianapolis Cabinet Company, which checks were then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to its credit. That said Indianapolis Cabinet Company was then and there insolvent as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association, with the custody, control, and care of the moneys, funds, credits, and assets of said association, and the general superintendence of all its affairs. And the grand jurors aforesaid do further say that Francis A. Coffin and Percival B. Coffin and Albert S. Reed at the district and State of Indiana aforesaid did unlawfully, wilfully, knowingly, and feloniously and with intent to injure and defraud said association on, to wit, the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-two, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and wilfully misapply the money, funds, and credits of said association, to wit, the sum of three thousand nine hundred and sixty dollars and eigh-

president knew that such person was cashier.[54] Where an indict-

ty-four cents aforesaid. . . . The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district aforesaid, on, to wit, the first day of January, in the year of our Lord one thousand eight hundred and ninety-one, and on divers times between said date and the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-three, the said Theodore P. Haughey then and there being the president of a certain national banking association then and there known and designated as the Indianapolis National Bank of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, and without authority of the board of directors, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association, with intent to convert the same to the use of the Indianapolis Cabinet Company, a more particular description of said moneys, funds, and credits being to the grand jurors unknown, in a large amount, to wit, the sum of three hundred and seventy-five thousand dollars, by then and there cashing, discounting, and paying for the use and benefit of said Indianapolis Cabinet Company, out of the funds of said association, a large number of worthless and insolvent notes, drafts, and bills of exchange being drawn upon and by divers persons, firms, and companies, and corporations, each and all of whom were then insolvent, as the said Theodore P. Haughey then and there well knew, whereby said sum was wholly lost to said association; with intent then and there and thereby to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association with the custody, control, and care of the funds, credits, and assets of said association, and the general superintendence of its affairs, and agent of said association in the transaction of all its business. And the grand jurors aforesaid do further say that Francis A. Coffin, Percival B. Coffin and Albert S. Reed, at the district and State of Indiana aforesaid, did unlawfully, knowingly, and feloniously and with intent to injure and defraud said association, on, to wit, the first day of January, in the year of our Lord one thousand eight hundred and ninety-one, and on divers times between said date and the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-three, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and wilfuly misapply the moneys, funds, and credits of said association, to wit, the sum of three hundred and seventy-five thousand dollars aforesaid.''

[54] U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664.

ment charged a person with aiding or abetting a bank officer in committing an offense by a misapplication of funds of the bank, and each count averred that the person whom the defendant was charged with abetting, misapplied the funds while an officer of the bank, and then averred that the defendant had unlawfully, wilfully, feloniously and knowingly, and with intent to defraud it and abet the said person "as aforesaid," without repeating the fact that the latter was then an officer of the bank; it was held to be sufficient.[55] Where an indictment charged "the defendants, Warner and Work, as aiders and abettors of Ferdinand Ward, in a wilful misapplication by Ward of the money of the Marine Bank, of which association Ward was at the time a director," and contained a statement, "that Ward intended that he and Warner and Work should convert to their own use the money in question," but no allegation that such a conversion by Ward was thereafter affected; a demurrer was sustained.[56]

§ 506a. Indictments for fraudulent use of the mails. In the crime of using the mails to aid in a fraud.[1] The gist of the

[55] Coffin v. U. S., 156 U. S. 432, 449, 39 L. ed. 481, 489.

[56] U. S. v. Warner, 26 Fed. 616.

§ 506a. [1] Criminal Code, § 215, U. S. R. S., § 5480, amended, March 2, 1889, c. 393, § 1, 25 Stat. 873. March 4, 1909, c. 321, § 215, 35 Stat. 1130, Comp. St., § 10385.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit-money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'green goods,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered

offense is the improper use of the mails.[2] This must be pleaded clearly and specifically as to time, place and circumstances.[3] The letter mailed should be set forth in full, if that is practicable,[4] or else identified and described as fully as the circumstances will permit.[5] It is not necessary to allege how the letter would aid, or was intended to aid, in the execution of the scheme.[6] Knowledge of the falsity of the alleged fraudulent statement or recklessness in making it, should also be set

by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.''

Criminal Code, § 216, March 2, 1889, c. 393, § 2, 25 Stat. 873. March 4, 1909, c. 321, § 216, 35 Stat. 1131, Comp. St., § 10386.

''Whoever, for the purpose of conducting, promoting, or carrying on, in any manner, by means of the post-office establishment of the United States, any scheme or device mentioned in the section last preceding or any other unlawful business whatsoever, shall use or assume, or request to be addressed by, any fictitious, false, or assumed title, name, or address, or name other than his own proper name, or shall take or receive from any post-office of the United States, or station thereof, or any other authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be punished as provided in the section last preceding.'' See Wilson v. U. S., C. C. A., 190 Fed. 427; Lemon v. U. S., C. C. A., 164 Fed. 953; U. S. v. Bartholomew, C. C. A., 177 Fed. 902; Horn v. U. S., C. C. A., 182 Fed. 721.

2 Whitehead v. U. S., C. C. A., 245 U. S. 385, 388.

3 U. S. v. Wupperman, 215 Fed. 135; Coleman v. U. S., C. C. A., 223 Fed. 590; U. S. v. Dale, 230 Fed. 750. An averment that letters were placed in a Post Office of the City of New York was sustained by evidence, that the letter was delivered at its address enclosed in an envelope postmarked ''New York,'' as against the objection that it might have been deposited in a sub station or in a box on a lamp post. Farmer v. U. S., 223 Fed. 903.

Where an indictment charged in separate counts the mailing of letters upon a different date in furtherance of the same scheme, an acquittal of an intent to defraud is not inconsistent with the existence of a fraudulent intent of when the letter was mailed. Tucker v. U. S., C. C. A., 224 Fed. 833.

4 U. S. v. Wupperman, 215 Fed. 135.

5 Ibid.

6 Ibid.

forth [7] that defendants acted fraudulently,[8] or willfully,[9] is not indispensable.

The person whom it was intended to defraud should be named, if that is practicable; [10] but when the scheme's aim was to entrap members of a class, it is sufficient to name the class [11] and the omission of the averment of the incorporation of a person named unless objected to by a special demurrer, is not fatal to the indictment.[12]

When the intent to defraud is clearly charged, the pleader need not aver that any one was actually defrauded.[13] The fraudulent scheme must be described.[14] Since it is subsidiary to the offense, it need not be set forth with the technical details required when obtaining money or goods under false pretenses or swindling, or a like crime, is the subject of the indictment.[15]

7 Farmer v. U. S., 223 Fed. 903; Bettman v. U. S., C. C. A., 224 Fed. 819.

An averment, that part of a financial statement was intended by defendant to be, and was, false and fraudulent, is sufficient in this respect. Ibid.

8 Moffatt v. U. S., C. C. A., 232 Fed. 522.

9 Holsman v. U. S., C. C. A., 248 Fed. 193.

10 In McClendon v. U. S., C. C. A., 229 Fed. 523, held, "where an indictment for using the mails in the execution or attempted execution of a scheme to defraud alleged that a letter mailed in such execution or attempted execution was inclosed in an envelope, a further description of which envelope was to the grand jury unknown, and then set out the letter contained in the missing envelope, it was not defective because of the failure to allege to whom the envelope was addressed."

11 Finnegan v. U. S., C. C. A., 231 Fed. 561.

12 McClendon v. U. S., C. C. A., 229 Fed. 523.

13 Whitehead v. U. S., C. C. A., 245 Fed. 385, 388: "The consummation of the crime is not dependent upon the success of the scheme. The crime is complete before the letter designed to mislead or otherwise used in carrying out the scheme, is received by the intended victim. The person addressed may have the shrewdness to detect the fraud; or, being mislead, he may be in such financial condition as to be proof against fraud. Neither fact will affect the crime. Neither the mental nor financial condition of the person against whom the fraud is directed, nor any action on his part or failure to act, will increase or diminish a crime completed when, a scheme to defraud having been devised, the mails have been used in an effort to make it effective."

14 U. S. v. Wupperman, 215 Fed. 135; Spear v. U. S., C. C. A., 228 Fed. 485; U. S. v. Schwarz, 230 Fed. 537; Underwood v. U. S., C. C. A., 264 Fed., July 20, 1920.

15 Whitehead v. U. S., C. C. A., 245 Fed. 385, 388.

A general averment that defendants devised a scheme to defraud is insufficient without descriptive details showing the character of the scheme, and that it was reasonably calculated to effect the wrongful design.[16] The indictment need not mention all the auxiliary devices.[17] A description of the scheme as one by which the defendants would "pretend" certain things is sufficient.[18] There is no need of an allegation that the scheme was to be effected by the use of the mails.[19]

An indictment alleging that several persons entered into a scheme to defraud by use of the mails may justify a conviction of some, and an acquittal of the others, without a fatal variance.[20]

§ 506b. Indictments for mailing or expressing obscene matter. An indictment for mailing or expressing obscene matter[1] must

16 Spear v. U. S., C. C. A., 228 Fed. 485; U. S. v. Schwarz, 230 Fed. 537; Underwood v. U. S., C. C. A., 264 Fed.

17 Whitehead v. U. S., C. C. A., 245 Fed. 385, 390, where the contract pleaded recited that an application was a part thereof, and the indictment omitted such application. In Colburn v. U. S., C. C. A., 223 Fed. 590, held that a description of land as "worthless" was not repugnant to a subsequent statement that such land was not worth to exceed $2 an acre. Bonfoey v. U. S., C. C. A., 252 Fed. 802, that proof of a trust deed instead of a mortgage the latter word being alleged in the indictment was a fatal variance.

18 Mounday v. U. S., C. C. A., 225 Fed. 965; Ruthven v. U. S., C. C. A., 222 Fed. 70.

19 Tucker v. U. S., C. C. A., 224 Fed. 833; Smith v. U. S., C. C. A., 267 Fed. 665.

20 Farmer v. U. S., C. C. A., 223 Fed. 903.

§ 506b. 1 Criminal Code, § 211, U. S. R. S., § 3893, amended, July 12, 1876, c. 186, § 1, 19 Stat. 90, Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496, and May 27, 1908, c. 206, 35 Stat. 416. March 4, 1909, c. 321, § 211, 35 Stat. 1129. March 4, 1911, c. 241, § 2, 36 Stat. 1339, Criminal Code, § 245, as amended, Act of June 5, 1920, Ch. —, Comp. St., §§ 10381, 10415. These statutes are constitutional.

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be ob-

describe the article or paper objected to, so that the defend-

tained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. And the term "indecent" within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination.

"Whosoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, of notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

ant may have a fair opportunity to prepare for trial[2] and to make the judgment a complete defense to a second prosecution of the same offense.[3] When the objectionable article is voluminous,[4] or contains such indecent or obscene language that it is not proper to spread it upon the records of the courts,[5] it need not be pleaded at length; but in such a case the defendant is entitled to a bill of particulars if he moves for one.[6] The indictment need not refer to the whole publication, of which obscene pictures, the subject of the crime, form a part;[7] nor need it charge that the book, periodical or newspaper in which the objectionable matter appears is obscene.[8] It is the better practice to aver that defendants were aware of the character of the publication; but such an objection is waived unless raised by special demurrer.[9]

The person or persons to whom the objectional matter was mailed or sent should be named in the indictment; unless they are unknown to the grand jury, when an allegation of such ignorance is sufficient.[10] It has been held sufficient to allege that defendants deposited in the Post Office the objectionable matter, if properly described, to be transmitted by the Post Office establishment to such persons without stating that the newspapers were addressed to any particular person.[11]

A count is not duplicitous which charges the mailing of a writing which is obscene and also gives the prohibited information;[12] nor one which charges the deposit at the same time of a number of obscene books in the mail for delivery to different persons;[13] nor which charges that he "did deposit

2 Tyomies Pub. Co. v. U. S., C. C. A., 211 Fed. 385.

3 Ibid. Coomer v. U. S., C. C. A., 213 Fed. 1.

4 U. S. v. French, 57 Fed. 382.

5 Rosen v. U. S., 161 U. S. 29, 40 L. ed. 606; Price v. U. S., 165 U. S. 311, 41 L. ed. 727; Dunlop v. U. S., 165 U. S. 486, 41 L. ed. 799; Bartell v. U. S., 227 U. S. 427, 57 L. ed. 583.

6 Coomer v. U. S., C. C. A., 213 Fed. 1; *infra*, § 522.

7 Ibid.

8 Tyomies Pub. Co. v. U. S., C. C. A., 211 Fed. 385.

9 Ibid.

10 Magon v. U. S., C. C. A., 248 Fed. 201.

11 Ibid.

12 Burton v. U. S., C. C. A., 142 Fed. 57.

13 Clark v. U. S., C. C. A., Clark C. C. A., 211 Fed. 916.

and caused to be deposited the objectionable matter in the mail.'' [14]

§ 506c. Indictments for conspiracy. By far the greater number of indictments for conspiracy are based upon section thirty-seven of the Criminal Code which is as follows: ''If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.'' Under this statute, an indictment for a conspiracy is invalid unless it sets forth one or more overt acts in pursuance thereof; [1] since, until there has been an overt act there has been no crime.[2] A conspiracy to overthrow the Government of the United States or to levy war against them or to oppose by force the authority thereof, or by force to prevent the execution of a law of the United States or by force to seize any property of the United States,[3] and a combination or conspiracy to monopolize interstate commerce [4] are crimes upon their formation, and before the commission of any overt act. Consequently an indictment for such a seditious conspiracy [5] and an indictment under the Sherman Act [6] need aver no overt act. The charge of a conspiracy to commit the offense of conspiracy will not support an indictment.[7] A conspiracy to omit the offense of subornation of perjury is indictable.[8]

A conspiracy to commit a felony is merged in the latter when the felony is committed; [9] but the indictment for such a con-

[14] U. S. v. Janes, 74 Fed. 545; *supra*, § 500.

§ 506c. [1] U. S. R. S., § 5440, amended, May 17, 1879, c. 8, 21 Stat. 4. March 4, 1909, c. 321, § 37, 35 Stat. 1906, Comp. St., § 10201.

[2] Joplin Mercantile Co. v. U. S., 236 U. S. 531, 35 Sup. Ct. 291, 59 L. ed. 705; U. S. v. Baker, 243 Fed. 746; U. S. v. Rogers, 226 Fed. 512.

[3] Criminal Code, § 6, Act of March 4, 1909, Ch. 321, 35 St. at L. 1088, Comp. St., § 10170, see *infra*, § 523a.

[4] Act of July 2, 1890, Ch. 647, 26 St. at L. 209, Comp. St., § 8822; *infra*, § 506e.

[5] Bryant v. U. S., C. C. A., 257 Fed 378, 387.

[6] U. S. v. Bopp, 237 Fed. 283.

[7] U. S. v. Armstrong, 265 Fed. 683.

[8] Williamson v. U. S., 207 U. S. 425, 446, 28 Sup. Ct. 163, 52 L. ed. 278.

[9] U. S. v. Fischer, 245 Fed. 422, 427.

spiracy need not negative the commission of the felony.[10] This doctrine does not apply to a conspiracy to commit a misdemeanor [11] and the offense of the conspiracy is not merged in the misdemeanor when the latter is committed.[12] An indictment for conspiracy, which sets forth the names of the conspirators and alleges that the conspiracy was to commit an offense against the United States, the nature of the offense, the time and place, and the overt acts committed to execute the conspiracy, is sufficient.[13]

The gist of the offense is the conspiracy.[14] This must be clearly and specifically pleaded.[15] An indictment for seditious conspiracy [16] must charge that force was intended.[17] This cannot be implied from the words "feloniously, unlawfully, willfully, and maliciously"; [18] but where the overt alleged charged the defendants with intent to use force it was held that this supplied the defect in the averment of conspiracy when no special demurrer on this ground was filed.[19] Otherwise the averments describing the conspiracy cannot be aided by subsequent allegations as to the commission of an overt act.[20] "If completed acts separately stated, are not crimes, many may not be united in a conspiracy charge as overt acts, and made criminal." [21]

10 Grant v. U. S., C. C. A., 252 Fed. 693.

11 Steigman v. U. S., 220 Fed. 63.

12 Ibid. U. S. v. Scott, C. C. A., 165 Fed. 172; s. c. 139 Fed. 697.

13 U. S. v. Pennsylvania Central Coal Co., 256 Fed. 703.

14 Knauer v. U. S., C. C. A., 237 Fed. 8.

15 Joplin Mercantile Co. v. 236 U. S. 531, 535, 536, 35 Sup. Ct. 291, 59 L. ed. 705; U. S. v. Baker, 243 Fed. 741; U. S. v. Robinson, 266 Fed. 240.

16 Criminal Code, § 6, March 4, 1909, c. 321, § 6, 35 Stat. 1089, U. S. R. S., § 5336, Comp. St., § 10170. "If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars, or imprisoned not more than six years, or both."

17 Phipps v. U. S., C. C. A., 251 Fed. 879.

18 Ibid.

19 Ibid.

20 U. S. v. Robinson, 266 Fed. 240. But see U. S. v. Baker, 243 Fed. 741.

21 U. S. v. Ault, 263 Fed. 800, 804.

Where the criminality consists in an unlawful agreement to commit or promote some criminal or illegal purpose, or the commission of an unlawful act, such act or purpose must be fully and clearly set forth;[22] but ordinarily such an indictment need not show the means by which the conspiracy was planned to be executed,[23] nor what part each conspirator should play,[24] nor the character of the act to be performed.[25] Where, however, the conspiracy is to defraud the United States it seems that a detailed statement of the means should be set forth in order fairly to inform the defendant of the charge he has to meet.[26]

If the criminality consists in an agreement to accomplish by criminal or unlawful means, a purpose not in itself criminal or unlawful, such means must be averred.[27] If it consists in an agreement to accomplish such a purpose by fraud, deceit, misrepresentation, or concealment must be specifically pleaded.[28] If the conspiracy be that one shall do an overt act and the other aid in abetting, the indictment should charge what each was to do.[29]

The place of the formation of the conspiracy, except possibly when it is a violation of the Sherman Act, need not be averred,[30] when the place of the commission of any overt act is clearly set forth.[31] It is not a fatal variance when it appears that the conspiracy was formed in another district from that where the case is tried; when there is proof that an overt act was committed within the territorial jurisdiction.[32]

The indictment must show that one of the overt acts was committed within the period of the conspiracy as charged.[33]

22 Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419.

23 Houston v. U. S., C. C. A., 217 Fed. 852.

24 U. S. v. Dahl, 225 Fed. 909; Proffit v. U. S., C. C. A., 264 Fed. 299.

25 Ibid.

26 Jelke v. U. S., C. C. A., 255 Fed. 264.

27 Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; Tillinghast v. Richards, 225 Fed. 226, 228.

28 Tillinghast v. Richards, 225 Fed. 226, 228.

29 U. S. v. Rogers, 226 Fed. 512.

30 Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136; U. S. v. Aviles, 222 Fed. 474. But see Jelke v. U. S., C. C. A., 255 Fed. 264.

31 Vane v. U. S., C. C. A., 254 Fed. 28.

32 Bernstein v. U. S., C. C. A., 238 Fed. 923.

33 U. S. v. Baker, 243 Fed. 746. See s. c. 242 Fed. 741.

An allegation that it was performed on or about a certain day is ordinarily sufficient.[34] So is an averment that the conspiracy was formed on "the —— day" of a specified month within the period of limitations.[35]

The overt acts which complete the offense must be pleaded clearly and specifically,[36] with an allegation of the place of at least one of them as committed within the district where the indictment is found.[37] The indictment need not allege that the overt acts charged were effective,[38] nor in what manner they would tend to effect the object of the conspiracy.[39] But, it has been held, that the connection between the overt act and the conspiracy should be made to appear specifically by proper recitals.[40] When an overt act to make it revelant to a conspiracy must be qualified by circumstances, such circumstanees must be pleaded.[41] It has been said to be sufficient to allege that the overt acts were done to effect the purpose of the conspiracy.[42] None of the overt acts need constitute a criminal offense when the charge is a conspiracy to violate a law of the United States.[43] The object of the conspiracy need not be set forth as specifically as the conspiracy itself, or as the overt act, or as if it alone were the subject of an indictment.[44] "Certainty to a common intent,

34 U. S. v. Aviles, 222 Fed. 474.

35 Firth v. U. S., C. C. A., 253 Fed. 36.

36 Tillinghast v. Richards, 225 Fed. 226; U. S. v. Rogers, 226 Fed. 512.

37 U. S. v. Marx, 122 Fed. 964; Phipps v. U. S., C. C. A., 251 Fed. 879.

38 U. S. v. Shevlin, 212 Fed. 343; Phipps v. U. S., C. C. A., 251 Fed. 879.

39 U. S. v. Donau, 11 Blatch. 168, Fed. Cas. 14,983; U. S. v. Shevlin, 212 Fed. 343; U. S. v. U. S. Brewers' Ass'n, 239 Fed. 163; U. S. v. Pennsylvania Central Coal Co., 256 Fed. 703.

40 U. S. v. Wupperman, 215 Fed. 135; Tillinghast v. Richards, 225 Fed. 226.

41 U. S. v. Ruroed, 220 Fed. 210; Tillinghast v. Richards, 225 Fed. 226.

42 U. S. v. U. S. Brewers' Ass'n, 139 Fed. 163; U. S. v. Pennsylvania Central Coal Co., 256 Fed. 703. But see U. S. v. Ault, 263 Fed. 800. *Contra*, Tillinghast v. Richards, 225 Fed. 226, 230.

43 U. S. v. Ault, 263 Fed. 800.

44 Aezel v. U. S., C. C. A., 232 Fed. 652; Knauer v. U. S., C. C. A., 237 Fed. 8; U. S. v. Baker, 243 Fed. 741; U. S. v. D'Arey, 243 Fed. 739; U. S. v. Gouled, 253 Fed. 239; U. S. v. Risenwasser, 255 Fed. 233; Jelke v. U. S., C. C. A., 255 Fed. 264; see *supra*, § 506; *infra*, § 506d.

In Vane v. U. S., C. C. A., 254 Fed. 28; that an indictment was sufficient which charged: that Vane and certain others, on or about Sep-

sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." [45]

An indictment for conspiracy to violate a statute need not negative an exception created by a proviso therein.[46]

An indictment may charge a conspiracy to commit two or

tember 6, 1914, in Bonner county, Idaho, and within the jurisdiction of the United States District Court for the District of Idaho, did wilfully, unlawfully and feloniously conspire, combine and agree by force and violence to "rob one Hugo De Witz of certain mail matter constituted a part of the United States mails under the control of the post office establishment of the United States, and in the lawful charge and custody of him, the said Hugo De Witz, and which said robbery of the aforesaid mail matter was then and there agreed among them, the said William Vane and Joe Bassio, . . . to be effected by force, and violence, and by placing the life of him, the said Hugo De Witz, in jeopardy by the use of certain dangerous weapons, to wit, certain pistols and certain rifles loaded with gunpowder and leaden bullets, with which said dangerous weapons it was then and there agreed by the said William Vane and Joe Bassio . . . to threaten him, the said Hugo De Witz, and to put his life in peril and thereby to take, steal, and carry away from the possession of said Hugo De Witz, and against his will, the aforesaid mail matter;" although it did not show the manner in which De Witz acquired the lawful custody of the mail.

In Roberts v. U. S., C. C. A., 248 Fed. 873; that an indictment for conspiracy to violate Criminal Code, § 145 (35 St. at L. 1114, Comp. St., § 10315), providing "Whoever shall, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demand or receive any money or other valuable thing, shall be fined," etc., need not aver that the person threatened had in fact violated any law of the United States, when the law to which reference was made in the threat was made.

In Kaphan v. U. S., C. C. A., 264 Fed. 323; that a count for conspiracy to bring into the United States Chinese not entitled to enter was sufficient when it charged that in furtherance thereof, one of the defendants delivered to another letters containing questions and answers to be used by the immigrant which failed to show what was done with these papers after such delivery. And that so was a count charging a conspiracy to conceal, remove, and mutilate public records of an immigration office which charged as an overt act the abstraction of certain official files pertaining to certain Chinese but did not allege what was done with these records after the abstraction, nor whether the Chinese were entitled to enter the United States. See also Lew Moy v. U. S., C. C. A., 237 Fed. 50.

[45] Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. ed. 278.

[46] Jelke v. U. S., C. C. A., 255 Fed. 264.

more offenses.[47] A charge in a single count of a conspiracy to violate two or more of the laws of the United States does not make an indictment duplicitous.[48]

An indictment may charge a conspiracy between defendant and others unknown to the grand jury.[49] In such a case the names of the others need not be proved, when it is clear that in committing the overt acts of which evidence is given, the defendants must have been aided by others.[50]

§ 506d. Indictments for conspiracy under the civil rights laws. By the Criminal Code which substantially re-enacts the Revised Statutes in this respect: "§ 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."[1] "§ 20. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."[2] "§ 21. If two or more persons in any State, Territory, or District conspire to prevent, by force, intimidation, or threat, any person

47 Frohwerk v. U. S., 249 U. S. 204, 39 Sup. Ct. 249, 63 L. ed. 561; U. S. v. Ault, 263 Fed. 803.

48 Knauer v. U. S., C. C. A., 237 Fed. 8.

49 Nee v. U. S., C. C. A., 267 Fed. 84. See *supra*, § 506.

50 Ibid.

§ 506d. 1 Act of March 4, 1909, ch. 321, 35 St. at L. 1092, Comp. St., § 10183, re-enacting U. S. R. S., § 5508.

2 Ibid., Comp. St., § 10184, re-enacting U. S. R. S., § 5510.

from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, Territory, District, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than five thousand dollars, or imprisoned not more than six years, or both."[3]

By the Revised Statutes which re-enact in this respect the Enforcement Act of May 30, 1870:[4] "First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

"Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of

3 Ibid., Comp. St., § 10185, re-enacting U. S. R. S., § 5518.

4 16 St. at L. 140.

justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

"Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United State; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." [5]

The right of a qualified voter to take part in an election of a member of Congress or of a United States Senator is a right secured to him by the Constitution and laws of the United States.[6] A conspiracy to deprive him of such a right is a crime.[7]

[5] U. S. R. S., § 1980, Comp. St., § 3933.

[6] *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274; *Re* Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. ed. 274; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. ed. 84; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. ed. 1005; James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979; U. S. v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355; Felix v. U. S., C. C. A., 186 Fed. 685; U. S. v. Stone, 188 Fed. 836; Aczel v. U. S., C. C. A., 232 Fed. 652.

[7] *Ex parte* Yarbrough, 110 U. S.

The overt act may be an assault upon a voter,[8] or the intimidation of voters by threats,[9] or by the use of fire arms[10] or otherwise;[11] by the intimidation of citizens to prevent their acting as election officers,[12] the arrest and imprisonment of such citizens for no offense without process of law;[13] or the preparation of the ballots in such a way as to make it difficult or impossible for illiterate voters to exercise the right of suffrage;[14] by causing men to vote in the names of voters who had been intimidate;[15] by the omission of the returns of certain precincts from the returns to the State Election Board;[16] by the fraudulent manipulation of voting machines.[17]

These sections are not designed to protect exclusively those who are oppressed because of race, color, or previous condition of servitude.[18] An indictment is not defective because it fails to charge that the persons against whom the conspiracy was directed were negroes.[19]

When such an indictment charges a conspiracy to deprive negroes of their right to vote, it need not allege the names of the voters whom the defendants intended to injure.[20] A count in an indictment charging a conspiracy to injure and oppress specified electors in the free exercise of their right to vote at such an election is not defective because of an omission of an averment that these were registered, as was required by the

651, 4 Sup. Ct. 152, 28 L. ed. 274; U. S. v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355; Felix v. U. S., C. C. A., 186 Fed. 685; U. S. v. Stone, 188 Fed. 836; Aezel v. U. S., C. C. A., 232 Fed. 652 (including the right to vote for a United States Senator).

8 *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274; Felix v. U. S., C. C. A., 186 Fed. 685.

9 Aezel v. U. S., C. C. A., 232 Fed. 652.

10 Felix v. U. S., C. C. A., 186 Fed. 685; Aezel v. U. S., C. C. A., 232 Fed. 652.

11 *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274.

12 Aezel v. U. S., C. C. A., 232 Fed. 652.

13 Ibid.

14 U. S. v. Stone, 188 Fed. 836.

15 Aezel v. U. S., C. C. A., 232 Fed. 652.

16 U. S. v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355.

17 Aezel v. U. S., C. C. A., 232 Fed. 652, affirming 219 Fed. 917. *Contra*, U. S. v. Gradwell, 234 Fed. 446.

18 U. S. v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355; Felix v. U. S., C. C. A., 186 Fed. 685.

19 U. S. v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355.

20 U. S. v. Stone, 188 Fed. 836.

State law in order to entitle them to vote, when it states that they were "qualified voters and entitled to vote at said election";[21] because it further charges that a further object of the conspiracy was to injure and oppress certain citizens in the exercise of their rights to act as election officers and to be free from arrest without due process of law.[22] An averment was held to be insufficient which stated that defendants intended to threaten to use their efforts to cause sentence on a criminal charge then pending against him for judgment to be pronounced upon a voter whom they were charged with conspiring to intimidate; since it was said to be argumentative, not to charge a direct threat to have the sentence pronounced and that whether the threat would naturally raise in the voter's mind any further apprehension of the sentence was too conjectural.[23] It was further held that a count was bad which charged a conspiracy to threaten a voter with reference to the consequences of his vote for representative in Congress by telling him that he had better look out and that defendants had got something on him.[24] Where the gravamen of the charge was the preparation of ballots so as to deprive illiterate negro voters of their right of suffrage, a count was sufficient which, after charging the conspiracy in the language of the statute with due specification of the time and place of the Congressional election, and setting forth a copy of the objectionable ballot, averred that the form of the ballot was devised by two of the defendants, naming them, with intent and purpose, on account of the race and color of a large number of persons of the negro race and black color, citizens of the United States, and the State and county where the Congressional election was held, duly qualified and registered voters in said county, a large number of whom could neither read nor write and were illiterate, it being impossible for many of the duly qualified and registered negroes voters of such county, and difficult for any of them to vote at said Congressional election for the candidate of their choice; the said two defendants well knowing that said duly qualified and registered negroes voters would in all probability vote for

21 Aczel v. U. S., C. C. A., 232 Fed. 652.

22 Ibid.

23 U. S. v. Welch, 243 Fed. 996.

24 U. S. v. Welch, 243 Fed. 996.

the candidate of the Republican party and not for the candidate of the Democratic party.[25] A further allegation that the third defendant aided and abetted the other two by printing these ballots for them, well knowing that their purpose in causing the ballots to be printed in the way they were printed was the purpose previously set forth.[26]

Indictments will be authorized because of a conspiracy by intimidation to make a citizen abandon a claim to Government land;[27] to inflict upon him personal violence because he has informed the revenue officers of illicit distilling[28] and to intimidate a United States marshal and his posse and thus prevent them from making an arrest;[29] to lynch a prisoner in the custody of a United States' marshal or the latter's deputy.[30]

Such an indictment is not objectionable because it charges as an overt act in the execution of the conspiracy, murder;[31] nor is it duplex because it charges that both assault and murder were thus committed.[32]

No indictment will lie for a conspiracy by force or intimidation to hinder and prevent citizens of the United States, who are of African descent and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held" by the people of a specified State or subdivision thereof, it not appearing that the election was a Congressional election nor that the intent of the defendants was to prevent these citizens from voting because of their race, color, or previous condition of servitude.[33] An indictment was not sustained which charged different overt acts without showing whether they related to the election of a Congressman or to the election of State officers held at the same time.[34]

25 U. S. v. Stone, 188 Fed. 836, 839.

26 Ibid.

27 U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. ed. 673.

28 Motes v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. ed. 1150.

29 U. S. v. Davis, 103 Fed. 457.

30 Logan v. U. S., 144 U. S. 263, L. ed. 429.

31 Motes v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. ed. 1150; U. S. v. Davis, 103 Fed. 457.

32 U. S. v. Davis, 103 Fed. 457.

33 U. S. v. Cruikshank, 92 U. S. 542, 555, L. ed. 588.

34 U. S. v. Gradwell, 234 Fed. 446, 453.

No indictment will lie for a conspiracy to injure, oppress, threaten, or intimidate citizens and thus prevent the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose."[35] The First Amendment prohibits Congress from abridging such rights; but neither this nor the Fourteenth Amendment forbids interference by a State or the citizens thereof with such right unless the meeting was intended for consultation in respect to national affairs and for the purpose of petitioning Congress for a redress of grievanees.[36] The right to assemble for such a purpose is an attribute of national citizenship, and a conspiracy to interfere therewith might be indictable.[37] No indictment will lie for a conspiracy thus to hinder and prevent citizens of the United States in the free exercise and enjoyment of their right of "bearing arms for a lawful purpose."[38] The Second Amendment applies to Congress only.[39] Nor for a conspiracy to deprive citizens "of their respective several lives, and liberty of person without due process of law."[40] The Fourteenth Amendment prohibits action by the States, not by their citizens.[41]

No indictment will lie for a conspiracy thus "to hinder and prevent the parties in their respective free exercise and enjoymen of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana for the reason that they being then and there citizens of said State of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof; and to hinder and prevent them in their several and respective free exercise and enjoyment of every, each, all and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States."[42]

35 U. S. v. Cruikshank, 92 U. S. 542, 551, L. ed. 588.

36 Ibid., 92 U. S. 542, 552, L. ed. 588.

37 Ibid.

38 Ibid., 92 U. S. 542, 553, L. ed. 588.

39 Ibid.

40 Ibid.

41 Ibid., 92 U. S. 542, 554, L. ed. 588.

42 Ibid., 92 U. S. 542, 557, L. ed. 588.

The charge is too broad. There is no specification of any particular right which the conspiracy seeks to infringe.[43]

§ 506e. Indictments for conspiracy to restrain or monopolize interstate or international commerce. An indictment under the Anti Trust or Anti Monopoly Law[1] because of a conspiracy or combination to monopolize interstate or international commerce, or in restraint of trade between the States or with foreign nations, need aver no overt act.[2] It should aver precisely and specifically the purpose of the conspiracy,[3] and the manner in which the monopoly was designed to be effected.[4] This averment cannot be aided by subsequent allegations of overt acts not incorporated therein by reference.[5] The indictment should contain a distinct averment in the words of the statute, or in equivalent language that, by means of the acts charged, the defendant has monopolized, or has combined or conspired to monopolize trade or commerce among the several States or with foreign nations.[6] It should give the particulars of the contract, combination or monopoly and not rely simply on the words of the statute.[7] It may be that the words, "combination," or "combine" may be pleaded in the language of the statute,[8] leaving the specifications to be ascertained by a bill of particulars.[9] The words "monopoly" and "monopolize" are not in themselves to be sufficient.[10] It has been held that the phrase "a concerted plan" does not imply an agreement.[11] An averment that defendants entered into a conspiracy "that they should" do certain acts and that in pursuance and to effect the object thereof, they

43 Ibid.

§ 506e. 1 26 St. at L. 209, ch. 647, § 4, Comp. St., § 8823, *supra*, § 4541.

2 Nash v. U. S., 229 U. S. 373; Knauer v. U. S., C. C. A., 237 Fed. 8; U. S. v. Bopp, 237 Fed. 283.

3 U. S. v. McAndrews & Forbes Co., 149 Fed. 823; U. S. v. American Naval Stores Co., 186 Fed. 592, 595. See U. S. v. King, 250 Fed. 908. *Supra*, § 506c.

4 U. S. v. American Naval Stores Co., 186 Fed. 592, 595.

5 U. S. v. Patterson, 55 Fed. 605, 639; U. S. v. McAndrews & Forbes Co., 149 Fed. 823, 831.

6 U. S. v. Greenhut, 50 Fed. 469.

7 U. S. v. Cowell, 243 Fed. 730.

8 U. S. v. McAndrews & Forbes Co., 149 Fed. 823, 831.

9 See § 522 *infra*.

10 U. S. v. American Naval Stores Co., 186 Fed. 592, 595. But see U. S. v. Cowell, 243 Fed. 730.

11 U. S. v. M. Piowaty & Sons, 251 Fed. 375.

acted as they had conspired as they should do sufficiently alleges that the conspiracy was actually entered upon.[12] The indictment need not aver that defendants were engaged in interstate commerce;[13] nor that all of them were traders;[14] nor show that the defendants do not fall within one of the classes exempted from the operation of the statute;[15] nor that the conspiracy was successful.[16]

A demurrer was sustained to an indictment against a manufacturer alone, charging a combination in restraint of trade in violation of Sherman Anti-Trust Act, which averred only that defendant required its customers, to whom it sold its products, individually and not collectively, to sell at established prices, not alleged to be unreasonable, and refused to sell to customers who would not so agree, which did not charge that defendant had or attempted to acquire a monopoly, that it retained any control over the purchasers, or the goods after their sale, or any interest therein, or the right to control the disposition of the same, or that there was any combination or agreement between the customers themselves.[17]

The time of the formation of the conspiracy or of the commission of some overt act in pursuance of the conspiracy must be shown to have been within the three years statute of limitations;[18] but the exact time need not be alleged or proved.[19] There can be no conviction for conspiring to interfere with competitors who ceased to exist more than three years before the indictment.[20] Where the indictment alleged that during twenty years before certain business houses had been engaged in the commerce which defendants had conspired to monopolize, setting forth a list of such houses so far as known to the grand jurors, that the defendant corporation together with those who at different times

12 U. S. v. Knig, 229 Fed. 275.

13 Knauer v. U. S., C. C. A., 237 Fed. 8.

14 Nash v. U. S., 229 U. S. 373.

15 U. S. v. King, 250 Fed. 908.

16 Knauer v. U. S., C. C. A., 237 Fed. 8.

17 U. S. v. Colgate & Co., 253 Fed. 522.

18 Patterson v. U. S., C. C. A., 222 Fed. 599; U. S. v. National Packing Co., D. C., N. D., Illinois, March 2, 1910; per Landis, J.; Shield's Federal Courts and Practice 442. *Supra*, § 506e.

19 U. S. v. McAndrews & Forbes Co., 149 Fed. 823, 830.

20 Patterson v. U. S., C. C. A., 222 Fed. 599. See U. S. v. Cowell, 243

had been its officers during said time, had conspired to obtain such a monopoly and had engaged in such unlawful competition against the houses thus engaged and was still engaged in the execution of such conspiracy; it was held that it was not the intention of the pleader to aver that each of such competitors had been engaged in competition during the entire twenty years, but only to allege that during such period there was no time when one or more of them were not so engaged; and that the indictment was not void for uncertainty because of its failure to show which of these were thus engaged within the past three years, although the defendants could not be held liable for their acts against any who had previously abandoned such business.[21]

The indictment should allege the place of the conspiracy or combination, or of one of the overt acts performed in furtherance of such conspiracy.[22] An averment that at a specified place within the district the defendants therein named unlawfully entered into a conspiracy therein described, that in pursuance of such conspiracy, and to effect its object, they did certain acts sufficiently charges that the crime was committed by each of the defendants within the district.[23]

It has been held that a count which charges both a monopoly and an attempt to monopolize is duplicitous,[24] but not one which shows an attempt unlawfully to take trade from several competitors,[25] nor one alleging several means of accomplishing the monopoly, combination or conspiracy.[26] A count for a conspiracy in restraint of a branch of interstate commerce may be joined with a count for a conspiracy to monopolize such branch and a count for creating such a monopoly.[27]

A corporation may be the subject of an indictment under these statutes.[28] The officers of the corporation who personally

21 Ibid. U. S. v. Colgate & Co., 253 Fed. 522. See U. S. v. Cowell, 243 Fed. 730.

22 Patterson v. U. S., C. C. A., 222 Fed. 599. *Supra*, § 506e.

23 U. S. v. King, 229 Fed. 275.

24 U. S. v. American Naval Stores Co., 186 Fed. 592, 596. *Supra*, § 500.

25 Patterson v. U. S., C. C. A., 222 Fed. 599; *supra*, §§ 501, 503.

26 Ibid.; U. S. v. McAndrews & Forbes Co., 149 Fed. 823, 836.

27 U. S. v. Patterson, 201 Fed. 697, reversed on another point, Patterson v. U. S., C. C. A., 222 Fed. 599; *supra*, § 506e.

28 U. S. v. McAndrews & Forbes Co., 149 Fed. 823; *supra*, § 506d.

participated in the execution of the conspiracy may be joined as defendants although their acts may have been separate and committed at different times.[29] It has been held to be sufficient to aver that they were the managing officers and agents of the defendant company at certain times specified and then controlled the conduct of its business, when the unlawful acts of the corporation are specifically set forth.[30]

When the defendants have been convicted upon two separate counts of the same indictment, one charging a conviction in restraint of a certain branch of Interstate Commerce and the other a monopoly thereof; a separate punishment upon each may be inflicted.[31]

§ 506f. Indictments under the interstate commerce law. An indictment because of discrimination by a railroad company in favor of a shipper[1] must show that other shippers were not equally favored by the defendant.[2] There is no need of an aver-

29 U. S. v. McAndrews & Forbes Co., 149 Fed. 823; *supra*, § 506c.

30 U. S. v. Patterson, 201 Fed. 697, reversed on another point, Patterson v. U. S., C. C. A., 222 Fed. 599.

31 U. S. v. McAndrews & Forbes Co., 149 Fed. 836.

§ 506f. 1 Act of February 4, 1887, Ch. 104, § 2, 24 St. at L., 379, Comp. St., § 8564.

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed to be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

2 U. S. v. Hanley, 71 Fed. 673, 674, per Grosscup, J.: "The indictment ought to state all the facts that make the gist of the offense, and the gist of the offense is not completely disclosed unless it shows a case where two or more persons, making to the carrier an offering of traffic alike in point of time, kind, circumstances, and condition, have been treated differently in the rate exacted. A rebate or variation from the usual rate in force is not, alone, sufficient. It must be supplemented by another member of the comparison, namely, the existence of another shipper or shippers who, entitled to like treatment, have been denied it. A rebate, drawback, or special rate is not, of itself, unjust discrimination; for it does not neces-

ment that any other shipper asked and was refused similar rates.[3] "It cannot be necessary that the others should have known of the partiality and should have demanded equal treatment. Such concessions are naturally not made generally known.[4] It is sufficient to show that at the same time under substantially similar conditions the railway company demanded and collected from other shippers a higher rate than was paid by the favored individual.[5] In an indictment against a shipper for obtaining, through fraud, transportation while an embargo was in force, it is not necessary to aver that other shippers were denied similar transportation.[6] It is sufficient to allege the embargo and that by the transportation which defendant obtained a discrimination was practiced in favor of the consignee against the United States and all other shippers who wished to ship similar and other commodities over the railroad naming some of them among others.[7] It is not necessary to aver that the embargo was authorized by the President of the United States when the indictment shows that it was authorized by the Director General.[8] A consignee is a shipper within the statutory prohibition when he exercises such direct control over shipment of commodities consigned to him as to enable him to procure discrimination in his own favor.[9] A count may charge a discrimination or concession, which does not in any way effect transportation rates or charges.[10]

The word "concession" was first used in the Act of February 19, 1903, sometimes known as the "Elkins Act."[11] It has been

sarily follow that a like rebate, drawback, or special rate has not been extended to all the patrons of the carrier."

3 Hocking Valley Ry. Co. v. U. S., C. C. A., 210 Fed. 735, 746.

4 Ibid., per Denison, J.

5 Ibid.

6 U. S. v. Metropolitan Lumber Co., 254 Fed. 335.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ch. 708, 32 St. at L. 847, § 1, Comp. St., § 8597. "It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required

said to be "apparently a catchall for any practice by either carrier or shipper which by any devise whatever would tend to defeat the purpose of the law."[12] When it is charged that there was a rebate or concession from the joint rate published and filed by the carrier as required by law there is no need of a further statement that such rate was required by the statute to be filed.[13]

Such an indictment need not aver that the established tariff was posted;[14] that any other shipper had been charged or paid the published rate; nor that any shipment was actually made at such rate.[15] Nor that the defendant solicited the concession.[16] It is the better practice to aver specifically, when a shipper is a defendant, that he knew the concession to be a privilege not accorded to others shipping under similar circumstances.[17] Evidence that he did not know this is admissible.[18]

When the indictment charges that the carrier refused to transport similar commodities for other shippers at the rate which it charges defendant, there is no need of an averment that there was a departure from a tariff printed and filed in accordance with the statute.[19] A crime charging that a carrier offered a discrimination needs no averment that the offer was accepted by the shipper;[20] but an allegation of giving a permit for transportation is insufficient.[21] A count is insufficient which charges that demurrage has not been collected from, or paid by certain shippers, when no agreement upon the subject is pleaded.[22]

An indictment charging that a carrier by false billing assisted a shipper to obtain transportation at less than the regular rates need not set forth the waybills.[23]

by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

12 U. S. v. Vacuum Oil Co., 153 Fed. 598, 604, per Hazel, J.

13 Ibid.

14 U. S. v. Miller, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568.

15 U. S. v. Vacuum Oil Co., 153 Fed. 598, per Hazel, J.

16 Ibid.

17 Standard Oil Co. v. U. S., C. C. A., 164 Fed. 376.

18 Ibid.

19 Ibid.

20 U. S. v. Lehigh Valley R. R. Co., 254 Fed. 332, 334.

21 Ibid.

22 Ibid.

23 Elgin J. & E. Ry. Co. v. U. S., C. C. A., 253 Fed. 906.

An indictment charging use of free interstate railroad transportation need not negative the exception.[24]

It has been held that the offense of receiving a concession is a single crime irrespective of whether the property involved consists of train loads, car loads or pounds, that it is not completed until the shipper receives a rate more favorable than those which were established and that it cannot be split into separate crimes each consisting of a single shipment at an unlawful rate when each was not separately paid for.[25]

§ 506g. Indictments under the White Slave Traffic Act. An indictment under the White Slave Traffic Act of June 25, 1910,[1]

[24] Krause v. U. S., C. C. A., 267 Fed. 183; see *supra*, § 497b.

[25] Standard Oil Co. v. U. S., C. C. A., 164 Fed. 376, 385. See *supra*, § 500.

§ 506g. [1] Ch. 395, § 2, 36 Stat. 825, Comp. St., §§ 8813, 8814, 8815. "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured, or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

"§ 3. Any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other

otherwise known as the Mann Law, is sufficient if it charges in the language of the statute a violation thereof, naming the woman, and the railway company or other common carrier by which the transportation took place, and then avers specifically the amount paid, the payee, that the purpose of the payment was for the woman's transportation for the purpose of prostitution from one State to another, or for payment for such transportation, as the case may be.[2] An indictment is sufficient in its charge of the purpose of the payment when it avers that it was for the purpose of the woman's engaging in illicit intercourse, cohabitation and concubinage with accused,[3] or "for the purpose of having unlawful sexual intercourse" with the accused.[4] A count may charge that on a certain day the accused transported, caused to be transported, and aided and assisted in transporting in interstate commerce a certain woman for the purpose of prostitution.[5]

A count is not bad for duplicity because it charges the transportation of two women at the same time for the same immoral

immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court.

"§ 4. Any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

2 Weddel v. U. S., C. C. A., 213 Fed. 208, 210.

3 U. S. v. Flaspoller, 205 Fed. 1006.

4 Carey v. U. S., C. C. A., 265 Fed. 515.

5 Freed v. U. S., D. C. C. A., 266 Fed. 1012.

purposes.[6] It is not a fatal variance to charge that the offense was committed with reference to two women, when there is proof only as to one of them;[7] nor, when the woman transported was described as Opal Clark if it is proved that she was known as Jeanette Clark, and that her real name was wholly different.[8] Nor is it a misjoinder to unite a count for bringing a woman to a man with another for transporting the two to a place for prostitution.[9]

Any violation of the statute "shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections."[10]

§ 506h. Indictments for larceny and receiving stolen goods. An indictment for larceny, or for receiving stolen goods, should describe the stolen property as fully as the circumstances of the case permit.[1] A description of it as "certain property of the United States furnished for the military service" is insufficient.[2] Descriptions have been held to be sufficient: "a large quantity of Wayne knit hose, to wit, one case of hose, then and there of the value of, to wit, five hundred and seventy-six dollars."[3] "Certain goods and chattels moving as and constituting a part of an interstate shipment of freight, to wit, 49 cases of whisky, which had theretofore been shipped," naming the shipper, the place of shipment, the place of consignment, and the name of the railroad company in possession.[4] A specified quantity of nitrate of soda of a certain value.[5]

6 U. S. v. Westman, 182 Fed. 1017. See Freed v. U. S., D. C. C. A., 266 Fed. 1012; *supra*, § 500.

7 Bennett v. U. S., 227 U. S. 333, 57 L. ed. 531; affirming C. C. A., 194 Fed. 630.

8 Ibid. *Supra*, § 497h.

9 Freed v. U. S., D. C. C. A., 266 Fed. 1012. See *supra*, § 501.

10 Act of June 25, 1910, ch. 395, § 5, 36 St. at L. 826, Comp. St., § 8816.

§ 506h. 1 Edwards v. U. S., C. C. A., 266 Fed. 848.

2 Ibid.

3 Pounds v. U. S., C. C. A., 265 Fed. 242.

4 Fleck v. U. S., C. C. A., 265 Fed. 617. See Morris v. U. S., C. C. A., 229 Fed. 516.

5 Tredwell v. U. S., C. C. A., 265 Fed. 350.

An indictment charging that defendant did willfully, unlawfully, and feloniously commit a robbery need not allege any specific intent.[6] An indictment charging defendant with robbery is supported by evidence that he aided and abetted in such a robbery.[7]

An indictment for entering a railroad car containing an interstate shipment for the purpose of committing larceny is sufficient; when it follows the language of the statute,[8] specifically describes the car, names the owner of the car, avers that the car contained an interstate shipment, naming the States, and the consignor and consignee, and alleges that the breaking was with intent to commit larceny.[9] When a count charging larceny or breaking with an intent to commit larceny in a car containing an interstate shipment in transit from one State to another, "which car was then and there in the possession of" a specified railroad company and sufficiently alleges the place of the crime at the last place named.[10] An averment that the property was stolen from a specified car in the freight yards of a specified railroad, a common carrier, and was part of an interstate shipment sufficiently describes the bailee.[11] A failure to allege the incorporation of the railroad company did not vitiate an indictment.[12] There was no fatal variance between a count charging larceny from a freight car in the yards of a specified railway company and proof that the goods were taken from the railroad's freight house then under the control of the United States Administration.[13]

An error in failing to require the prosecutor to elect whether he would proceed on a count for larceny from an interstate carrier, or on a count for receiving goods stolen from such carrier, was held to be harmless, where the punishment did not exceed that authorized for a single count.[14]

6 Vane v. U. S., C. C. A., 254 Fed. 32.

7 Ibid.

8 Act of February 13, 1913, 37 St. at L. 670, Comp. St., § 8603. This statute is constitutional. Morris v. U. S., C. C. A., 229 Fed. 516, 519.

9 Ibid.

10 Greenburg v. U. S., C. C. A., 253 Fed. 728.

11 Nudelman v. U. S., C. C. A., 264 Fed. 942.

12 Morris v. U. S., C. C. A., 229 Fed. 516.

13 Nudelman v. U. S., C. C. A., 264 Fed. 942.

14 Ibid. See Morris v. U. S., C. C. A., 229 Fed. 516.

§ 506i. Indictments for embezzlement. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or into whose hands it has lawfully come, and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking."[1]

If at the time of obtaining lawful possession, the one to whom property is entrusted has the intention of appropriating it for his own use, and he subsequently makes such appropriation he commits the crime of larceny.[2] If the wrong doer has loaded the property on cars of a railroad company, before his appropriation thereof, to his own use, the possession has then passed to the common carrier and its subsequent conversion is larceny.[3]

Where the charge was conspiracy to defraud the United States by retaining more than the proper share of the proceeds of the sale of goods in the possession of the Government, it is immaterial whether the Government had the right to make the sale.[4] The right of the accused to deduct as a commission, part of the amount converted to his own use, though he had not separated this from the rest is no defense to such a charge.[5] In an indictment for an embezzlement by a postmaster, the pleader need not state by what means a depository of the post office was designated, or a post office inspector made the authorized agent of the department, when general averments of such designation and such authority are therein set forth.[6] An indictment charging that the defendant, "being then and there an assistant clerk or employee" in a certain post office, embezzled a certain sum, the property of the United States, was held to be defective because it did not allege that the money came into his possession by virtue of his employment.[7] Upon the charge

§ 506i. 1 Moore v. U. S., 160 U. S. 268, 40 L. ed. 422; Tredwell v. U. S., C. C. A., 266 Fed. 350, 352.

2 Grin v. Shine, 187 U. S. 181, 196, 23 Sup. Ct. 98, 47 L. ed. 130; Tredwell v. U. S., C. C. A., 266 Fed. 350.

3 Tredwell v. U. S., C. C. A., 266 Fed. 350.

4 U. S. v. U. S. Brokerage & Trading Co., 262 Fed. 459.

5 Ibid.

6 Foster v. U. S., C. C. A., 256 Fed. 207.

7 Moore v. U. S., 160 U. S. 268, 40 L. ed. 422.

of preventing for approval a false and fraudulent claim for expenses during the same month, each item of the claim which is supported by a separate voucher may be made the subject of the separate count.[8] Under such indictment which charges a false and fraudulent claim against the United States for forty-five dollars for expenses incurred, proof that the claim presented was for a larger sum is not a fatal variance when there is further proof that such amount of such claim covered by the voucher, had not been paid by the claimant.[9]

The charge that defendants conspired to violate an order of the Director General requiring railroads to sell certain unclaimed freight at public auction to the highest bidder by delivering certain freight under a corrupt agreement and not at public auction to the highest bidder is insufficient; since, the word "delivery" does not import a final disposition.[10]

It has been held that where securities belonging to different people are embezzled by a single act only one criminal offense is committed.[11] Counts charging the embezzlement of money and of postage stamps may be united.[12]

§ 506j. Indictments for counterfeiting. An indictment charging the defendant with having in his possession and uttering counterfeits resembling the silver coin coined at the mints commonly called a dollar [1] need not aver that such coins were not one of the minor coins of the United States; [2] although the uttering and publishing of counterfeited minor coins is a separate offense subject to less punishment [3] when minor coins of the United States are defined by another statute as the five, three, and one cent pieces.[4] It was held that an indictment charging the defendant with passing a counterfeit coin, to defraud a specified person, was not defective because it further averred that he passed the coin to that person or to another.[5]

8 Fain v. U. S., C. C. A., 265 Fed. 473.

9 Ibid.

10 U. S. v. U. S. Brokerage & Trading Co., 262 Fed. 459.

11 Henry v. U. S., C. C. A., 263 Fed. 459.

12 McNeil v. U. S., C. C. A., 246 Fed. 827.

§ 506j. 1 Penal code, § 163, 35 St. at L. 1119, Comp. St., § 10333.

2 Linningen v. Morgan, C. C. A., 241 Fed. 645.

3 Penal Code, § 164, 35 St. at L. 1119, Comp. St., § 10334.

4 U. S. R. S., § 3515, Comp. St., § 6458.

5 U. S. v. Bejandio, 1 Woods, 294, Fed. Cas. No. 14,561.

§ 506k. Indictments under the tobacco laws. An indictment for the removal of cigars from their place of manufacture without their being packed in boxes, duly stamped and the stamps duly cancelled, containing a description of the numbers of the manufactory, District and State,[1] need not aver that the removal

§ 506k. [1] U. S. R. S., § 3397 (as amended), March 1, 1879, ch. 125, § 16, 20 St. at L. 348, Comp. St., § 6207.

"Whenever any cigars are removed from any manufactory, or place where cigars are made, without being packed in boxes as required by the provisions of this chapter, or without the proper stamp thereon denoting the tax, or without stamping, indenting, burning, or impressing into each box, in a legible and durable manner, the number of the cigars contained therein, the number of the manufactory, and the number of the district and the State, or without properly affixing thereon and canceling the stamp denoting the tax on the same, or are sold, or offered for sale, not properly boxed and stamped, they shall be forfeited to the United States. And every person who commits any of the above-described offenses shall be fined for each such offense not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than two years. And every person who packs cigars in any box bearing a false or fraudulent or counterfeit stamp, or who affixes to any box containing cigars a stamp in the similitude or likeness of any stamp required to be used by the laws of the United States, whether the same be a customs or internal-revenue stamp, or who buys, receives, or has in his possession any cigars on which the tax to which they are liable has not been paid, or who removes, or causes to be removed, from any box any stamp denoting the tax on cigars, with intent to use the same, or who uses, or permits any other person to use, any stamp so removed, or who receives, buys, sells, gives away, or has in his possession any stamp so removed, or who makes any other fraudulent use of any stamp intended for cigars, or who removes from the place of manufacture any cigars not properly boxed and stamped as required by law, shall be deemed guilty of a felony, and shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than three years. Provided, That cigars packed expressly for export, and which shall be exported to a foreign country under the restrictions and regulations prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, shall be exempt from the provisions of this section, and also from the provisions of section thirty-three hundred and ninety-three of the Revised Statutes, requiring a label to be affixed to each box."

U. S. R. S., § 3398, Comp. St., § 6208. "The absence of the proper revenue stamp on any box of cigars sold, or offered for sale, or kept for sale, shall be notice to all persons that the tax has not been paid thereon, and shall be prima facie evidence

or omission was made with intent to defraud the United States.[2] An indictment for the sale of such cigars, by the use of the words "as required by law" after the averment that the cigars were not packed in boxes, stamped and marked as above described, supplies the omission of an allegation that the cigars did not belong to a class excepted from the statutory requirement.[3] An allegation in an indictment that the defendant "did buy, receive and have in his possession" such cigars, does not necessitate the proof of all three of these acts by the defendant.[4] Proof that he had such cigars in his possession is sufficient.[5]

§ 5061. Indictments under the Oleomargarine Laws. A count of an indictment for attempting to defraud the United states on the tax of Oleomargarine[1] is sufficient when it describes the defendants, their place of business, the date and place where they conducted the business of manufacturing oleomargarine in violation of law, and defines with considerable particularity the steps that led up to and were a part of the attempt to defraud.[2]

An indictment to defraud the Revenue Laws of the United States by removing oleomargarine from the factory without payment of the tax may be found in any district where the article in pursuance of the conspiracy was concealed.[3] Where it avers that the act prohibited was conspired to be performed unlawfully and knowingly, there is no need of an allegation that the fraud was to be accomplished by deceit, misrepresentation, or concealment.[4] An allegation that defendants, "being manufacturers of oleomargarine, defrauded and attempted to defraud the United States of the tax on a quantity of oleomargarine, produced and manufactured and removed from the place of

of the non-payment thereof, and such cigars shall be forfeited to the United States."

2 U. S. v. Jacoby, Fed. Cas. 15, 462.

3 U. S. v. Edwards, Fed. Cas. 15,025.

4 U. S. v. Millard, Fed. Cas. 15,769. See U. S. v. Scheimer, Fed. Cas. 16,629.

5 Ibid.

§ 5061. 1 Act of Aug. 2, 1886, ch. 840, § 8, 24 St. at L. 210, as amended by Act of May 9, 1902, ch. 784, § 3, 32 St. at L. 194, Comp. St., § 6220.

2 Marhoefer v. U. S., C. C. A., 241 Fed. 48. For an indictment held sufficient, see Jelke v. U. S., C. C. A., 255 Fed. 264.

3 Tillinghast v. Richards, 233 Fed. 710.

4 Tillinghast v. Richards, 225 Fed. 226.

manufacture for consumption and sale by them," sufficiently alleges the removal and is not limited by a succeeding clause "that is to say, they, the said defendants, then and there as such defendants, so engaged in carrying on the business of manufacturing oleomargarine, did manufacture, produce, and furnish for the use and consumption of others" with a description of the product.[5] It was held that an indictment for conspiracy thus to defraud the Government insufficiently charges an overt act when it alleges that for the purpose of the conspiracy the defendants there bought palm oil, shipped this to the State of manufacture, and paid for it.[6]

A joint verdict upon a joint indictment for joint violations of the law is not supported by evidence which shows only separate offenses.[7]

§ 506m. Indictments under the Pure Food and Drugs Act. The Act of June 30, 1906, which is commonly known as the Pure Food and Drugs Act[1] is constitutional.[2] Congress has the

5 Marhoefer v. U. S., C. C. A., 241 Fed. 48.

6 Tillinghast v. Richards, 225 Fed. 226.

7 Virmi v. U. S., C. C. A., 200 Fed. 726. But see U. S. v. O. R. R., 223 Fed. 220.

§ 506m. 1 Ch. 3915, 34 St. at L. 768, § 1, Comp. St., § 8717. "It shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court."

§ 2, Comp. St., § 8718. "The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is herein prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay

or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: Provided, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act."

§ 3, Comp. St., § 8719. "The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country."

§ 4, Comp. St., § 8720. "The examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated

power to bar from the channels of interstate commerce articles which are injurious to the public health and also such as are branded and labeled so as to deceive the purchasers thereof.[3]

An indictment thereunder is not invalid for failure to aver, a preliminary investigation by an officer of the Department of Agriculture, and a notice to defendants of their violation of the statute, or a failure to give them an opportunity for a hearing before the Department.[4]

A count charging adulteration will not be supported by evidence of misbranding.[5]

A count for misbranding must set forth facts which show that the brand or label is false.[6] An innuendo stating the design and intention of the use of the label or brand does not change its natural meaning.[7] Nor, will an averment, that the defendant intended that a label or brand should be understood by the public to mean differently from its ordinary and accepted interpretation, make its use a violation of the law.[8]

A description in an indictment of defendants as, naming them, doing business in a specified place under the firm name and style of, then naming the firm, "hereinafter called the defendants" does not make the indictment one of the firm.[9] The individual defendants may be separately punished thereunder.[10]

The indictment must show that the offense was committed

by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid."

§ 5, Comp. St., § 8721. "It shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

2 McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. ed. 754; Shawnee Milling Co. v. Temple, 179 Fed. 517.

3 Ibid.

4 Schraubstafter v. U. S., C. C. A., 199 Fed. 568.

5 U. S. v. St. Louis Coffee and Spice Mills, 189 Fed. 191.

6 Nave McCord Mercantile Co. v. U. S., C. C. A., 182 Fed. 46.

7 Ibid.

8 Ibid.

9 Schraubstradter v. U. S., C. C. A., 199 Fed. 568.

10 Ibid.

within the statutory term of limitation,[11] but it need not name the day of the commission.[12]

Upon the trial the court will take judicial notice of the facts of science and chemistry usually known in the community where the court is held;[13] including the fact "that good sound wheat of the best variety, properly and timely harvested, put through the sweat 'in the stack,' well ground and bolted, makes nutritious, wholesome, and white flour."[14]

§ 506n. Indictments for smuggling. An indictment for smuggling must sufficiently describe the smuggled merchandise.[1] The description need not use the name contained in the schedule of the tariff.[2] A description thereof as "four bottles of whisky" is sufficient.[3]

A count charging a conspiracy to smuggle merchandise need not allege the exact manner or means by which such merchandise was to be passed through the custom's lines,[4] nor that defendants intended that the merchandise should not be invoiced.[5] In an indictment for false valuation a count is sufficient which charges: that the defendants caused certain described merchandise, to be passed through the Custom House and did so pass it, and introduce it into the commerce of the United States by means of a statement, invoice and affidavit, which represented the value thereof, to be a specified amount and no more; when in fact the value was a greater amount, which is specified, and that defendants did such act knowing this statement and affidavit to be false.[6]

It was held that an indictment for conspiracy to defraud the United States of duties on imported coal by making and causing to be made false weights of cargoes and importations of coal and of coal discharged into vessels entitled to claim a drawback was held to be sufficiently specific when it averred, as above set forth, and further charged that defendants so manipulated the scales and weights and method of weighing thereon that they

11 U. S. v. Gaag, 237 Fed. 728.
12 Ibid.
13 See *supra*, § 329a.
14 Shawnee Milling Co. v. Temple, 179 Fed. 517, 520.

§ 506n. 1 U. S. v. Powers, 263 Fed. 724.
2 Ibid.
3 Ibid.
4 U. S. v. Shevlin, 212 Fed. 413; *supra*, § 506e.
5 Ibid.
6 U. S. v. Abrams, 230 Fed. 310.

recorded the weights of coal desired by defendants, and not the true weight of the coal, and that they caused all coal weighed on scales upon which the coal handled by their company was weighed to be incorrectly measured and weighed, to the end and for the purpose that they, under the name and guise of such company, should receive the profit and gain from such inaccurate and fraudulent weight.[7]

§ 506o. Indictments for the offense of receiving smuggled opium. An indictment for the offense of concealing and facilitating the transportation and concealment of opium prepared for smoking and imported from a foreign country is sufficient, when it avers: that the defendants at a specified time and place took to a specified place opium prepared for smoking in an automobile, or other conveyance duly described, and then and there secreted and hid such opium with a general statement of the number and size of the receptacles thereof, knowing that such opium prepared for smoking had been so imported into the United States contrary to law.[1] When no conspiracy is charged, there need be no allegation of any overt act.[2] An acquittal under an indictment, for a conspiracy to import opium into the United States for smoking, when it was averred as an overt act, that on a specified date the defendant had in his possession, concealed and fraudulently transported into the United States a specified number of tins of opium prepared for smoking of a size described, is no bar to a subsequent prosecution for the offense of receiving, concealing, buying, selling and facilitating the same opium on the same date after such opium had been imported into the United States contrary to law and that the accused aided and abetted another in the commission of such offense.[3] In the same case, it was held that an instruction was not unfavorable to the defendant when the court charged that the jury should separate any plan or combination of the two men that was charged in the former indictment from the charge in the latter and that unless the conversation between the defendant and the importer or receiver of the opium amounted to

7 Smith v. U. S., C. C. A., 231 Fed. 25.

§ 506o. 1 Proffitt v. U. S., C. C. A., 264 Fed. 299.

2 Ibid.

3 Louie v. U. S., C. C. A., 218 Fed. 36.

more than a general keeping in touch with him, or a general agreement, and unless accused knowingly gave him knowledge of where he could get opium, then the jury should not consider it, and if they had a reasonable doubt they should not consider it as supporting the charge of aiding, because he having been acquitted, was entitled to that reasonable doubt.[4]

§ 506p. Indictments under the Anti-Narcotic Law. The Anti-Narcotic Law of December 17, 1914, sometimes known as the Harrison Drug Act,[1] after exempting certain persons from having in their possession any of the drugs therein classified continues: "It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceedings laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."[2] This provision is constitutional.[3] So is the remainder of the act.[4]

It has been held that it is limited to the exemptions contained in this section and does not apply to the exceptions and exemptions in the other sections;[5] and that an indictment for the dispensation of the drugs should negative them.[6]

The offense of failing to preserve a duplicate of an order for one of the narcotics, in such a way as to be readily accessible, is committed when no such duplicate is so preserved immediately after the acceptance of the order and continues until compliance is made with the statute in this respect.[7]

4 Ibid.

§ 506p. 1 Act of December 17, 1914, Ch. I, 38 St. at L. 789, Comp. St., §§ 6287-6287q.

2 Ibid., § 8, 38 St. at L. 789, Comp. St., § 6287n.

3 U. S. v. Loewenthal, 257 Fed. 444; Fyke v. U. S., C. C. A., 254 Fed. 225.

4 U. S. v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. ed. 1061, Ann. Cas. 1917 D 854; U. S. v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. ed. 493; Webb v. U. S., 249 U. S. 96, 34 Sup. Ct. 217, 63 L. ed. 497; U. S. v. Ah Hung, 243 Fed. 762.

5 U. S. v. Hammers, 241 Fed. 542. See Fyke v. U. S., C. C. A., 254 Fed. 225; Reeves v. U. S., C. C. A., 263 Fed. 690. *Contra*, Wallace v. U. S., C. C. A., 243 Fed. 300, 305, per Alschuler, J.: "The words 'and complaint, . . . indictment, etc., brought under this act' which indicate the intended application of the proviso to the entire act." U. S. v. D'Arcy, 243 Fed. 739; U. S. v. Hoyt, 255 Fed. 927; Oliver v. U. S., C. C. A., 267 Fed. 544; U. S. v. Lowenthal, 257 Fed. 444.

6 Ibid.

7 U. S. v. Gaag, 237 Fed. 728.

An indictment for a conspiracy to violate the statute sufficiently avers knowledge of the illegality of the act of a co-conspirator when it alleges that the accused unlawfully and knowingly aided the former, who was not registered, in the sale of the prohibited drugs.[8]

A count charging that defendant was a registered physician and dispensed a forbidden drug not on a written order upon a form issued by the Commissioner of Internal Revenue, is not duplicitous.[9]

An allegation of the time of the offense as at some unknown date within two years before the indictment was sustained.[10]

An indictment for a conspiracy to violate the statute sufficiently charges the commission of the overt acts within the district when it avers that the defendants there conspired and after describing the each overt act concludes that they "at the times and places aforesaid conspired" to violate the act "and did do the several acts mentioned in collection with their several names to effect the object of said conspiracy."[11]

§ 506q. Indictments for offenses against the prohibition law and other liquor laws. By the Act of October 28, 1919, sometimes known as the Volstead Law: "In any affidavit, information or indictment for the violation of this act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."[1]

An indictment or information charging that defendant sold for beverage purposes a malt product "commonly known as lager beer" and containing as much as one-half of one per centum of

8 Wallace v. U. S., C. C. A., 243 Fed. 300.

9 U. S. v. Hoyt, 255 Fed. 927; *infra*, § 500.

10 U. S. v. Gaag, 237 Fed. 728.

11 Wallace v. U. S., C. C. A., 243 Fed. 300; U. S. v. D'Arcy, 243 Fed. 739.

§ 506q. 1 41 St. at L. 305, ch. —, Title II, § 32. See Ozello v. U. S., C. C. A., 268 Fed. 243.

alcohol is sufficient, although it does not charge in terms that the beverage was intoxicating.[2]

"In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district." [3]

To what extent the Federal Prohibition Law repeals the previous statutes of the United States regulating and taxing the manufacture, sale and transportation of intoxicating liquors has not yet been decided. Since it recognizes the continuance of a number of sections of the Revised Statutes therein enumerated, which relate to offenses against the Internal Revenue Laws,[4] it seems that no repeal of such statutes was effected unless they applied exclusively to the manufacture and sale of intoxicating liquor for beverage.[5]

When the Act of October 28, 1919, penalized the same offense which was made a crime by previous Federal legislation and the penalty last imposed is less than the former, the former penalty was repealed.[6]

Indictments for failing to register a still for unlawfully making a mash fit for the production of spirits and for unlawfully carrying on the business of distilling without giving bond,[7] and for removing intoxicating liquor without a permit [8] were sus-

2 U. S. v. Schmaunder, 258 Fed. 251.

3 Act of Oct. 28, 1919, 41 St. at L. 305, ch. —, Title II, § 31, Comp. St., § 10138½r; *infra*, § 525e.

4 U. S. v. Sohm, 265 Fed. 910.

5 U. S. v. Sohm, 265 Fed. 910. According to the N. Y. Times the case of U. S. v. Yuginovich decided by the Supreme Court, June 1, 1921, holds that the National Prohibition Act repeals the statutes imposing penalties and punishments for the failure of complying with the provisions of the Internal Revenue Laws regulating the manufacture of intoxicating liquors.

6 U. S. v. Sohm, 265 Fed. 910; U. S. v. Windham, 264 Fed. 376.

7 U. S. v. Sohm, 265 Fed. 910; that U. S. R. S., §§ 3258, 3260, 3282, Comp. St., §§ 5594, 5997, 6022, have not been repealed. But see U. S. v. Windham, 264 Fed. 376, 379.

8 U. S. v. Turner, 266 Fed. 248; U. S. R. S., § 3296, Comp. St., § 6038.

tained. So was a libel under the section of the Revised Statutes [9] providing for the confiscation of any vehicle used for the transportation of intoxicating liquors.[10] Another decision holds that the sections of the Revised Statutes imposing penalties for transporting or concealing liquor upon which no revenue tax has been paid [11] have been repealed.[12]

9 U. S. R. S., § 3450, Comp. St., § 6352.

10 U. S. v. One Essex Touring Automobile, 266 Fed. 138.

11 U. S. R. S., §§ 3258, 3279, 3281, 3296.

12 U. S. v. Windham, 264 Fed. 376, 378, 380, per Smith, J.:

"The question, however, arises whether the statute of October 28, 1919, expressly continues in force and refuses to repeal those sections of the Revised Statutes. By section 35 of title 2 of the statute of October 28, 1919, it is provided that all provisions of law inconsistent with that statute are repealed only to the extent of such inconsisteney, and the regulations therein contained for the manufacture or traffic in intoxicating liquors are to be construed as an addition to existing laws, and further that that statute should not relieve any person from any liability, civil or criminal, theretofore or thereafter incurred under existing law.

"In construing this section, it must be assumed that Congress had in mind the existing rules of law, as well as the rules of statutory construction. Under the provisions of the Fifth Amendment to the Constitution of the United States, prohibiting the placing of a party twice in jeopardy, and similar constitutional provisions, it has been held that the constitutional inhibition applies to any attempt to try a man twice and to punish him twice for the same offense. To such extent, therefore, as the last statute of October 28, 1919, would appear to cover and include the same offenses mentioned and described in the previous sections of the Revised Statutes of the United States, and to provide a punishment for them, it would be the imposing of different penalties and different punishments for the same offenses, against the constitutional inhibition.

"The effect of the constitutional inhibition as contained in the Eighteenth Amendment is to prohibit the transportation or manufacture or sale or disposition for beverage purposes of liquors containing alcohol over the prohibited amount, and logically that would appear impliedly to repeal all provisions of law which contemplated such manufacture, sale, disposition, or use for those purposes; and, if so, any requirements to secure the payment of the tax, so as to authorize the party to manufacture, sell, or transport for the prohibited purpose, would appear to be repealed also.

"The question, then, further arises whether the sections of the Revised Statutes and the prohibitions contained in the last statute of October 28, 1919, cover the same offenses, inasmuch as the prohibition of the sections of the Revised Statutes is against doing the things required with an intent to defraud

Under the act of Congress forbidding the transport of liquor

the United States, or with intent to evade the tax, or when the tax has not been paid, while the provisions of the last statute are to prohibit their being done at all.

"It appears to the court that where the deed is precisely the same, although under a different wording, the act would not constitute a separate offense. If a man were charged with a murder, although the murder may have been committed both by rifle and knife, he could not, after having been tried for committing the murder with a rifle, be retried for having committed it with a different weapon, on the ground that it was a separate offense. So, if he were tried for transporting liquor upon which the tax had not been paid, and then attempted to be retried for merely transporting it without permission, it would appear to the court to cover the same act and the same offense.

"On behalf of the government it is claimed that these sections of the Revised Statutes can all still have an application, inasmuch as by title 3 of the statute of October 28, 1919, alcohol is still allowed to be manufactured and transported; therefore these sections about manufacturing and transporting could still apply to any alcoholic spirits manufactured or transported, not in pursuance and compliance with the provisions of title 3 of the statute.

"Title 3 of the statute provides a complete system with regard to the manufacture of what it terms industrial alcohol, and all plants for the manufacturing of industrial alcohol under that title are by section 9 of that title expressly exempted from the provisions of sections 3258 and 3279 of the Revised Statutes, and that title would appear, when carefully read, to institute a system for the manufacture of industrial alcohol independent of and differing from the system formerly existing for the manufacture of alcoholic spirits for beverage purposes.

"Section 3258 requires every person having in his possession a still or distilling apparatus set up to register the same with the collector of the district, which provision is apparently superseded by section 2 of title 3 of the statute of October 28, 1919, which directs application to the Commissioner to be made for registration of an industrial alcohol plant.

"Under section 3281 every person carrying on the business of a rectifier or wholesale liquor dealer, retail liquor dealer, etc. (which includes the dealing in liquor for beverage purposes), without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, etc., is subject to prosecution and punishment for so doing; when, by the new statute, the carrying on of any of this business is absolutely prohibited, no tax is allowed to be paid for permission to carry it on for beverage purposes, and there cannot be any intent to defraud the United States of a tax which is not allowed to be levied as preliminary to a permission to carry it on.

into a prohibition State,[13] it was not indispensable to state the point from which the shipment was made, unless the indictment was found in such district.[14] An incorrect statement of the

"Taking the new statute as a whole, its provisions would appear to cover and provide for the punishment of every act which could be punished under the former provisions of the Revised Statutes with regard to the manufacture and sale of liquors for beverage purposes. To hold that the old law is continued would therefore be to hold that two inconsistent sets of statutory provisions, punishing the same substantial act, and with differing penalties, were of force, and that a person could be prosecuted and punished under section 3 and section 6 of the new statute for transporting any liquor at all, without the required permit, and at the same time prosecuted and punished under the provisions of section 3296 for transporting liquor without having previously paid the tax that he is forbidden by law to pay.

"Giving to the repealing clause of the last statute that construction which it would be assumed the legislative department intended—that is, that it should be construed in harmony with existing rules of law and the existing rules of statutory construction—it appears to the court that the sections referred to have been repealed by the last statute, and the indictment will be accordingly quashed.

"Inasmuch, however, as under the warrant of arrest the act committed would be one for which the party would be liable to indictment or information under the last statute of October 28, 1919, if not under the section of the Revised Statutes referred to, if imprisoned, he will be detained until he can give bond for his release, or, if out on bond, his bond will be continued of full force for his appearance for trial whenever thereto lawfully required."

[13] Appropriation Act of March 3, 1917, reading as follows: "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state." Ch. 162, § 5, 39 St. at L. 1069; Comp. St., § 8739a.

[14] Ciafirdini v. U. S., C. C. A., 266 Fed. 471. After evidence that two packages containing whisky came by mail from Cincinnati to a point in West Virginia to fictitious addresses, but each in care of a post office box, one rented by a brother of defendant, a tailor, and the other by an employee of his, that on the same and the preceding day both the brother and employee sent telegrams to defendant in Cincinnati, inferentially relating to the shipments, and that the packages were addressed by direction of defendant; testimony of a government agent that he found a large quantity of whisky in the brother's shop was relevant and competent. Ibid.

"Labels on packages and bottles

point of shipment was not a fatal defect.[15] Such an indictment[16] and an indictment for a conspiracy to violate the statute[17] was sufficient although it did not negative the exceptions, as to liquor intended for scientific, sacramental, medicinal and mechanical purposes. An indictment for such a conspiracy did not need to allege the place from which the conspirators intended to have the liquor transported; since the purpose might have been to transport it from any place where it could be procured.[18]

A charge that a defendant purchased intoxicating liquor in one State "to be transported into interstate commerce" into another State for beverage purposes was sufficient.[19]

§ 506r. Indictments for perjury and for subornation and for false notarial certificates. By the Revised Statutes: "In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."[1]

of whisky, which defendant and others were loading into an automobile near a wharf, and the identity in marks and other respects with other whisky found in a scow near the wharf, justified a finding that the whisky was transported from without the State into the State of Virginia." Lindsey v. U. S., C. C. A., 264 Fed. 94.

"The possession by defendant and his associates of whisky transported by them from a wharf to a nearby automobile, with nothing to show any intervening possession or control, justified the inference that they had transported it into the state, where other evidence supports a finding that it had been transported into the state by some one."

15 Ciafirdini v. U. S., C. C. A., 266 Fed. 471.

16 Hockett v. U. S., C. C. A., 265 Fed. 588.

17 Hockett v. U. S., C. C. A., 265 Fed. 588.

18 Ibid.

19 U. S. v. Collins, 264 Fed. 380.

§ 506r. 1 U. S. R. S., § 5396, Comp. St., § 1687.

"In every presentment or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, or any affidavit, deposition, or certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed."[2]

"In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court."[3]

When the indictment averred, that the oath was taken "before" a certain District Judge, it was no variance to prove that it was taken in open court when the judge was presiding and administered by the deputy,[4] nor, when it charged that the hearing was a trial and an issue before a commissioner, and it otherwise appeared therein that the proceeding was a preliminary examination.[5] It must allege that the testimony was false.[6] A general averment to that effect must be accompanied by a special averment to falsify the matter wherein the perjury is assigned;[6a] but each false statement need not be denied antithetically.[7]

It must show that the false testimony was material to mat-

2 U. S. R. S., § 5397, Comp. St., § 1688.

3 U. S. R. S., § 1023, Comp. St., § 1689.

4 West v. U. S., C. C. A., 258 Fed. 413.

5 Cohen v. U. S., C. C. A., 214 Fed. 23.

6 Markham v. U. S., 160 U. S. 319, 323, 16 Sup. Ct. 288, 40 L. ed. 441.

6a Baskin v. U. S., C. C. A., 209 Fed. 740, 744.

7 U. S. R. S., § 5396, Baskin v. U. S., C. C. A., 209 Fed. 740, 744, holding that the following special averment was sufficient: "Whereas, in truth and in fact, the grand jurors aforesaid . . . do further present the facts to be, that he, the said Samuel Baskin did see certain goods removed from the said place of business" of the bankrupt at the times and place specified in the inquiry followed by a statement of the number of packages so removed each day and their general contents. Ulmer v. U. S., C. C. A., 219 Fed. 641; U. S. v. Salen, 216 Fed. 420.

ters within the jurisdiction of the court where the testimony was given.[8] It need not show how the testimony was material.[9] A general allegation of materiality is sufficient.[10] It is sufficient to plead the circumstances from which the court may determine the materiality;[11] but if the matters alleged appear to the court not to be material the indictment is insufficient, although it positively asserts their materiality.[12] Where the pleadings in the former case showed jurisdiction, the prosecution does not fail because the testimony subsequently proved that jurisdiction did not exist.[13] Repetition of the same false statement in the course of the same examination, although upon different dates cannot be the subject of separate counts.[14]

Under the Selective Service Act or Selective Draft Act of May 18, 1917,[15] it was held that a count was duplicitous which charged a false certificate by a notary to statements by several physicians concerning the same individual.[16] It was further held that it was a criminal offense for a notary falsely to certify that physicians whose statements were filed in support of a claim for exemption from military service had appeared before him although the physicians' statements were true;[17] but that an indictment charging a false certificate as to unfitness for military service was insufficient to charge the offense of making a false statement as to fitness or liability to such service.[18]

§ 506s. Indictments under the Land Laws. Indictments under the Land Laws are usually for conspiracy,[1] or for perjury,[2] therewith connected. An indictment is sufficient which charges

8 Markham v. U. S., 160 U. S. 319, 323, 16 Sup. Ct. 288, 40 L. ed. 441; U. S. v. Rose, 212 Fed. 518.

9 Markham v. U. S., 160 U. S. 319, 323, 16 Sup. Ct. 288; U. S. v. Rosenstein, 211 Fed. 738; U. S. v. Salen, 216 Fed. 420.

10 Ibid.; U. S. v. Nelson, 199 Fed. 464.

11 Regina v. Harvey, 8 Cox Cr. cases 99; Ammerman v. U. S., C. C. A., 185 Fed. 1; U. S. v. Nelson, 199 Fed. 464; Salen v. U. S., 216 Fed. 420, 422.

12 U. S. v. Rhodes, 212 Fed. 519f.

13 West v. U. S., C. C. A., 258 Fed. 413.

14 Ulmer v. U. S., C. C. A., 219 Fed. 641.

15 Ch. 15, § 6, 40 St. at L. 80, Comp. St., § 2044f.

16 U. S. v. Blakeman, 51 Fed. 306.

17 Ibid.

18 Ibid.

§ 506s. 1 See *supra*, § 506c.

2 See *supra*, § 506r.

a conspiracy to obtain patents to Government land for the benefit of a corporation to be thereafter formed, in excess of the acreage which such corporation could lawfully obtain through direct entry; and as overt acts, the verification of applications for entry by others, the verification by some of defendants of affidavits that there were no minerals in the land, the filing in the Land Office by the conspirators, of the application of the entrymen, the payment by the conspirators of the statutory price of the land, the payment to the entrymen of ten dollars a piece for making the entries, and conveying to th corporation the rights thereby acquired.[3]

[3] U. S. v. Wells, C. C. A., 192 Fed. 870. In Williamson v. U. S., 207 U. S. 425, 448, 449, 28 Sup. Ct. 163, 52 L. ed. 278, held to be sufficient to charge: that an unlawful conspiracy and combination was entered into on a date and at a place named within the district; that the object of the conspiracy was the suborning of a large number of persons to go before a United States Commissioner of the District of Oregon duly named, and in proceedings for the entry and purchase of lands therein under the Timber and Stone Act, make oath before the Commissioner, that the lands "were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement, or contract in any way or manner, with any other person, or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when, in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith, appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Williamson and Van Gesner, then and before then engaged in the business of sheep raising in said country; the matters so to be stated, subscribed, and sworn by the said persons being material matter under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would not believe to be true; and the said Marion R. Biggs, United States Commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to

In this case four of the defendants were removed from their homes in another district to the district where the Land Office was situated, although they had never been there and the entrymen resided in another district,[4] and the grand jury of the district from which they were removed had refused to indict them.[5] An indictment will lie for a conspiracy to jump a claim by the use of force against the rightful owner thereof.[6]

§ 506t. Indictments arising out of bankruptcy and therewith connected. By the bankruptcy law of July 1, 1898: "a. A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

"b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally

administer the said oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered." The court said, "These allegations plainly import, and they are susceptible of no other construction than that the unlawful agreement contemplated a future solicitation of individuals to enter lands, who in so doing would necessarily knowingly state and subscribe under oath material false statements as to their purpose in respect to entering the land, etc., and known to be such by the conspirators. There is no reason to infer that the details of the unlawful conspiracy and agreement are not fully stated in the indictment, and it may, therefore, be assumed that the persons who were to be suborned, and the time and place of such subornation, had not been determined at the time of the conspiracy, except as might be inferred from a purpose to procure the persons to be suborned to come before the United States Commissioner for the District of Oregon named in an indictment."

[4] Ibid.

[5] Ibid.; the author was counsel for the defendants when the charges against them were made before the grand jury which refused to act.

[6] U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. ed. 673.

or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the peittion, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

"c. A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

"d. A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense."[1]

The one year statute of limitations does not apply to a conspiracy to commit a violation of the bankruptcy act.[2] A prosecution for such a conspiracy is not barred for three years.[3] "Conceal shall include secrete, falsify and mutilate."[4] The concealment must be a positive act.[5] Secretly keeping property already in the possession of the bankrupt and withholding it from the trustee, under circumstances indicating an intention to defraud and conceal, may amount to concealment within the meaning of the statute.[6] A continuous concealment after the

§ 506t. [1] Ch. 541, 30 St. at L. 554, § 29, Comp. St., § 9613.

[2] U. S. v. Rabinowitz, 238 U. S. 78, 59 L. ed. 1211.

[3] U. S. R. S., § 1044, amended April 13, 1876, ch. 56, 19 St. at L. 32, Comp. St., § 1708.

[4] Act of July 1, 1898, ch. 541, 30 St. at L. 544, 545, § 1, Comp. St., § 9585.

[5] Gretsch v. U. S., C. C. A., 231 Fed. 57.

[6] Glass v. U. S., C. C. A., 231 Fed. 65. It was there held that evidence that defendant, shortly before the petition was filed against him, removed his books and disposed of a large part of his goods, which were then in the district in which the bankruptcy proceedings were subse-

adjudication of bankruptcy is an offense within the statute when the property was previously physically converted and concealed.[7] Concealment of the property may be accomplished without conversion.[8] The mere omission of property from the schedule is not punishable as a concealment.[9] If intentional, it is punished under the clause of the statute penalizing "a false oath or account."[10]

There can be no indictment for concealment in a district where the property concealed has never been,[11] but an indictment for a conspiracy to conceal such property may be found in such district if an overt act was there committed.[12] The filing there of a petition in voluntary bankruptcy is such an overt act.[13]

A count contains a sufficient charge of concealment from the trustee when it begins with averments substantially following the language of the statute and alleges the bankrupt's acquisition of such property, the appointment of a receiver, that while he was a bankrupt he knowingly, wilfully, and fraudulently concealed such property from the receiver, that a trustee was selected, appointed and qualified, and that, after such selection, appointment, and qualification, the bankrupt continued to conceal knowingly, fraudulently, wilfully, and unlawfully from the trustee, such property belonging to the estate in bankruptcy, and while he was a bankrupt. The unnecessary averment as to the concealment from the receiver does not impair the sufficiency of the indictment.[14]

Such an indictment is sufficient when it alleges that the bankrupt knowingly and fraudulently concealed before or after his discharge as the case may be from his trustee property belonging to his estate in bankruptcy with as full a description of the prop-

quently filed and the prosecution instituted, was properly admitted, not as proof of the completed act of concealment, but in evidence of a plan or scheme from which an inference of subsequent concealment could be drawn.

7 Glass v. U. S., C. C. A., 231 Fed. 65.

8 Gretsch v. U. S., C. C. A., 231 Fed. 57, 59.

9 Ibid.

10 Ibid.

11 Ibid.

12 Gretsch v. U. S., C. C. A., 243 Fed. 897.

13 Ibid.

14 Meyer v. U. S., C. C. A., 220 Fed. 822. The appointment of the trustee is a collateral matter which may be proved by parol. Sharfsin v. U. S., C. C. A., 265 Fed. 916.

erty as the nature of the case will allow.[15] A statement that the property consisted of money and merchandise of the value of a specified amount, said merchandise being women's and children's clothing and ready to wear garments, general clothing, dry goods, and merchandise and being of the general kind and description manufactured and handled at wholesale and retail at his place of business which was specified, a more particular description of said merchandise being to these grand jurors unknown, and a more particular description of the denomination, kind and character of said money being also to these grand jurors at this time unknown contrary to the form, force, and effect of the act of Congress in such case is sufficient.[16]

Such an indictment may be sustained by evidence that on a certain date the defendant had property there of a certain value and that when he became bankrupt, about four months later, the aggregate of all the property and money he turned over to his trustee was much less than he owned on the former date.[17] It is sufficient to charge a concealment by using the word "conceal."[18] The manner in which the concealment was accomplished need not be set forth in the indictment.[19] The indictment need not negative that the property concealed was exempt from execution.[20] An allegation that the concealment took place at a specified city in the district sufficiently alleges the time and place.[21] Where the charge was conspiracy, a demurrer was sustained to an indictment for conspiracy by bankrupts to make and file a false account of their assets and liabilities when the period of the conspiracy laid in the indictment was: "On, to wit, the first day of January, A. D. 1913, and on divers days and times between said first day of January, A. D. 1913, and the twentieth day of September, A. D. 1913," and the only overt act alleged was the filing of a false schedule on September 20.[22] A demurrer was overruled, when the indictment charged such a conspiracy which continued between certain specified dates, within which time

15 U. S. v. Greenbaum, 252 Fed. 259.

16 Ibid.

17 Ibid.

18 U. S. v. Comstoca, 161 Fed. 644; U. S. v. Rhodes, 212 Fed. 513; U. S. v. Greenbaum, 252 Fed. 259.

19 Ibid.

20 U. S. v. Greenbaum, 252 Fed. 259.

21 Ibid.

22 U. S. v. Baker, 243 Fed. 746.

after the first day a petition of involuntary bankruptcy was filed, and that, after adjudication and qualification of the trustee the defendants to effect the object of the conspiracy concealed from the trustee "certain merchandise, property, moneys, rights and credits belonging to the estate in bankruptcy" of the defendants.[23]

An indictment for concealment from the trustee need not allege a demand for the property by the trustee.[24] In an indictment for conspiracy to commit an offense against the United States by concealing property from a trustee in bankruptcy, an averment of the appointment of a trustee is not an essential allegation, since the crime charged might be committed, although no trustee was ever appointed.[25] A demurrer was sustained to such an indictment which alleged that, while the "company" was bankrupt, the defendant (an individual) did conceal from the trustee in bankruptcy the proceeds of a certain sale of the bankrupt's property, etc., but failed to allege any receipt of assets by the defendant after the filing of the petition, or any act or acts by the defendant as an officer or agent or accessory for the bankrupt corporation, were demurrable.[26]

Persons other than a bankrupt commit a crime when they conspire with him to conceal his property.[27] A count was held to contain sufficient averments of a conspiracy to conceal from the trustee of a bankrupt corporation or to continue and accomplish such concealment of the assets of the bankrupt when it charged: that the business of the bankrupt was conducted by the three defendants as its officers, specifying the offices held by each, that they, as individuals, "did business as aforesaid," and planned to sell the corporation's outstanding accounts and conceal the proceeds which were to be paid to the three defendants for the assignment of the accounts of the bankrupt corporation,

23 U. S. v. Baker, 243 Fed. 741, 744: "So general a mode of pleading a description of property is questionable, and ordinarily requires justification by an allegation that a more particular description is to the grand jury unknown."

24 Meyer v. U. S., C. C. A., 220 Fed. 825.

25 Steigman v. U. S., 220 Fed 63.

26 U. S. v. Rosenstein, 211 Fed. 738.

27 Tapack v. U. S., C. C. A., 220 Fed. 445.

with intent to defraud its creditors, and that the defendants conspired in anticipation of the election of a trustee in bankruptcy, to conceal from such trustee, while the corporation should be a bankrupt, the property which should then and there belong to the bankrupt; although it was objected that there was no definite allegation of the insolvency of the corporation at the time of the sale.[28] It was held that an indictment was sufficient when it charged: that defendants knowing that two of them were insolvent and contemplating that these would be adjudicated bankrupts, in order to defraud the creditors of the prospective bankrupts, corruptly, wickedly, and unlawfully conspired to conceal the property of such bankrupts, and to continue to conceal it, after they should be adjudicated bankrupts, from the person to be appointed trustee, and that after the adjudication and appointment of a trustee they removed, secreted, and concealed such property; although the phrase knowingly and fraudulently was omitted.[29] In such a case it is not necessary to allege that the owner of the property was a bankrupt at the time of the conspiracy.[30] That the trustee appointed for a bankrupt failed to give bond, where he continued to act and there was no declaration of a vacancy, was not a defense to a prosecution of bankrupt for fraudulent concealment of property from him.[31]

§ 506u. Indictments for personation of an officer of the United States. An indictment for the personation of an officer or employe of the United States must aver that defendant assumed or pretended to be an officer or employe acting under the authority of the United States, or acting under any authority of any Department of the United States, or acting under the authority of any officer of the Government of the United States; that he was not such an officer or employe, as the case may be;[1] that he took upon himself to act as such; that in such pretended character he either demanded or obtained, either from the

28 U. S. v. Rosenstein, 211 Fed. 738.

29 Tapack v. U. S., C. C. A., 220 Fed. 445. See Friedman v. U. S., C. C. A., 236 Fed. 816; Frankfort v. U. S., C. C. A., 231 Fed. 903.

30 Tapack v. U. S., C. C. A., 220 Fed. 445.

31 Sharfsin v. U. S., C. C. A., 265 Fed. 916.

§ 506u. 1 Criminal code, §§ 32, 33, U. S. R. S., §§ 5435, 5438, April 18, 1884, ch. 26, 23 Stat. 11, March 4, 1909, ch. 321, §§ 32, 33, 35 Stat. 1095, Comp. St., §§ 10196, 10197. "Whoever, with intent to defraud

United States or from any person, either money or paper or other valuable thing.[2] It need not show that the defendant pretended to be any particular officer or employe of the United States,[3] nor that he pretended to hold an office or employment which actually existed.[4] The false personation of a member of Congress, accompanied by a demand in such pretended character is an offense within the statute.[5]

§ 507. Ordinance in Constitution as to juries in criminal prosecutions. The Sixth Amendment to the Federal Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the

either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.

"Whoever shall falsely personate any true and lawful holder of any share or sum in the public stocks or debt of the United States, or any person entitled to any annuity, dividend, pension, prize money, wages, or other debt due from the United States, and, under color of such false personation, shall transfer or endeavor to transfer such public stock or any part thereof, or shall receive or endeavor to receive the money of such true and lawful holder thereof, or the money of any person really entitled to receive such annuity, dividend, pension, prize money, wages, or other debt, shall be fined not more than five thousand dollars and imprisoned not more than ten years."

2 In Lamar v. U. S., 241 U. S. 103, 111, the Supreme Court sustained an indictment that at a stated time the petitioner "unlawfully, knowingly, and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to-wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, the intent, then and there, to defraud Lewis Cass Ledyard, "and other persons who were named and others to the grand jury unknown," and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace," etc.

3 U. S. v. Barnow, 239 U. S. 74; Roberts v. U. S., C. C. A., 248 Fed. 873.

4 U. S. v. Barnow, 239 U. S. 74.

5 Lamar v. U. S., 241 U. S. 103.

State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This does not give him the right to be tried by a jury composed of persons representing every locality in the district, but only by a jury, every member of which is a resident of the territory which comprised the district at the time the offense is charged to have been committed.[1] It has been held that a direction that the grand jury shall be summoned from a certain part of the district, in accordance with the Revised Statutes,[2] is not in conflict with this Amendment.[3] Where a district is divided into several divisions, a grand jury selected from the inhabitants of a single division is not forbidden by the Constitution.[4] An indictment was not quashed because the court excluded, from the grand jury, residents of counties where the acts charged were committed.[5]

When, between the time of the commission of an offense and that of the indictment and trial for the same, the place where it was committed is made a part of a new or different district or division, the court of the district or division where it is situated at the time of the indictment and trial has jurisdiction.[6]

§ 508. Writ of venire facias. "No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before in-

§ 507. 1 U. S. v. Peuschel, 116 Fed. 642. See Post v. U. S., 161 U. S. 583, 40 L. ed. 816.

2 U. S. R. S., § 802.

3 U. S. v. Ayres, 46 Fed. 651.

4 U. S. v. Dixon, 44 Fed. 401.

5 U. S. v. Green, 113 Fed. 683; aff'd C. C. A., 154 Fed. 601; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

6 *Ex parte* Moran, C. C. A., 144 Fed. 594.

dictment found of a person accused of a crime or offense, or the time during which a person so accused must be held under recognizance before indictment found.'' [1]

It has been held that a writ of *venire facias*, or a process in the nature of that writ, is an indispensable prerequisite to the summons of a grand jury; [2] but where an order had been made

§ 508. [1] Jur. Code, § 284, 36 St. at L. 1087, re-enacting in substance U. S. R. S., § 810. See U. S. v. Louisville & N. R. Co., 177 Fed. 780. An order for the Grand Jury need not state for what time it is to serve. U. S. v. Lewis, 192 Fed. 633.

[2] U. S. v. Antz, 16 Fed. 119, 122, 123; citing Act of 1846, 9 St. at L., p. 72, § 3, Rev. St., § 810; U. S. v. Reed, 2 Blatchf. 435, 451, per Nelson, J.; Peter Cook's Case, 13 How. St. Tr. 311, per Treby, L. C. J., Talcot, arguendo; People v. McKay, 18 Johns. 212. ''Although the writ which was to be used by the courts of the United States for summoning the juries was denominated in the statute a *venire facias*, and in its general features was that writ, it was not precisely that. The writ of *venire facias* was the process used to summon in a jury after issue joined, and when a trial was to be had in a particular cause, and was confined to that cause. Hence it was that the challenge to the array was limited to the interest or favor of the officer who summoned. The writ used throughout all the States of the Union for the summoning of petit jurors, though known as the *venire facias* was more precisely the 'general previous precept, by virtue of which the sheriff returned into the courts of jail delivery divers several panels, and returned and delivered in one or more of those panels from time to time as the court needed and called for any.' Since at the common law the writ in the nature of *venire facias* was used for no other purpose than to convene grand and petit juries, it is manifest that the Congress by authorizing its issuance meant to include it as the writ of juries, under the grant to the courts of 'power to issue all writs necessary for the exercise of their respective jurisdictions.' If the Congress had stopped here the question would have been, whether, there being a grant of power to issue all writs necessary for the exercise of their jurisdictions which were agreeable to the usages and principles of law, as well as a jurisdiction which for its exercise rendered grand juries necessary, namely, a jurisdiction in criminal causes, and the ancient and invariable writ according to the usages and principles of law being the *venire*, the courts of the United States must not employ that writ, or a process in the nature of that writ, in the exercise of their criminal jurisdiction. I say if Congress had stopped here, the question would have been how far the acts of Congress had made the usage of the common law the exclusive guide or rule for convening grand juries. But Congress has not yet stopped here. Congress enacted 'That no grand jury shall be summoned to attend any Circuit or District Court unless one of the judges of such Circuit Court, or the judge of said district, in his own discre-

directing the clerk and jury commissioner to draw jurors for the next term, an indictment was not quashed because no such writ had been issued.[3] Under the former statute it was held, that a judge from another district, duly designated to act, might make the necessary order for the selection of a grand jury.[4]

A *venire* is the regular process to summon talesmen for a petit jury.[5] It seems that no order for that purpose is required.[6] When the order was made in another district by a judge assigned to hold court in the district where the panel was summoned a challenge to the array upon this ground was overruled.[7] Such a *venire* may issue after the grand jury has been discharged for talesmen to fill the box on the trial of an indictment which the grand jurors have found.[8] In Alaska when means of transportation are difficult and many are leaving the district for the winter, and only a few of the persons summoned under a regular *venire* attend, the court may in its discretion then issue a special *venire* without compelling the attendance of all the persons summoned under the former writ.[9]

In the Eastern District of Pennsylvania, it has been held that the District Court has power to issue a writ of *venire facias* directing the defendant to answer an indictment.[10]

tion, or upon a notification by the District Attorney that such jury will be needed, orders a *venire* to issue therefor, and either of said courts may in term order a grand jury to be summoned at such time and to serve such time as it may direct, whenever in its judgment it may be proper to do so.' I am aware that the immediate purpose of this last provision was to do away with the invariable presence of a grand jury at every term of a Circuit or District Court, and to leave it discretionary with the judges whether and when such a body should be convened; but I think the fair meaning of the enactment is that Congress either makes it, or recognizes it as already being, a rigid, unyielding requirement of the law that no grand jury shall be summoned unless a *venire facias* has therefore issued, if in the vacation, by order of one of the judges, or, if in term time, by order of the court.'' U. S. v. Antz, 16 Fed. 119, 122.

3 Breese v. U. S., C. C. A., 203 Fed. 824.

4 May v. U. S., 199 Fed. 53.

5 Apgar v. U. S., C. C. A., 255 Fed. 16.

6 Apgar v. U. S., C. C. A., 255 Fed. 16.

7 Ibid.

8 St. Clair v. U. S., 154 U. S. 134, 38 L. ed. 936.

9 Campbell v. U. S., 221 Fed. 186; but see Johnson v. U. S., C. C. A., 247 Fed. 92.

10 U. S. v. Philadelphia & R. Ry. Co., 237 Fed. 292.

"Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the post-office addressed to such person at his usual post-office address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts." [11]

When the prosecution has been instigated by the marshal or is the result of an investigation to the expense of which he has contributed, he is not an indifferent person and a special officer should be appointed to serve the writ.[12] It seems that the *venire facias* may be issued by the deputy clerk in the absence of his principal.[13] A *venire* is not illegal because the names of the jurors are attached thereto, instead of being inserted in the body thereof.[14] The objection to the omission to issue a *venire facias* is waived unless seasonably taken.[15]

§ 509. Qualifications of grand and petit jurors. The Judicial Code provides: "Jurors to serve in the courts of the United States, in each State respectively, shall have the same

[11] Jud. Code, § 279, 36 St. at L. 1087; see *supra*, § 418.

[12] Johnson v. U. S., C. C. A., 247 Fed. 92. It has been held that a *venire* is irregular when addressed to "the marshal of the District of Louisiana," there being no such officer and the title of the executive officer of the court being "the marshal of the Eastern District of Louisiana." Frisbie v. U. S., 157 U. S. 160, 163.

[13] U. S. v. Greene, 113 Fed. 683. 53.

[14] May v. U. S., C. C. A., 199 Fed. 53.

[15] U. S. v. Antz, 16 Fed. 119; Powers v. U. S., 223 U. S. 303, 56 L. ed. 448.

qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."[1] This relieves talesmen from any disability imposed by the Fourteenth Amendment.[2] No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, on account of race, color, or previous condition of servitude.[3]

By the Judicial Code, "No person shall serve as a petit juror in any District Court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge."[4] Since this section deals specifically with the effect of prior service, it excludes the operation of State statutes on the same subject.[5] Prior service as a petit juror in the State courts is no disqualification for similar service in the Federal courts.[6] It is not necessary that any court rules should specify the qualifications. Without any court rule, jurors not having them may be challenged.[7]

A State law relating to the challenges of jurors as to the favor or to the array pertains to their qualifications and exemptions,

§ 509. 1 Jud. Code, § 275, 56 St. at L. 1087, re-enacting U. S. R. S., § 800. It has been said: that the Federal Courts have no discretion concerning the qualifications and exemptions of jurors. The law is that they shall have the like qualifications and shall be entitled to like exemptions that jurors of the higher courts of the State had at the time of the enactment of the statute, or shall hereafter have in such State. U. S. v. Wilson, 6 McLean, 604, Fed. Cas. No. 16,737; U. S. v. Gardner, 5 Chicago Leg. News, 501, Fed. Cas. No. 15,187; U. S. v. Coit, 1 Car. L. Rep. 346, Fed. Cas. No. 14,829. *Contra*, U. S. v. Price, 3 Hall, L. J. 121, Fed. Cas. No. 16,088.

2 *Re* Carnes, 31 Fed. 397.

3 Jud. Code, § 278, 36 St. at L. 1087, re-enacting in part Act of March 1, 1875, ch. 114, § 4, 18 St. at L. 336.

4 U. S. R. S., § 812, Act of June 30, 1879, ch. 52, § 2, 21 St. at L. 43, Act of March 3, 1911, ch. 231, § 286, 36 St. at L. 1166, Comp. St., § 1263.

5 Papernow v. Standard Oil Co. of N. Y., 228 Fed. 399.

6 Ibid.

7 U. S. v. Collins, 1 Woods, 499, Fed. Cas. No. 14,837.

and is in force, and is followed by the Federal courts;[8] but the right to a peremptory challenge, which sets aside a juryman without regard to his qualification or exemption, is not affected by the statute.[9] Those who are exempt from serving on juries, are not disqualified, unless there is some statutory regulation to that effect.[10] It has been said that, where the State laws provide that jurors shall be selected from the book of the receiver of tax returns in each county, the fact that a man's name there appears implies that he is qualified, but does not establish the fact.[11] A grand juror does not become disqualified if after he has been drawn and summoned he loses the property which by the State law was required for his qualification.[12]

It was held not to be a ground of challenge to a grand juror, under the statutes of California, that his name was not on the last preceding assessment roll of the county from which he was summoned.[13] A juror does not lose his qualification by residence in the district where he is regularly employed during the navigable season because he is accustomed to leave it every winter.[14]

In considering objections to grand jurors, the Federal courts are not restricted to such as are specifically designated by the State laws, but they may give effect to any objection which goes to the fitness of the men to serve.[15] The court may, of its own motion, discharge grand jurors, when those substituted are not disqualified;[16] and the court may, of its own motion, enforce other objections to grand jurors than those prescribed by the State statutes.[17] It has been said that the word qualifications, has respect to the juror personally and may relate to his age,

8 U. S. v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; U. S. v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16,429; U. S. v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550.

9 U. S. v. Shackleford, 18 How. 588, 15 L. ed. 495; U. S. v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; U. S. v. Devlin, 6 Blatchf. 71, Fed. Cas. No. 14,953. Other sections of the Revised Statutes regulate peremptory challenges. U. S. R. S., §§ 819, 1031, 1063. See *infra*, § 526.

10 U. S. v. Gardner, 5 Chicago Leg. News, 501, Fed. Cas. No. 15,187.

11 U. S. v. Collins, 1 Woods, 499, Fed. Cas. No. 14,837.

12 U. S. v. Gradwell, 227 Fed. 243.

13 U. S. v. Benson, 31 Fed. 896.

14 Rooney v. Barnette, C. C. A., 200 Fed. 700.

15 U. S. v. Benson, 31 Fed. 896.

16 U. S. v. Jones, 69 Fed. 973.

17 U. S. v. Jones, 69 Fed. 973.

property, citizenship, or anything else belonging to his personal standing;[18] but does not refer to special reasons, which do not exclude the juror from the panel, but only preclude him from acting in the particular case;[19] and that, consequently, the prosecuting witness may serve upon the grand jury, although he was disqualified under the State laws to act in the case, where he is a witness.[20] The fact that a man is a member of a political party, and a strong partisan, does not disqualify him as a grand juror in election cases.[21] It was held that the fact that a grand juror had said, when he heard that strikers were destroying private property, that they ought to be shot, did not disqualify him from taking part in the finding of an indictment against a striker for obstructing mails and commerce;[22] that an officer who had issued a warrant of arrest for the accused, and had expressed his opinion as to his guilt, was not disqualified from serving upon a grand jury, which returned an indictment against him.[23] The employee of a railroad under Government control was not disqualified as an employee of the Government.[24] But a plea in abatement was sustained and an indictment dismissed, when it appeared that one of the grand jurors had served on a jury which had, on a former trial, found the accused guilty of the same offense.[25]

§ 510. Selection of grand and petit jurors. "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good stand-

18 U. S. v. Collins, 1 Woods, 499, Fed. Cas. No. 14,837.

19 U. S. v. Williams, 1 Dillon, 485, Fed. Cas. No. 16,716.

20 U. S. v. Williams, 1 Dillon, 485, 495; Fed. Cas. No. 16,716. *Contra*, U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

21 U. S. v. Eagan, 30 Fed. 608.

22 U. S. v. Clune, 62 Fed. 798.

23 U. S. v. Belvin, 46 Fed. 381.

24 Lee U. Ong v. U. S., C. C. A., 264 Fed. 315.

25 U. S. v. Jones, 31 Fed. 725.

ing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein."[1] More than one jury commissioner may be appointed in a district.[2]

It has been held that an appointment may be made of a man registered as an Independent, who had for many years been a member of the principal party opposed to that of the clerk.[3] Before the recent amendment of the statute it was held that the commissioner might be appointed by a judge of another district, authorized to hold court there.[4]

The duty of selection cannot be delegated nor exercised by any one except the officers named in the statute.[5] But when the name of one of the grand jurors who found an indictment was not put into the box by any competent authority, nor drawn from the box, it was held that the indictment was not vitiated when there was no imputation that the name appeared in the *venire* through bad faith.[6] It has been held that a plea in abatement was insufficient when it merely alleged that an unauthorized person placed certain names in the box, without alleging that any of the grand jurors who were drawn, and acted and returned the indictment, were jurors whose names were placed in the box by the deputy clerk; as it was not sufficient to say that the defendants did not know whether or not any name placed in the box by the deputy clerk was drawn.[7]

In the selection of the names to be placed in the box by the clerk and the jury commissioner each has a right to select his

§ 510. 1 Jud. Code, § 276, 36 St. at L. 1087, as amended, Act of Feb. 3, 1917, ch. 27, Comp. St., § 1253, reenacting in substance Act of June 30, 1879, ch. 52, § 2, 21 St. at L. 43. See U. S. v. Miller, 187 Fed. 369.

2 U. S. v. Rockefeller, 221 Fed. 462.

3 U. S. v. Coplis, 257 Fed. 840.

4 May v. U. S., C. C. A., 199 Fed. 53.

5 Dunn v. U. S., C. C. A., 238 Fed. 508.

6 U. S. v. Ambrose, 3 Fed. 283.

7 U. S. v. Rockefeller, 221 Fed. 462.

names, absolutely independent of the other.[8] Neither has the right to accept suggestions from others as to the names to be placed in the box,[9] although either may properly request information from others as to the character and fitness of persons whose names are under consideration.[10] Where a new jury commissioner is appointed, he and the clerk may use the box in which names were placed by the clerk and his predecessor; and, in the absence of testimony, it will be presumed that the names which he there finds were duly placed therein.[11]

Where jurors were lawfully chosen it was held to be of no moment that their names were placed in the jury box by handfuls, instead of alternately by the clerk and by the commissioner.[12] Where the boxes for the juries of the District and Circuit Courts contained more than three hundred names, and the court directed the jury to be drawn "from the jury boxes," the indictment was not quashed because the grand jury was in fact drawn from one of the boxes, which contained less than three hundred names.[13] Nor on the ground that the jury box was not kept continuously in the clerk's custody, where, in pursuance of the usual practice, a jury for another division of the same district was drawn at the official residence of the judge and then transmitted to the clerk's office in the other division by a reliable express company.[14] It is no objection to a grand jury that, when they were drawn, there were in the jury box the names of only three hundred and three persons, of whom three were ineligible and three dead. It has been held that the legality of the panel is not affected by a direction of the court that additional grand jurors be summoned, after a sufficient number have been impanelled and sworn to constitute a legal grand jury,[15] and that the summons by the marshal of some of the members of a grand jury, by the order of the court, from the body of the district, without drawing their names, will not affect the validity of an indictment where the persons

8 U. S. v. Murphy, 224 Fed. 554.

9 Ibid.

10 Ibid.

11 May v. U. S., C. C. A., 199 Fed. 53.

12 U. S. v. Greene, 113 Fed. 683. Aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

13 Ibid.

14 Ibid.

15 U. S. v. Rondeau, 16 Fed. 109.

thus summoned are duly qualified.[16] An indictment was quashed where the court ordered that thirty-six names be drawn for the formation of a grand jury and that the marshal summon therefrom twenty-three persons whom he should select.[17] No notice of the drawing of the grand jurors need be given to anyone.[18]

16 U. S. v. Nevin, 199 Fed. 831.

17 U. S. v. Lewis, 192 Fed. 633.

18 U. S. v. Lewis, 192 Fed. 633. Under the Revised Statutes, it was held that the Federal courts had a large discretion as to the extent to which they might follow the details of State practice and avail themselves of the services of State officers, and that they might exercise this either by a general standing rule or by a special order. Silsbury v. Foote, 14 How. 218, 14 L. ed. 394, U. S. v. Shackleford, 18 How. 588, 15 L. ed. 495; U. S. v. Richardson, 28 Fed. 61, 69; U. S. v. Gardiner, 5 Chicago Leg. News, 501; U. S. v. Wilson, 6 McLean, 604. Substantial conformity was all that was required. U. S. v. Douglass, 2 Blatchf. 207; U. S. v. Reed, 2 Blatchf. 435; U. S. v. Tallman, 10 Blatchf. 21; U. S. v. Collins, 1 Woods, 499; U. S. v. Woodruff, 4 McLean, 105 Silsby v. Foote, 14 How. 218, 14 L. ed. 394; U. S. v. Shackleford, 18 How. 588, 15 L. ed. 495; U. S. v. Rondeau, 16 Fed. 109; Kie v. U. S., 27 Fed. 351; U. S. v. Richardson, 28 Fed. 61; U. S. v. Benson, 31 Fed. 896; U. S. v. Dow, Taney, 34. It was held that a change in the practice of the State courts in the mode of summoning jurors, although based upon a statute, is not binding upon the Federal courts, until they have adopted it by rule, or otherwise. Alston v. Manning, Chase, 460; that an indictment was not rendered invalid because the notice of the town meeting for drawing the grand jurors was posted only three days, instead of four, as was required by the *venire facias*, issued to the constable, and the State statutes; U. S. v. Richardson, 28 Fed. 61, 69, 74; that the drawing of the jurors within thirty days after each term, and not, as in the State court, on the last day of the term, was an immaterial variance; U. S. v. Collins, 1 Woods, 499; that it was not necessary that the officers who attended to drawing the jurors should be the same, either in rank or in number, nor that the jury boxes should be the same in material or shape, nor that they should be kept in the same shape and manner, nor that the same number of names should be placed in the box as in the State courts. U. S. v. Collins, 1 Woods, 499; U. S. v. Wilson, 6 McLean, 604; that the marshal of the United States was the proper person to attend to the matter. U. S. v. Collins, 1 Woods, 499; that the jurors need not be taken from the lists made by the State authorities; U. S. v. Collins, 1 Woods, 499; but that this might be done; U. S. v. Richardson, 28 Fed. 61, 69; that a State law requiring that jurors be taken from the books of a certain officer, the receiver of tax returns, was not binding upon the Federal courts; U. S. v. Collins, 1 Woods, 499, but that, where the State law in Illinois required that the jurors should be selected by an officer, a rule requiring the clerk to issue a *venire facias* to the marshal, authorizing the latter

"Jurors shall be returned from such parts of the district from time to time as the court shall direct, so as not to incur any unnecessary expense or unduly to burden the citizens of any part of the district with such services."[19] This statute is constitutional.[20] It applies to grand, as well as to petit juries.[21] Where two-thirds of the population of the district resided in a city where the defendant resided and the case involved large questions concerning interstate commerce, the panel of jurors, composed principally of farmers and drawn almost entirely from outside the city, was set aside.[22] It has been held that the court has power to direct the clerk and commissioner to place in the box the names of a specified number of persons residing in the division of the district where the court is held, divided in a certain proportion among the different counties therein without regard to the population of such counties.[23] There is no law or rule requiring an apportionment of the names selected in accordance with the population of the various towns and wards in a county, or in proportion to the persons liable to jury duty residing therein.[24] It is no objection to the legality of a grand jury that it was drawn from a district larger in area, but including the district as constituted at the time the offense was committed.[25]

"When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of

to select the jurors at his convenience, instead of requiring their selection before the issue of the writ, did not conform to the State statute. U. S. v. Woodruff, 4 McLean, 405, Fed. Cas. No. 16,758, construing Illinois act of 1845. But, it was held, that the provisions of the Missouri statute, concerning the manner of drawing grand juries, were directory and need not be followed. U. S. v. Eagan, 30 Fed. 608.

19 Jud. Code, § 277, 36 St. at L. 1087, re-enacting U. S. R. S., § 802.

20 Ruthenberg v. U. S., 245 U. S. 480.

21 Agnew v. U. S., 165 U. S. 36, 44, 41 L. ed. 624, 627; U. S. v. Stowell, 2 Curtis, 153.

22 U. S. v. Standard Oil Co., 170 Fed. 988.

23 Merchants' & Miners' Transp. Co. v. U. S., C. C. A., 199 Fed. 902; affirming U. S. v. Merchants' & Miners' Transp. Co., 187 Fed. 355.

24 U. S. v. Murphy, 224 Fed. 554.

25 McKinney v. U. S., C. C. A., 199 Fed. 25. As to grand juries in Illinois, see § 66, *supra*.

jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section."[26]

"When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states."[27]

"Every grand jury empaneled before any District or Circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."[28]

An indictment against a negro will not be quashed because there was no colored man on the grand jury[29] unless there is proof of a discrimination in the selection of grand jurymen.[30]

On the trial of a colored person, there was no error in refusing to require that at least one colored person be included in the jury, where there was no showing that colored jurors were excluded by the court, or those acting under it.[31]

§ 511. Proceedings of grand jury. The grand jury must consist of not less than sixteen, nor more than twenty-three, persons.[1] "From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have

26 Ibid., § 280, re-enacting U. S. R. S., § 804. See Lovejoy v. U. S., 128 U. S. 171, 32 L. ed. 389.

27 Ibid., § 281, re-enacting U. S. R. S., § 805.

28 Ibid., § 282, re-enacting U. S. R. S., § 808. See U. S. v. London, 176 Fed. 976.

29 Younge v. U. S., C. C. A., 242 Fed. 788.

30 Ibid.; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

31 Younge v. U. S., C. C. A., 242 Fed. 788.

§ 511. 1 Jud. Code, § 282, 36 St. at L. 1087 re-enacting U. S. R. S., § 8. See U. S. v. London, 176 Fed. 976.

power to administer oaths and affirmations to witnesses appearing before the grand jury."[2] "No indictments shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors."[3]

The organization is not vitiated because the jurors are sworn and impanelled the day before that fixed by the court for their appearance.[4] The jurors must be duly sworn, except those who have conscientious scruples against taking an oath, and they must take an affirmation to do their duty.[5] The record must show this fact.[6] The usual oath requires a grand juror diligently to inquire and true presentment make of all such matters and things as are given him in charge; to present no one for envy, hatred or malice; to leave no one unpresented for fear, favor, or affection, reward, or hope of reward; to keep secret the counsel of the United States, his fellows and his own.[7]

An objection upon the ground that the grand jury was illegally constituted, when not merely technical, may be taken at any time before the arraignment.[8]

The indictment should be endorsed "a true bill" by the foreman,[9] and must be publicly presented in open court, the proper

2 Ibid., § 283, re-enacting U. S. R. S., § 809.

3 U. S. R. S., § 1021.

4 U. S. v. Lewis, 192 Fed. 633.

5 Burchett v. U. S., C. C. A., 194 Fed. 821.

6 Burchett v. U. S., C. C. A., 194 Fed. 821. A recital in the indictment that the grand jury was duly selected and sworn is sufficient. Powers v. U. S., 223 U. S. 303, 56 L. ed. 448; Burchett v. U. S., C. C. A., 194 Fed. 821. Where the record showed that all the grand jurors were duly sworn, except one, "who was duly affirmed;" it was held, that the indictment should not be quashed, although it did not affirmatively appear that such grand juror possessed conscientious scruples against taking oath. Bram v. U. S., 168 U. S. 532, 42 L. ed. 568.

7 Atwell v. U. S., C. C. A., 17 L. R. A. (N. S.) 1049, 162 Fed. 97, 99. "It may well be said that the first three obligations of this oath relate to the positive duty required of the grand juror, while the latter relates to and defines the rule of conduct to be followed by him in the discharge of these positive duties. The first three are demanded by direct mandate of the law; the latter only by its policy, and solely in order that the first three may be the more thoroughly and effectively performed. The first three obligations are absolutely required by the law, to be laid by oath upon the conscience of the juror; the latter may be omitted, as in some courts is done, and supplied by instructions given by the court." Ibid.

8 U. S. v. Haskell, 169 Fed. 449.

9 See U. S. v. Breese, 172 Fed. 765.

practice being for the grand jury to be present and answer to their names, whereupon the indictment is delivered by the foreman to the clerk and the fact entered of record;[10] but an indictment is not void because the grand jury do not accompany the foreman to the court-room when they are in session in an adjoining room with the door opening into the same opened so that they can see the actions of their representative.[11] Where an indictment has been regularly returned into open court, it will be presumed that the grand jury and the officials therewith connected discharged their respective duties with reference to the same.[12]

The grand jury can meet and adjourn of its own motion, in the absence of an order of the court, until its discharge and may lawfully proceed in the performance of its duties whether the court is in session or not.[13] The final adjournment of the court for the term for which the jury is impanelled discharges the grand jury.[14] The absence of one or more grand jurors, by reason of a failure to notify them of a meeting at which an indictment was found, was held not to be sufficient to invalidate the indictment, when there were present a sufficient number.[15] It was further held that the improper discharge of a grand juror would not vitiate an indictment if the necessary number remained.[16]

"A court shows no punctilious respect for the Constitution in regulating their conduct. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance, not he who by a verbal pedantry tries *a priori* to formulate its limitations and its extent."[17]

10 Renigar v. U. S., C. C. A., 26 L. R. A. (N. S.) 683, 172 Fed. 646. A paper which purports to be an indictment, endorsed as "a true bill" by the foreman of a Grand Jury and delivered by him alone to the clerk when the court is not in session, was held not to be an indictment and to confer no jurisdiction upon the court to try the accused. Ibid.

11 Breese v. U. S., 226 U. S. 1, 57 L. ed. 97; affirming 172 Fed. 765.

12 Carlisle v. U. S., C. C. A., 194 Fed. 827.

13 Jones v. U. S., C. C. A., 162 Fed. 417.

14 Jones v. U. S., C. C. A., 162 Fed. 417.

15 Ibid.

16 Ibid.

17 *Re* Kittle, 180 Fed. 946, per Learned Hand, J.

A preliminary complaint is not essential to the validity of an indictment [18] or of a subpoena *ad testificandum* or *duces tecum*.[19] A grand jury has inquisitorial powers of the broadest nature.[20] It has the right to make investigations and to find indictments and presentments, of its own motion, as well as to consider the bills laid before it by the District Attorney.[21] It may consider a complaint presented by one of its own members,[22] although it seems proper that he should take no part in its deliberations thereupon;[23] it may consider a complaint which was rejected by a previous grand jury.[24]

The proceedings of the grand jury are secret; but it has been held not to be a contempt of court for a grand juror, after an indictment has been found and he has been discharged, to disclose the testimony upon which he acted.[25]

No one has the right to be present during an investigation by the grand jury;[26] except the witness when under examination,[27] the District Attorney of the United States for the district,[28] one of his duly appointed assistants,[29] his clerk,[30] a stenographer,[31] an interpreter,[32] the Attorney General,[33] an officer of the De-

18 U. S. v. Lewis, 192 Fed. 633; U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301; U. S. v. Thompson, 251 U. S. 407, 413.

19 Norcross v. U. S., C. C. A., 209 Fed. 13.

20 U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301.

21 Frisbie v. U. S., 157 U. S. 160, 163.

22 Elder v. U. S., C. C. A., 243 Fed. 84. See § 493a, *supra*.

23 Ibid.

24 U. S. v. Thompson, 251 U. S. 407, 413.

25 Atwell v. U. S., C. C. A., 17 L. R. A. (N. S.) 1049, 162 Fed. 97; reversing *Re* Atwell, 140 Fed. 368; U. S. v. Perlman, 247 Fed. 138.

26 U. S. v. Farrington, 5 Fed. 343; U. S. v. Kilpatrick, 16 Fed. 765, 774; U. S. v. Edgerton, 80 Fed. 374; U. S. v. Rosenthal, 121 Fed. 862; U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66.

27 U. S. v. Farrington, 5 Fed. 343; U. S. v. Edgerton, 80 Fed. 374.

28 U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; U. S. v. Rosenthal, 121 Fed. 862.

29 U. S. v. Reed, 2 Blatchf. 435, 455, Fed. Cas. No. 16,134; U. S. v. Rockefeller, 221 Fed. 462.

30 U. S. v. Reed, 2 Blatchf. 454, 455, Fed. Cas. No. 16,134; U. S. v. Rockefeller, 221 Fed. 462.

31 State v. Brewster, 70 Vermont, 341; U. S. v. Rockefeller, 221 Fed. 462; U. S. v. Haskel, 169 Fed. 449; Wilson v. U. S., C. C. A., 229 Fed. 344; U. S. v. Rubin, 218 Fed. 245. *Contra*, U. S. v. Philadelphia & R. Ry. Co., 221 Fed. 683; Latham v. U. S., C. C. A., 226 Fed. 420.

32 Case of Norberg, 4 Mass. 81; Opinion of Justices June, 1919, — Mass. —.

33 Act of June 30, 1906, ch. 3935, 34 St. at L. 816, Comp. St., § 534.

partment of Justice,[34] or any attorney specially appointed by the Attorney General under any provision of law when thereunto specifically directed by the Attorney General,[35] even when not a member of the Bar of the Supreme Court of the State or of the United States, if a member of the County Bar;[36] and none of these has a right to be present during the deliberations of the grand jury, after the testimony is closed.[37] But, in the latter case, it was held that the presence of the District Attorney at that time was an irregularity, which, when there was no proof of its injury or prejudice to the defendant, should be disregarded.[38]

By the Act of June 30, 1906, the Attorney General or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which District Attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.[39] This authorizes two or more such attorneys, especially appointed and designated by the Attorney General, to be present together in a grand jury room, although one of them acts as a stenographer.[40] But it does not permit the presence of an expert accountant.[41] Such an appointment may be signed by an Assistant Attorney General who will then be pre-

34 U. S. v. Kilpatrick, 16 Fed. 765, 774.

35 Ibid.

36 U. S. v. Philadelphia & R. Ry. Co., 221 Fed. 683.

37 U. S. v. Terry, 39 Fed. 355.

38 U. S. v. Terry, 39 Fed. 355.

39 Ch. 3935, 34 St. at L. 816, Comp. St., § 534. It has been held, that this statute did not validate an indictment previously found, when a special assistant appointed by the Attorney General was present before the grand jury during the examination of the witnesses. U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66. Before its enactment, it was held that the presence of a special assistant to the Attorney General; U. S. v. Rosenthal, 121 Fed. 862; U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66; or an examiner of the Department of Justice, was improper. U. S. v. Kilpatrick, 16 Fed. 765, 774.

40 U. S. v. Haskell, 169 Fed. 449.

41 U. S. v. Heinze, 177 Fed. 770.

sumed to have acted under the authority of his chief.[42] It is the better practice for the Attorney especially appointed to present to the court certified copies of his appointment and oath of office, and to file these in the clerk's office before acting.[43]

It has been held that the presence, after their examination, of an expert witness,[44] or of an attorney for private prosecutors, who subsequently read documents and minutes of testimony previously taken and made comments thereupon,[45] is ground for setting aside an indictment.

The District Attorney or other representative of the Department of Justice may place the evidence before the grand jury, examine witnesses, summarize the evidence before them and state that he desires an indictment.[46] If he goes beyond this,[47] and even if he remains during the deliberations of the grand jury [48] it has been held that the indictment cannot be quashed unless it appears that his conduct was prejudicial to the accused.

One whose acts are being investigated by the grand jury has no right to appear before them unless requested,[49] nor to present evidence either oral or written.[50]

A subpœna may direct the attendance of witnesses before the grand jury alone or before both the grand jury and the petit jury as well.[51] When it summons witnesses before the grand jury, it should disclose the name of the person against whom the inquiry is instituted or the subject of the investigation.[52] A witness properly subpœnaed cannot refuse to testify before a grand jury upon the ground that there is no cause or specific charge pending.[53] It has been said that the evidence which shall be received before a grand jury is not subject to judicial control,[54] that the proceedings before a grand jury are no

42 May v. U. S, C. C. A., 236 Fed. 495.

43 May v. U. S., C. C. A., 236 Fed. 495.

44 U. S. v. Edgerton, 80 Fed. 374.

45 U. S. v. Farrington, 5 Fed. 343.

46 U. S. v. Rintelen, 235 Fed. 787.

47 Ibid.

48 U. S. v. Terry, 39 Fed. 355.

49 U. S. v. Bolles et al., 209 Fed. 682.

50 Ibid.

51 *Re* Shaw, 172 Fed. 520.

52 Ibid.

53 Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652; Wilson v. U. S., 221 U. S. 361, 55 L. ed. 771; Norcross v. U. S., C. C. A., 209 Fed. 13.

54 *Re* Kittle, 180 Fed. 946.

part of criminal proceedings against the accused within the meaning of the Fifth Amendment to the Federal Constitution,[55] and that an indictment is not invalidated by the fact that the accused was subpœnaed before the grand jury, there sworn against his protest and asked questions concerning the offense charged, to which he refused to answer upon the ground that he might thus incriminate himself; but indictments with no support except hearsay evidence[56] or evidence obtained by an illegal search may be set aside.[57]

"The district courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary."[58] An indictment is void when found at a time when the grand jury is not authorized to hold its sessions.[59] Unless discharged by the court, a grand jury retains its powers until the end of the term, although it does not continue in session, and has been relieved from service.[60] Although, perhaps, the members have then no right to reassemble on their own motion, and to find indictments,[61] it may be recalled by the court, and then reassume all its functions.[62] Objections to irregularities in the summons, the panel and the organization of a grand jury, must be made by a plea in abatement or motion to quash and are waived by a plea of "not guilty," unless the proceedings are absolutely void.[63] It has been held that a grand jury which has not completed its investigation of a particular matter may be authorized to continue in session for the purpose of such investigation during the following term.[64]

§ 511a. Inspection of the minutes of the grand jury. Ordinarily a defendant is not entitled to inspect the minutes of the grand jury.[1] Such a motion will not be granted to see what

55 U. S. v. Price, 163 Fed. 904.

56 U. S. v. Rubin, 218 Fed. 245; *supra*, §§ 515, 517.

57 U. S. v. Silverthorne, 265 Fed. 859; *supra*, §§ 515, 517.

58 Judicial Code, § 285, 36 St. at L. 1166, Comp. St., § 1263.

59 *Ex parte* Harlan, 180 Fed. 119.

60 U. S. v. Philadelphia & R. Ry. Co., 227 Fed. 206.

61 Ibid.

62 Ibid.

63 Burchett v. U. S., C. C. A., 194 Fed. 821. See Harlan v. McGourin, 218 U. S. 442; *infra*, §§ 515, 516.

64 U. S. v. Rockefeller, 221 Fed. 462.

§ 511a. 1 U. S. v. Price, C. C., S. D. N. Y., August, 1908, N. Y. L. J., Sept. 9, 1908; U. S. v. Violon, 173

evidence there was.[2] Such a motion may perhaps be granted when it is shown that the indictment was found without any legal or competent evidence sufficient to support it;[3] or was the result of fraud, or corruption, or intimidation, or, it has been suggested, caprice[4] and was not the expression of the fair judgment of the grand jury upon the facts,[5] or by an invasion of the constitutional rights of the accused such as the use of papers obtained through a search warrant forbidden by the Fourth Amendment.[6] The motion must be supported by affidavits which raise a reasonable presumption that the minutes will prove such misconduct on the part of the grand jury.[7] When the affidavits on behalf of the accused tend to show this they should be answered by the Government; or else the motion may be granted.[8] The fact that incompetent evidence was given before the grand jury will not justify the inspection, unless it appears that there was no competent evidence sufficient to make a *prima facie* case in support of the indictment.[9]

§ 512. Challenges to grand jurors. A party under bail may challenge individuals upon the grand jury for prejudice or lack of qualification.[1] When his objection goes to the whole of the panel, he may challenge the array.[2] The same right is possessed by any individual who has notice that a complaint against him is to be brought before a grand jury.[3] If he does not do so immediately after he has received notice of such investigation, and of any objections to the constitution of the grand jury or of the manner of its selection or of the proceedings before it, it may be held that they are waived by him, and

Fed. 501; McKinney v. U. S., C. C. A., 199 Fed. 25; U. S. v. Rubin, 214 Fed. 507; U. S. v. Perlman, 247 Fed. 158; U. S. v. Silverthorne, 265 Fed. 853.

2 U. S. v. Perlman, 247 Fed. 158.

3 U. S. v. Rubin, 214 Fed. 507; U. S. v. Perlman, 247 Fed. 158; U. S. v. Silverthorne, 265 Fed. 853.

4 U. S. v. Gouled, 253 Fed. 242.

5 Ibid.

6 U. S. v. Silverthorne, 265 Fed. 853.

7 U. S. v. Rubin, 214 Fed. 507; U. S. v. Silverthorne, 265 Fed. 853.

8 U. S. v. Rubin, 214 Fed. 507.

9 U. S. v. Rubin, 214 Fed. 507; U. S. v. Perlman, 247 Fed. 158; U. S. v. Silverthorne, 265 Fed. 853.

§ 512. 1 U. S. v. Richardson, 28 Fed. 61.

2 Agnew v. U. S., 165 U. S. 36, 44, 41 L. ed. 624, 627.

3 Agnew v. U. S., 165 U. S. 36, 44, 41 L. ed. 624, 627.

that it is too late to raise them after an indictment has been found against him.[4]

§ 513. Manner of taking objections to an indictment. Objections to an indictment may be raised: by a motion to quash the same;[1] by a plea in abatement;[2] or by a demurrer.[3] Objections which are purely technical and not based upon a constitutional right, must be raised at the first possible moment.[4] The objection, that the indictment does not charge an offense under the laws of the United States may be raised at any time.[5] An irregularity in the organization of a grand jury, which does not affect their authority to sit, is waived if the accused goes to trial without raising the same.[6]

§ 514. Arraignment. The arraignment is the call of the prisoner to the bar, of the court, to answer the matter charged upon him in the indictment.[1] This usually takes place upon the first day of the term.

The arraignment is an essential part of the proceedings.[2] The interposition of a plea is conclusive evidence that the prisoner has been duly arraigned.[3] It has been held: that if the record shows no arraignment or plea, the judgment must be reversed, although no objection was interposed below,[4] and the record states that a jury was duly empanelled and sworn to try the issue joined and after hearing the evidence rendered a verdict of guilty;[5] or although there is a bill of exceptions which states that the issue joined came on to be tried.[6] These decisions however have been severely criticised and seem now to be overruled.[7] When a second information has been filed for the same offense after the reversal of a conviction upon a previous informa-

4 Agnew v. U. S., 165 U. S. 36, 44, 41 L. ed. 624, 627.

§ 513. 1 § 515, *infra*.

2 § 517, *infra*.

3 § 516, *infra*.

4 Breese v. U. S., 226 U. S. 1, 57 L. ed. —.

5 U. S. v. Barcow, 10 Fed. 874, 20 Blatchf. 349; Morris v. U. S., C. C. A., 168 Fed. 682; Mossew v. U. S., C. C. A., 266 Fed. 18; *infra*, § 531.

6 *Ex parte* Harlan, 180 Fed. 119.

§ 514. 1 Blackstone, IV., 322.

2 Crain v. U. S., 162 U. S. 625, 40 L. ed. 1097; Shelp v. U. S., C. C. A., 81 Fed. 694.

3 Shelp v. U. S., C. C. A., 81 Fed. 694; Shidler v. U. S., C. C. A., 257 Fed. 620, 624.

4 Ibid.

5 Ibid.

6 Shelp v. U. S., C. C. A., 81 Fed. 694.

7 Garland v. State of Washington, 232 U. S. 642, 58 L. ed. 772.

tion to which a plea of not guilty had been filed, the judgment of a State court should not be reversed because of the absence of an arraignment or plea upon the second information when there has been a trial by jury of the truth of the facts therein and no objection to this effect has been made upon the trial.[8]

No second arraignment or plea is required when a new trial is ordered.[9] And when a plea of not guilty is made and withdrawn in order that defendant may demur or move to quash the indictment, by going to trial after such demurrer or motion has been overruled, the defendant is presumed to renew his plea.[10] When there are several counts and a plea to only one of them the defendant can be convicted upon such count alone.[11]

"When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall be tried by a jury."[12] This statute applies to a prosecution by information.[13] It applies to offenses created by statutes subsequently enacted.[14]

It is usual custom to grant the prisoner leave to withdraw his plea of not guilty and to file, within a limited time thereafter, a demurrer or plea in abatement,[15] or sometimes a motion to quash the indictment;[16] but he has no absolute right to obtain such permission.[17] It has been held that this does not enable

8 Ibid.

9 U. S. v. McKnight, 112 Fed. 982.

10 O'Hara v. U. S., C. C. A., 129 Fed. 551.

11 Beck v. U. S., C. C. A., 145 Fed. 625.

12 U. S. R. S., § 1032; *Re* Smith, 13 Fed. 25; Shidler v. U. S., C. C. A., 257 Fed. 620, 624.

13 U. S. v. Borger, 7 Fed. 193 (19 Blatchf. 249).

14 U. S. v. Hare, 2 Wheeler, Crim. Cas. 283, Fed. Cas. No. 15,304; U. S. v. Gibert, 2 Sumner 19, Fed. Cas. No. 15,204.

15 Post v. U. S., 161 U. S. 583, 40 L. ed. 816. See *infra*, § 516.

16 U. S. v. Lewis, 192 Fed. 633. See *infra*, § 515.

17 Holt v. U. S., 218 U. S. 245, 247, 54 L. ed. 1021, 1028; Waller v. U. S., C. C. A., 179 Fed. 810; U. S. v. London, 176 Fed. 976; U. S. v. Lewis, 192 Fed. 633; Billingsley v. U. S., 249 Fed. 331.

a party to present an objection which is purely technical.[18] The better practice is to ask for leave at the time of the arraignment. The trial of a case without the entry of a plea of not guilty is erroneous.[19] After a defendant has filed a plea of not guilty, it is not necessary to ask him how he will be tried, for the plea includes everything essential to put him on trial by jury.[20]

§ 515. Motions to quash an indictment. A motion to quash an indictment is usually addressed to the discretion of the court.[1]

Ordinarily, it must be founded upon a legal objection to the proceedings, which appears upon the record, and must clearly be decided in favor of the defendant.[2] "On motions to quash, the court accepts only such propositions as raise clear points of law. Any involved question should be raised by demurrer or motion in arrest of judgment, where the court must meet the issues and dispose of them, holding them under consideration if necessary for that purpose; but a motion to quash, being addressed to the discretion of the court, and interposing avoidable delays, unless clearly justified, should be decided on the spot, and therefore our practice as to such motions is as stated."[3]

Objections to the qualifications, the summons, or the selection of the grand jurors,[4] or to irregularities in their proceedings and deliberations,[5] or, it has been held, to the illegality of the proof, upon which they have acted,[6] may be raised by

18 Breese v. U. S., 226 U. S. 1, 57 L. ed. —.

19 Palmer v. U. S., Washington, Ty. 5.

20 U. S. v. Tibert, 2 Sumner 19, Fed. Cas. No. 15,304.

§ 515. 1 U. S. v. O'Sullivan, Fed. Cas. No. 15,974; U. S. v. Stowell, 2 Curtis, 153, Fed. Cas. No. 16,409; U. S. v. Grunberg, 131 Fed. 137.

2 U. S. v. Grunberg, 131 Fed. 137.

3 U. S. v. Grunberg, 131 Fed. 137, 138, per Putnam, J.

4 *Re* Nicholls, 5 N. J. L. 539; Rex v. Belanger, 6 Canada Crim. Cas. 295; State v. Lawrence, 12 Oregon 297, 22 Cyc. 419. But see People v. Petrea, 92 N. Y. 128; U. S. v. Tallman, 10 Blatchf. 21 Fed. Cas. No. 16,429. The illegal registry of one of the grand jurors is not a ground for quashing an indictment, although the State law requires that the grand jurors should be registered electors. U. S. v. Ewan, 40 Fed. 451.

5 U S. v. Terry, 39 Fed. 355; Commonwealth v. Bradney, 126 Pa. St. 199, 17 Atl. 600; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. See § 511, *supra*.

6 U. S. v. Farrington, 5 Fed. 343; McGregor v. U. S., 134 Fed. 187. But see U. S. v. Price, C. C., S. D. N. Y. August, 1908, N. Y. L. J. Sept. 9, 1908; *supra*, § 511a. But see *supra*, § 482.

such a motion. Where an improper person was present before the grand jury during their proceedings, the indictment may be quashed upon motion.[7]

Under extraordinary circumstances a motion to quash may be made because there was not competent or legal evidence before the grand jury to warrant an indictment[8] or because the defendant's constitutional rights were infringed in the proceedings,[9] by the use of papers obtained by search warrant of the nature forbidden by the Fourth Amendment or an unlawful seizure,[10] by compelling the accused to testify against himself,[11] or otherwise. In one case an indictment was quashed because of the admission of incompetent evidence before the grand jury although it seems that there was sufficient other evidence before the jurors to justify the indictment.[12] This is in conflict with the weight of authority.[13] The use before the grand jury of papers seized under a valid search warrant is no ground for quashing the indictment.[14] A motion to quash is not the proper remedy to raise the objection that an indictment contains three counts, charging the same offense.[15] This objection should be made by a motion to compel an election.[16] Defendant cannot ordinarily thus object to such irregularities in the selection,[17] or summons,[18] of the grand jury, as have not prejudiced him. The courts have refused to quash indictments, where one or more of the grand jurors were not qualified,[19] but an indictment was

7 U. S. v. Edgerton, 80 Fed. 374; U. S. v. Rosenthal, 121 Fed. 862; U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66. U. S. v. Heinze, 177 Fed. 770. *Cf.* U. S. v. Merchants' & Miners' Transp. Co., 187 Fed. 355; May v. U. S., C. C. A., 236 Fed. 495.

8 Cooper v. U. S., C. C. A., 247 Fed. 45; U. S. v. Perlman, 247 Fed. 158; U. S. v. Silverthorne, 265 Fed. 853.

9 U. S. v. Silverthorne, 265 Fed. 853.

10 Ibid.; *supra*, § 487.

11 *Supra*, § 487.

12 U. S. v. Ruben, 218 Fed. 245.

13 U. S. v. Perlman, 247 Fed. 158; U. S. v. Silverthorne, 265 Fed. 853.

14 Cooper v. U. S., C. C. A., 247 Fed. 45; U. S. v. Gouled, 253 Fed. 242.

15 Wetzel v. U. S., C. C. A., 233 Fed. 984.

16 Ibid. See *supra*, § 503.

17 Agnew v. U. S., 165 U. S. 36, 44, 41 L. ed. 624, 627.

18 U. S. v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550.

19 U. S. v. Benson, 31 Fed. 896, 12 Sawyer, 477; U. S. v. Ewan, 40 Fed. 451.

quashed when the marshal was allowed to select the grand jury from a larger number of names than were drawn.[20]

A motion to quash an indictment unless upon its face it shows no punishable offense [21] should be made at least as early as the opening of the trial [22] and if delayed till then it may still be barred for laches.[23] Objections to the selection or qualification of a grand jury, or the proceedings before it, must be taken at the earliest possible moment.[24] Where there is a disputed question of fact concerning these matters, the proper remedy is usually a plea of abatement,[25] not a motion to quash.[26] It seems that objections, not apparent upon the face of the indictment, will not be considered unless they are specified as the grounds for the motion to quash.[27]

A motion to quash an indictment, except upon the ground that the indictment does not charge facts sufficient to constitute an offense, is addressed to the discretion of the court, and its denial will not be reviewed unless there has been such an abuse of discretion as to cause actual injustice.[28] It cannot be reviewed in the absence of an exception taken to the ruling when made.[29]

20 U. S. v. Lewis, 192 Fed. 633.

21 Cohen v. U. S., C. C. A., 258 Fed. 355.

22 Cooper v. U. S., C. C. A., 247 Fed. 45.

23 Benson v. U. S., C. C. A., 240 Fed. 413; U. S. v. Gouled, 253 Fed. 242.

24 U. S. v. Agnew, 165 U. S. 36, 44, 41 L. ed. 624, 627; Lowden v. U. S., C. C. A., 149 Fed. 673; Matters v. U. S., C. C. A., 244 Fed. 36. See *infra*, § 517. Where the accused was ready to file a motion to quash on the return day after the indictment, but the presiding judge, considering himself disqualified, would not permit the motion to be filed or accepted, nor accept a plea, and it was agreed that the motion might be filed without leave, to be subsequently obtained when another judge should preside; the motion was deemed to have been filed in time when leave was granted when the other judge next presided. U. S. v. Lewis, 192 Fed. 633.

25 *Infra*, § 517.

26 Agnew v. U. S., 165 U. S. 36, 44, 41 L. ed. 624, 627.

27 Kitt v. State, 117 Ala. 213, 23 So. 485; People v. Colby, 54 Cal. 37; People v. Hunter, 54 Cal. 65; State v. Phillips, 119 Iowa, 652, 89 N. W. 1092, 94 N. W. 229, 67 L. R. A. 292; State v. Fitzgerald, 63 Iowa, 268, 19 N. W. 202; State v. Simas, 25 Nev. 432, 62 Pac. 242; Shivers v. Territory, 13 Okla. 466, 74 Pac. 899; Stanley v. U. S., 1 Okla. 336, 33 Pac. 1025, 22 Cyc. 420.

28 Carlisle v. U. S., C. C. A., 194 Fed. 827; Steigman v. U. S., C. C. A., 220 Fed. 63.

29 Carlisle v. U. S., C. C. A., 194 Fed. 827.

A motion to quash because the indictment states no criminal offense may be made at any time [30] even after verdict.[31] When granted, it is equivalent to a decision sustaining a demurrer and may be reviewed by a writ of error taken by the government.[32] A judgment granting a motion to quash, which has the effect of barring further prosecution of the offense charged under the same or any other indictment is equivalent to a judgment sustaining a special plea involved and may be similarly reviewed.[33]

§ 516. Demurrers to indictments. A demurrer to an indictment admits the allegations thereof to be true and sets up the defense that they do not properly charge a punishable offense.[1] It has been said that a demurrer in the regular order precedes arraignment.[2] The court has discretionary power to permit a plea to be withdrawn and a demurrer subsequently filed.[3] A denial of the application will rarely, if ever, be reviewed by writ of error.[4] Such a refusal is no abuse of discretion although the court has previously sustained a demurrer to a similar indictment against another when such former ruling has been reversed.[5]

Oral demurrers were permitted at common law; [6] but it is the safer practice to file a demurrer in writing. Special demurrers are not usually recognized in the Federal courts; [7] but a paper filed as a special demurrer was sustained as an assignment of causes under the general demurrer.[8]

A demurrer may be filed to the whole of an indictment or to any count therein.[9] If filed to one or more counts it may be joined with a plea to the others.[10]

30 Cohn v. U. S., C. C. A., 258 Fed. 355.

31 Ibid.

32 U. S. v. Adams Express Company, 229 U. S. 381.

33 U. S. v. Oppenheimer, 242 U. S. 85; U. S. v. Thompson, 251 U. S. 407.

§ 516. 1 Knoell v. U. S., C. C. A., 233 Fed. 16; see *supra*, § 513.

2 Commonwealth v. Ramsey, 1 Brewster (Pa.) 422; 22 Cyc. 427. *Contra*, Ellis v. Commonwealth, 78 Ky. 130; Stroud v. Commonwealth, 19 S. W. 976, 14 Ky. L. Rep. 179.

3 Post v. U. S., 161 U. S. 583, 40 L. ed. 816; Phillips v. U. S., C. C. A., 205 Fed. 259.

4 Collins v. U. S., C. C. A., 219 Fed. 670; Andrews v. U. S., C. C. A., 224 Fed. 418; see *supra*, § 514.

5 Collins v. U. S., C. C. A., 219 Fed. 670.

6 Swan's case, Foster, Cr., 104.

7 U. S. v. French; 57 Fed. 382.

8 U. S. v. French, 57 Fed. 382; U. S. v. Patterson, 59 Fed. 280, 281.

9 Prettyman v. U. S., 180 Fed. 30.

10 Ibid.

Objections to the form of the indictment, or to part thereof, must be specifically stated in the demurrer. Such is the objection of duplicity.[11]

An objection to an indictment charging a conspiracy, because it does not properly charge overt acts to effect the objects of the same, does not challenge its sufficiency so far as it alleges the conspiracy.[12] It seems that surplus allegations in an indictment cannot be attacked by a demurrer.[13] Immateriality of testimony alleged to have been false cannot be raised by demurrer to an indictment for perjury unless such immateriality is clearly apparent.[14] Upon a demurrer to an indictment for mailing an obscene book, although the book is stipulated into the record as part of the indictment, the court cannot decide that the act was not criminal unless the book is so clearly free from obnoxious matter that the jury could not be permitted to hold it to be obscene.[15] No objections which do not appear upon the face of the indictment can be raised by demurrer.[16]

When the statute of limitations contains exceptions, advantage thereof cannot be taken by demurrer, unless the indictment shows on its face that the case does not fall within any of the exceptions.[17] Where, however, it appeared on the face of the indictment that the statute of limitations barred the prosecution, it was held that the objection might be raised by a general demurrer.[18] Where an indictment charged "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown," and showed on its face that the name John Doe was fictitious, and that the grand jurors could not identify the person whom they were indicting, a demurrer was sustained.[19]

"In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or

11 U. S. v. Patterson, 59 Fed. 280. See *supra*, § 500.

12 Hedderly v. U. S., C. C. A., 193 Fed. 561.

13 U. S. v. Patterson, 59 Fed. 280.

14 U. S. v. Rosenstein, 211 Fed. 738.

15 U. S. v. Kennerley, 209 Fed. 119, disapproving Regina v. Hicklin, L. R., 3 Q. B. 36.

16 U. S. v. Peuschel, 116 Fed. 642.

17 U. S. v. Cook, 17 Wall. 168, 21 L. ed. 538.

18 U. S. v. Watkins, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; U. S. v. White, 5 Cranch, C. C. 368, Fed. Cas. 16,678.

19 U. S. v. Doe, 127 Fed. 982.

counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster;* and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require." [20]

An error in overruling a demurrer to the Government's evidence is waived, when the defendant subsequently offers evidence in his own behalf.[21]

§ 517. Pleas in abatement. A plea in abatement is the proper remedy for objections to the indictment, which do not appear upon the face thereof.[1] A defect which appears on the face of the indictment cannot be raised by a plea in abatement.[2] Certain objections, which may be raised by a plea in abatement, can also be interposed by a motion to quash the indictment.[3] Where there is a disputed question of fact in such cases, the proper remedy is a plea in abatement.[4]

It seems that a misnomer of the defendant in an indictment is the subject of a plea in abatement,[5] and that it can only be raised in that manner.[6] Such a plea must state the true name of the accused, and also that he was not commonly known and called by the name under which he was indicted.[7]

[20] U. S. R. S., § 1026. See Summers v. U. S., 251 U. S. 92, 99.

[21] Collins v. U. S., 219 Fed. 670.

§ 517. [1] Agnew v. U. S., 165 U. S. 36, 44, 17 Sup. Ct. 235, 41 L. ed. 624; *supra,* §516.

[2] U. S. v. J. L. Hopkins & Co., 199 Fed. 649.

[3] Agnew v. U. S., 165 U. S. 36, 44, 17 Sup. Ct. 235, 41 L. ed. 624; *supra,* § 515.

[4] U. S. v. Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857; Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624.

[5] Rex v. Shakespeare, 10 East, 83, 2 Hale, P. C. 237; Washington v. State, 68 Ala. 85; Daniels v. State, 60 Ala. 56; Lawrence v. State, 59 Ala. 61; Miller v. State, 54 Ala. 155; Gabe v. State, 6 Ark. 519; Davids v. People, 192 Ill. 176, 61 N. E. 537; Gardner v. State, 4 Ind. 632; State v. Knowlton, 70 Me. 200; Commonwealth v. Fredericks, 119 Mass. 199; Commonwealth v. Dedham, 16 Mass. 141; State v. Narcarm, 69 N. H. 237, 45 Atl. 744; Commonwealth v. Demain, Brightly, 441, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29; State v. Lorey (South Carolina), 2 Brev. 395; State v. Brunell, 29 Wis. 435; 12 Cyc. 359.

[6] *Ex parte* Corrigan, 2 Can. Cr. Cas. 591; Dutton v. State, 92 Ga. 14, 18 S. E. 545; Davids v. People, 192 Ill. 176, 61 N. E. 537; State v. Winstrand, 37 Iowa, 110; State v. Burns, 8 Nev. 251; People v. Smith (New York), 1 Park. Cr. 329; State v. Farr (South Carolina), 12 Rich. 24; State v. Montague (South Carolina), 2 McCord, 257; 12 Cyc 359, 360.

[7] U. S. v. Janes, 74 Fed. 543; Ruffin v. State, 124 Ala. 91, 27 So.

An objection to the organization of a grand jury, the incompetency or disqualification of its members, and any irregularity in summoning them [8] or of misconduct on the part of the prosecutor in the grand jury room [9] may be raised by a plea in abatement. In case the irregularities have not prejudiced the defendant the plea will be overruled.[10] Such a plea must point out specifically the particular objection or defect, on which the defendant relies,[11] and must negative every conclusion in favor of the legality of the drawing and impaneling,[12] and must show that the accused was thereby injured.[13] A claim of immunity,

307; Bright v. State, 76 Ala. 96; Wren v. State, 70 Ala. 1; Waldron v. State, 41 Fla. 265, 26 So. 701; Henderson v. State, 95 Ga. 326, 22 S. E. 537; Washington v. State, 113 Ga. 698, 39 S. E. 294; Amann v. People, 76 Ill. 188; State v. Cooper, 96 Ind. 331; Commonwealth v. Demain, Brightly, 441, 3 Pa. L. J. 487, 6 Pa. L. J. 29; State v. Hughes (Tennessee), 1 Swan, 261, 12 Cyc. 360.

8 Agnew v. U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; U. S. v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294; U. S. v. Greene, 113 Fed. 683.

9 U. S. v. Gradwell, 227 Fed. 243.

10 Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624.

11 U. S. v. Greene, 113 Fed. 683; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 25 L. ed. 357. It was held to be insufficient to aver that instructions by those in charge, without naming them, were given to the officer serving the summons for the grand jury, to keep secret the names of the persons drawn and to enjoin upon those summoned the necessity of keeping their summons secret, when no such instructions were issued by the court. Ibid. An allegation that a grand jury was not publicly drawn was disregarded, when the court had knowledge of the fact that it was drawn in the presence of all the officers, who were required by law to be present. Ibid.

12 U. S. v. Rockefeller, 221 Fed. 462; U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301; Apgar v. U. S., C. C. A., 255 Fed. 46; State v. Brooks, 9 Ala. 9; Shiver v. State, 41 Fla. 630, 27 So. 36; Tervin v. State, 37 Fla. 396, 20 So. 551; Timberlake v. State, 100 Ga. 66, 27 S. E. 158; State v. Newer (Indiana), 7 Blatchf. 307; State v. Ward, 64 Me. 545; People v. Lauder, 82 Mich. 109, 46 N. W. 956; State v. Mead, 15 R. I. 416, 6 Atl. 867; State v. Duggan, 15 R. I. 412, 6 Atl. 597; State v. Rife, 18 R. I. 596, 30 Atl. 467; Sayle v. State, 8 Tex. 120; Commonwealth v. Thompson (Virginia), 4 Leigh, 667, 26 Am. Dec. 339; State v. Carter, 49 W. Va. 709, 39 S. E. 611; 12 Cyc. 359.

13 Agnew v. U. S., 165 U. S. 36, 45, 17 S. Ct. 235, 41 L. ed. 624; U. S. v. Merchants' & Miners' Transp. Co., 187 Fed. 355; U. S. v. Nevin, 199 Fed. 831; U. S. v. Gradwell, 227 Fed. 243. It is insufficient to allege that the irregularities, of which complaint is made, "tended to his injury or prejudice," without assigning any ground for such con-

because of testimony upon the subject by the defendant before a grand jury, may be raised by a plea in abatement.[14]

The objection that the defendant's constitutional rights were infringed in the proceedings before the grand jury by the use of his papers seized under a search warrant such as is forbidden by the Constitution,[15] and perhaps the objection that there was no competent evidence then received in the support of the indictment, may be raised by a plea in abatement;[16] but, as a general rule, the competency or relevancy[17] of the evidence upon which an indictment was found will not be examined by the court, either upon a plea in abatement or otherwise;[18] except, perhaps, where the State statute permits such a practice.[19] A grand jury is presumed to have acted on legal evidence in returning the indictment, until the accused shows the contrary.[20] It is no ground for a plea in abatement that the grand jury secrets have been disclosed.[21] By leave of the court two or more pleas in abatement may be filed.[22]

Pleas in abatement are not favored by the courts,[23] and the

clusion, when prejudice does not appear from the record or is not a necessary inference from what occurred. Agnew v. U. S., 165 U. S. 36, 45, 17 S. Ct. 235, 41 L. ed. 624; U. S. v. Greene, 113 Fed. 683, 694; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

14 U. S. v. Swift, 186 Fed. 1002.

15 See U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301; U. S. v. Silverthorne, 265 Fed. 853; *supra*, § 515.

16 See U. S. v. Perlman, 247 Fed. 158; Cooper v. U. S., C. C. A., 247 Fed. 45; U. S. v. Silverthorne, 265 Fed. 853; *supra*, § 515. The absence of other competent evidence besides that objected to should be averred in the plea. U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301.

17 McKinney v. U. S., C. C. A., 199 Fed. 25; U. S. v. Rintelen, 235 Fed. 787.

18 U. S. v. Rosenberg, 7 Wall. 580, 19 L. ed. 263; Holt v. U. S., 218 U. S. 245, 247, 54 L. ed. 1021, 1028; Hillman v. U. S., C. C. A., 192 Fed. 264; McKinney v. U. S., 199 Fed. 25; U. S. v. Nevin, 199 Fed. 831. But see U. S. v. Rubin, 218 Fed. 245; *supra*, § 515.

19 U. S. v. Swift, 186 Fed. 1002, 1018.

20 *Ex parte* Harlan, 180 Fed. 119.

21 Atwell v. U. S., C. C. A., 17 L. R. A. (N. S.) 1049, 162 Fed. 97; U. S. v. Am. Tobacco Co., 177 Fed. 774.

22 U. S. v. Richardson, 28 Fed. 61.

23 U. S. v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294; U. S. v. Williams, 1 Dillon, 485, Fed. Cas. No. 16,716; U. S. v. Greene, 113 Fed. 683, 689; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357; U. S. v. Rockefeller, 221 Fed. 462;

allegations therein must be pleaded with strict exactness.[24] Such a plea was held to be bad for uncertainty in the use of the words "within the year then next preceding"; it being material whether the calendar year of the 12 months next preceding was meant.[25] An equivocal expression used in the plea in abatement to an indictment is to be taken against the pleader.[26] The plea should negative all matters which could make the act complained of legal.[27]

A plea was held to be sufficient, which averred that the evidence presented to the grand jury was procured from sources, clues and leads contained in books and papers of defendants which had been unlawfully seized, and that the indictment was procured by information obtained from such books, papers and documents, accompanied by a description of the seizure; and an averment that specified Government employees and attorneys for persons interested in the prosecution, worked over such books and papers before the indictment, since it was said to be manifestly impossible for the defendants to be more specific or definite as to the nature of the clues and leads.[28] A plea averring an unlawful seizure of books in pursuance of a conspiracy between the United States attorney and others, to destroy the business of one of the defendants, and to oppress the others, and to oppress and

U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301.

24 Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624; U. S. v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294; U. S. v. Williams, 1 Dillon, 485, Fed. Cas. No. 16,716; U. S. v. Greene, 113 Fed. 683, 689; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 596, 52 L. ed. 357.

25 U. S. v. Gradwell, 227 Fed. 243; U. S. v. Rintelen, 235 Fed. 787.

26 U. S. v. Scott, 232 Fed. 192.

27 U. S. v. Ambrose, 3 Fed. 283; U. S. v. Rockefeller, 221 Fed. 461; U. S. v. Rintelen, 235 Fed. 787; *supra*, § 510. In U. S. v. Silverthorne, 265 Fed. 859, 864, held: that a plea in abatement is insufficient which alleged the presence of a stenographer when testimony was taken before the grand jury without averring that such stenographer had not been appointed an attorney to conduct the proceedings as authorized by the Act of June 30, 1906, ch. 3935, 34 St. at L. 816, Comp. St., § 534.

28 U. S. v. Silverthorne, 265 Fed. 859, 862. The plea that the private books and papers of the accused were wrongfully produced before the Grand Jury is insufficient when it fails to show that no other evidence was offered upon which the indictment was found. Hillman v. U. S., C. C. A., 192 Fed. 264.

retain the former's books and papers, was overruled since it did not appear that the grand jury knew of such conspiracy, nor was in any way prejudiced thereby.[29]

A plea in abatement should be pleaded on or before the arraignment and before pleading not guilty or filing any special pleas in bar.[30] An unexcused delay of five days after the return of an indictment was held to be a waiver of such a plea.[31] Absence from the district is no excuse for the delay, when the defendants resisted attempts of the government to bring them there.[32] The pendency of a demurrer is no excuse for the delay when the defendant has failed to urge the same for a speedy hearing.[33] The court may of its own motion dismiss the plea for laches.[34] The right to plead in abatement is waived by filing a plea in bar,[35] or by pleading not guilty and going to trial.[36] It seems that the court may, in its discretion, allow a plea of not guilty to be withdrawn and a plea in abatement to be filed.[37] When the plea in abatement is founded upon objections to the selection or qualification of a grand jury or the proceedings before it, the plea must be filed at the earliest possible moment.[38]

29 U. S. v. Silverthorne, 265 Fed. 855.

30 U. S. v. Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857; Agnew v. U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624.

31 Agnew v. U. S., 165 U. S. 36, 45, 17 S. Ct. 235, 41 L. ed. 624. So was a delay of nineteen days after the filing of the indictment and seventeen days after the return of the defendants to the State. Lowdon v. U. S., C. C. A., 149 Fed. 673; U. S. v. Am. Tobacco Co., 177 Fed. 774. A delay of two months after the indictment was also held to be too late. U. S. v. Greene, 113 Fed. 683, 697; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 956, 52 L. ed. 357. A delay of one hundred and eight days. U. S. v. Perlman, 247 Fed. 158. A delay of nine months. Moffatt v. U. S., C. C. A., 232 Fed. 522; Younge v. U. S., C. C. A., 242 Fed. 788.

32 U. S. v. Greene, 113 Fed. 683, 697; aff'd, Greene v. U. S., C. C. A., 154 Fed. 401, *certiorari* denied, 207 U. S. 956, 52 L. ed. 357.

33 Hyde v. U. S., 225 U. S. 347, 373, 56 L. ed. 1114, 1128.

34 Ibid.

35 U. S. v. Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

36 Eperson v. State, 5 Lea (Tenn.) 291; State v. Deason, 6 Baxt. (Tenn.) 511; Thompson v. State (Tex. Cr. App. 1901), 62 S. W. 919; 12 Cyc. 357.

37 Post v. U. S., 161 U. S. 583, 40 L. ed. 816.

38 Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624. "The defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before

If the defendant has had the right to raise the objection by challenging the array of the grand jury, after he had notice that a complaint against him was under consideration, it might be held that he could not raise the objection by a plea in abatement.[39] One Federal case holds that a plea in abatement alleging a disqualification of a grand juror need not be verified;[40] but, according to the preponderance of authority, every plea in abatement should be verified.[41] Averments upon information and belief may be disregarded if the sources of the information or the grounds of belief are not set forth.[42] The proper manner of objecting to a plea in abatement is by a demurrer.[43] Upon such a demurrer, judgment is rendered against the party who committed the first fault in pleading.[44] The objection that the defense raised by the plea in abatement has been presented to another judge upon a challenge to the array before the indictment is not raised by a demurrer to the plea.[45] The issues of fact upon a plea in abatement should be raised by replication.[46]

the grand jury, he should proceed at once to take exception to its competency; for, if he lies by until a bill is found, exception may be too late. But, where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by a motion to quash or by a plea in abatement; the latter in all cases of contested fact being the proper remedy.'' Ibid. Waller v. U. S., C. C. A., 179 Fed. 810.

39 Agnew v. U. S., 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. ed. 624.

40 U. S. v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294. See State v. Welch, 33 Mo. 33.

41 Rex v. Grainger, 3 Burrows, 1,617; State v. Allen, 91 Me. 258, 39 Atl. 994; Findley v. People, 1 Mich. 234; Commonwealth v. Sayers, 8 Leigh (Va.) 722; 12 Cyc. 356.

42 U. S. v. Bopp, 232 Fed. 177.

43 Rex v. Cooke, 2 B. & C. 618, 4 D. & R. 618, 9 E. C. L. 271; Rex v. Clark, 1 D. & R. 43, 14 E. C. L. 17; Agnew v. U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; Lowdon v. U. S., C. C. A., 149 Fed. 673; McLeroy v. State, 120 Ala. 274, 25 So. 247; State v. Barrett, 54 Ind. 434; Commonwealth v. Lannon (Massachusetts), 13 Allen, 563; State v. Emery, 59 Vt. 84, 7 Atl. 129; Commonwealth v. Jackson, 2 Va. Cas. 501; Newman v. State, 14 Wis. 393; 12 Cyc. 360.

44 U. S. v. Lawrence, 13 Blatchf. 295, Fed. Cas. No. 15,573; People v. Krummer, 4 Parker's Cr. Cas. (N. Y.) 217.

45 U. S. v. Philadelphia & R. Ry. Co., 225 Fed. 301.

46 State v. Malia, 79 Me. 540, 11 Atl. 602; Commonwealth v. Dockham, Thach. Cr. Cas. (Mass.) 238; Lewis v. State, 1 Head (Tenn.) 329; Baker v. State, 80 Wis. 416, 50 N. W. 518; Martin v. State, 79 Wis. 165, 48 N. W. 119; 12 Cyc. 360.

If the defendant demurs to such a replication, the court may grant judgment against him, if his plea in abatement was originally demurrable.[47] Otherwise, it has been held that any defects in the plea are waived by the replication.[48]

§ 518. Plea of Nolo Contendere. A plea of *nolo contendere* is one by which a defendant forgoes his right to make a defense without acknowledging his guilt.[1]

It has been said not to be a plea in the strict sense of that term as used in the criminal law,[2] but to be in effect a plea of guilty to every essential element of the offense pleaded and warrants the accused's conviction thereof without evidence, although the conviction cannot be used against him in any other case.[3] This plea can be accepted only by permission of the court.[4] It has been said to be in some respects in the nature of a compromise between the government and the accused.[5]

It has been said that it applies only to offenses punishable by a fine alone.[6]

Notwithstanding such a plea, the defendant may have the question whether the indictment charges an offense determined upon a writ of error.[7]

Such pleas have been accepted in the Seventh[8] and the Eighth Circuit.[9] In the Second Circuit, it was never the custom to accept them before the year 1911. In the Circuit Court

47 Reeves v. State, 29 Fla. 527, 10 So. 901; Commonwealth v. Hazlett, 16 Pa. Superior Ct. 534; State v. Wills, 11 Humphries (Tenn.) 222; 12 Cyc. 360.

48 State v. Ligon, 7 Porter (Ala.) 167; 12 Cyc. 360.

§ 518. 1 Tucker v. U. S., C. C. A., 196 Fed. 260. See note 41 L. R. A. (N. S.) 70.

2 Ibid.

3 U. S. v. Lair, C. C. A., 195 Fed. 47, 52. See U. S. v. Hartwell, 3 Cliff, 221, 26 Fed. Cas. No. 15,318.

4 Tucker v. U. S., C. C. A., 196 Fed. 260.

5 Hocking Valley Ry. Co. v. U. S., C. C. A., 210 Fed. 735.

6 Tucker v. U. S., C. C. A., 196 Fed. 260, 266, where the court below, after a plea of *nolo contendere* was filed, took evidence and sentenced the defendant to fine and imprisonment; whereupon the judgment was reversed and the cause remanded, with directions to accept or refuse acceptance of the plea and proceed thereupon in conformity with law. A most extraordinary decision. *Contra*, U. S. v. Lair, C. C. A., 195 Fed. 47.

7 Hocking Valley Ry. Co. v. U. S., C. C. A., 210 Fed. 735.

8 Tucker v. U. S., C. C. A., 196 Fed. 260.

9 U. S. v. Lair, C. C. A., 195 Fed. 47.

for the Southern District of New York, in the Steel Wire Pool Cases, a judge from another circuit, who had been assigned to try the cases, and who, for his judicial misconduct was afterwards impeached, accepted the plea against the protest of the District Attorney. A judge of the District Court for that district, shortly thereafter, said that he felt bound to follow this ruling by accepting the plea from another defendant indicted for acts connected with the same transactions, but that this action should not be regarded as a precedent.[10]

§ 519. Plea of Pardon. By the Constitution the President "shall have Power to grant Reprives and Pardons for Offenses against the United States, except in Cases of Impeachment."[1] By the Criminal Code, "Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President

10 N. Y. Sun, Sept. 21, 1911. Hough, J.: "During my time there have been quite a number of applications made for the plea of *non vult* in this district. So far as I know after inquiry of the comparatively few persons who have been acquainted with these courts longer than I have, it is not within the memory of living man that the plea of *non vult* has been accepted in New York. The reason for that is, I think, quite obvious on an examination of two or three of our State statutes. It is now many years since pleading on the criminal side has been regulated by statute in New York, and therefore the common law plea of *non vult* has not been accepted in the State court. It is of such common occurrence that on the substantive matter contained in any indictment a charge might be brought in the Federal court or in the State courts that it would be most unjust to have a kind of plea acceptable in the Federal court which was unlawful in the State court, especially when that particular style of plea is always and has always been from time immemorial within the discretion of the trial court.

Therefore I wish it to be understood, so far as I am concerned, that the acceptance of the plea of *non vult* in this case is based upon its acceptance by the Judge who first heard it, for there is no reason here that I can see to change what has been done in this particular cause, but this action is not to be regarded as a precedent in my administration of the criminal law." Upon the acceptance of the plea in each case the former judge imposed upon the defendants, fines, which District Attorney Wire considered inadequate to the crimes. The proceedings are fully described in Shield's Federal Courts and Practice, 522-525.

§ 519. 1 Art. II, Section 2.

shall have full discretionary power to pardon or remit, in whole, or in part, either one of the two kinds, without, in any manner, impairing the legal validity of the other kind, or of any portion of either kind, not pardoned or remitted."[2]

The word "pardon" as thus used in the Constitution has the same meaning which prevailed in England and the Colonies when the Constitution was adopted.[3]

"A pardon is an act of grace, proceeding from the power entrusted with the execution of the law which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended."[4]

Notwithstanding this provision of the Constitution Congress has the power to pass acts of general amnesty.[5] A pardon differs from an amnesty in that the amnesty overlooks the offense, the pardon remits punishment. An amnesty is usually addressed to classes, or communities. It is usually addressed to crimes against the sovereignty of a State, to political offenses. A pardon usually condones infractions of the peace of the State. An amnesty is usually a legislative act or the act of the President under "legislation, constitutional or statutory."[6]

A pardon is not effective until it is communicated to the individual pardoned,[7] and by him accepted.[8] The assertion of a right dependent upon a pardon is affirmative evidence of its acceptance.[9] An acceptance by a man who is lawfully imprisoned is not void as made under duress.[10]

A pardon may be conditional.[11] It will then not take effect

2 § 327, St. at L.

3 *Re* Wells, 18 How. 307, 15 L. ed. 421.

4 Marshall, C. J., in U. S. v. Wilson, 7 Peters 150, 160, 8 L. ed. 640.

5 Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. ed. 819.

6 Burdick v. U. S., 236 U. S. 79, 94.

7 U. S. v. Wilson, 7 Peters 150, 160, 8 L. ed. 640.

8 U. S. v. Klein, 13 Wall. 128, 20 L. ed. 519; Armstrong's Foundry, 6 Wall. 766, 18 L. ed. 882; Carlisle v. U. S., 16 Wall. 147, 21 L. ed. 426; **Burdick v. U. S.**, 236 U. S. 79, 95.

9 Re Wells, 18 How. 307, 15 L. ed. 421.

10 Burdick v. U. S., 236 U. S. 79, 87.

11 U. S. v. Wilson, 7 Peters 150, 160, 8 L. ed. 640; *Re* Wells, 18 How.

until the conditions have been satisfied.[13] The convict of a consular court sentenced to death for murder, by the acceptance of a pardon conditioned that he be imprisoned for life in a penitentiary, is bound by the condition, provided at least that the court had jurisdiction.[14] The recital therein, that it was requested by the District Attorney in order to restore the competency of a witness, does not restrict subsequent language stating that the pardon is full and unconditional.[15]

A pardon blots out the offense.[16] It blots out of existence the guilt so that in the eyes of the law the offender is as innocent as if he had not committed the offense pardoned.[17] It removes all penalties [18] and disabilities attached to the offense or to conviction thereof and restores the defendant to his civil rights,[19] but does not affect rights previously vested in others by reason of his conviction.[20] It does not extend the Statute of Limitation,[21] nor deprive Congress of the power to make proof of innocence of the offense pardoned a condition precedent to the removal of the bar of such statute against a claim.[22] A pardon restores a convict's competency as a witness.[23] It prevents a witness who has accepted it from pleading his constitutional immunity to a question which might disclose his former guilt.[24] If the witness refuses to accept the pardon he may still plead his

307, 15 L. ed. 421; U. S. v. Padelford, 9 Wall. 531, 19 L. ed. 788; U. S. v. Klein, 13 Wall. 128, 20 L. ed. 519; *Re* Ross, 140 U. S. 453, 480, 35 L. ed. 581.

13 U. S. v. Klein, 13 Wall. 128, 20 L. ed. 519.

14 *Re* Ross, 140 U. S. 453, 480, 35 L. ed. 581.

15 Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. ed. 1077.

16 U. S. v. Padelford, 9 Wall. 531, 19 L. ed. 788; U. S. v. Klein, 13 Wall. 128, 20 L. ed. 519; Armstrong v. U. S., 13 Wall. 154; 20 L. ed. 614.

17 *Ex parte* Garland, 4 Wall. 333, 18 L. ed. 366.

18 U. S. v. Padelford, 9 Wall. 531, 19 L. ed. 788; Pargoud v. U. S., 13 Wall. 156, 20 L. ed. 646; Carlisle v. U. S, 16 Wall. 147, 21 L. ed. 426; Young v. U. S., 97 U. S. 39, 24 L. ed. 992.

19 *Ex parte* Garland, 4 Wall. 333, 18 L. ed. 366.

20 Confiscation Cases, 20 Wall. 92, 22 L. ed. 320; Semmes v. U. S., 91 U. S. 21, 23 L. ed. 193; Wallach v. Van Riswick, 92 U. S. 202, 23 L. ed. 473; Chaffraix v. Shiff, 92 U. S. 214; Knote v. U. S., 95 U. S. 149, 24 L. ed. 442.

21 Haycraft v. U. S., 22 Wall. 81, 22 L. ed. 738.

22 Austin v. U. S., 155 U. S. 417, 15 Sup. Ct. 167, 39 L. ed. 206.

23 Logan v. U. S., 144 U. S. 263, 36 L. ed. 429.

24 Burdick v. U. S., 236 U. S. 79, 94.

privilege.[25] The differences between legislative immunity and a pardon in this respect are substantial. "The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is non-committal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon requiring him to confess his guilt in order to avoid a conviction of it." [26]

A pardon to be available as a defense should be specially pleaded.[27] Unless granted pending the proceedings, it cannot be considered when raised for the first time upon a motion in arrest of judgment.[28] A Territorial case holds that the defense of pardon may be set up by a motion to dismiss the indictment, after a plea of not guilty.[29]

§ 520. Plea of Former Jeopardy or of Former Acquittal or Conviction. By the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

It has been held that the prohibition of a prosecution because of former jeopardy is only a variant of the fundamental principles of justice and expediency which lie behind the doctrine of *res adjudicata*.[1] The Amendment does not abrogate the doctrine of *res adjudicata* as applied to criminal prosecutions.[2] The Amendment applies to prosecutions for misdemeanors as well as for felonies.[3] It applies to summary proceedings for the punishment of the crime as well as to those begun by indictment.[4] It has no application to proceedings for the deportation of aliens.[5]

A defendant has not been placed in former jeopardy, if he has not previously been put on trial upon any issues of fact.[6] It

25 Ibid.

26 Ibid.

27 U. S. v. Wilson, 7 Peters 150, 160, 8 L. ed. 640.

28 U. S. v. Wilson, 7 Peters 150, 160, 8 L. ed. 640.

29 Territory v. Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.

§ 520. 1 Harvard Law Review, Feb., 1917.

2 U. S. v. Oppenheimer, 242 U. S. 85.

3 *Ex parte* Lange, 18 Wallace 163, 21 L. ed. 87.

4 Wenyss v. Hopkins, L R., 10 Q. B. 378, 381.

5 Sire v. Burkshire, 185 Fed. 567.

6 Taylor v. U. S., 207 Fed. 120; People v. Stanton, 84 Misc. (N. Y.) 101, 146 N. Y. Supt. 862.

has been said that a person is in legal jeopardy when he is upon trial, before a court of competent jurisdiction, upon indictment or information sufficient in form and substance to sustain a conviction, and a jury has been charged with his delivery.[7] He is not put in jeopardy by his indictment, arraignment and pleading.[8] A jury is charged with his deliverance when the jurors have been impanelled and sworn.[9]

He has not been put in former jeopardy when a former jury has been discharged by his consent, express[10] or implied,[11] or for a sufficient cause such as the sickness or death of the trial judge,[12] or of a juror[13] on the discovery of the incompetence of a juror,[14] or because of misconduct of jurors,[15] or of facts which occurred before or pending the trial which tend to bias or prejudice the jury;[16] or because of their disagreement after sufficient time has been allowed for their deliberations;[17] or by the reversal of a judgment upon a writ of error;[18] or if the

7 Cooley's Constitutional Limitations, 6th ed., 399; citing Commonwealth v. Cook, 6 S. & R. 586; State v. Norvell, 2 Yerg. 24; Williams v. Commonwealth, 2 Gratt. 568; People v. McGowan, 17 Wend. 386; Mounts v. State, 14 Ohio 295; Price v. State, 19 Ohio 423; Wright v. State, 5 Ind. 292; State v. Nelson, 26 Ind. 366; State v. Spier, 1 Dev. 491; State v. Ephraim, 2 Dev. & Bat. 162; Commonwealth v. Tuck, 20 Pick. 356; People v. Webb, 28 Cal. 467; People v. Cook, 10 Mich. 164; State v. Ned, 7 Port. 217; State v. Callendine, 8 Iowa 288.

8 Bassing v. Cady, 208 U. S. 386, 52 L. ed. 540.

9 McFadden v. Commonwealth, 23 Pa. St. 12; Lee v. State, 26 Ark. 260, s. c. 7 Am. Rep. 611; O'Brian v. Commonwealth, 9 Bush (Ky.) 333, s. c. 15 Am. Rep. 15; Cooley's Constitutional Limitations, 6th ed., 399 citing Freeman v. U. S., C. C. A., 23 Fed. 815.

10 Lovato v. New Mexico, 242 U. S. 199; Wierse v. U. S., C. C. A., 252 Fed. 435; Cooley's Constitutional Limitations, 6th ed. 400.

11 Ibid.

12 Freeman v. U. S., C. C. A., 237 Fed. 815; Nugent v. State, 4 Stew. & Port. 72, but see *Ex parte* Ulrich, 42 Fed. 587.

13 Gardes v. U. S., 87 Fed. 172.

14 Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73.

15 See Simons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171; Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73.

16 Simons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171.

17 U. S. v. Perez, 9 Wheaton 579; Dreyer v. Illinois, 187 U. S. 71, 23 Sup. Ct. 28. But see U. S. v. Gilbert, 2 Sumner 56, Fed. Cas. No. 15,204.

18 Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. ed. 262; Strand v. U. S., 251 U. S. 14; Steinman v. U. S., 185 Fed. 147.

verdict has been set aside and a new trial granted;[19] or, it has been held, when judgment thereupon has been arrested,[20] even though part of the sentence has been served.[21]

An accused has not been put in double jeopardy when after conviction of assault and acquittal of murder upon the same complaint in a court of the Philippines he is upon his appeal to the Supreme Court of those Islands convicted of homicide upon the same evidence.[22] Upon the second trial the defendant may be convicted of a higher degree of crime than upon the first if such crime was included in the original indictment.[23] Whether after an acquittal upon one count and a conviction upon another, a reversal of the conviction and an order for a new trial will deprive the defendant of the benefit of his acquittal has not yet been positively decided by the Federal courts.[24] There is no double jeopardy: when the term of the court as fixed by law comes to an end before the first trial is finished and cannot legally be extended;[25] if the first indictment was dismissed

19 Kendall v. State, 65 Ala. 492; State v. Blaisdell, 59 N. H. 328; Gannon v. People, 127 Ill. 507; State v. Brecht (Minn.), 42 N. W. Rep. 602; People v. Hardisson, 61 Cal. 378; Cooley's Constitutional Limitations, 6th ed. 400. See Commonwealth v. Downing (Mass.), 22 N. E. Rep. 912. In State v. Redman, 17 Iowa 329, held that where the verdict is so defective that no judgment can be rendered thereupon it may be set aside and a new trial granted against the defendant's objection.

20 Casborus v. People, 13 Johns 351; State v. Clark, 69 Iowa 196; Cooley's Constitutional Limitations, 6th ed. 400; but where the indictment was good and the judgment thereupon erroneously arrested; it was held that the verdict was a bar. State v. Yerg (Tenn.), 24. See People v. Webb, 28 Cal. 467.

21 Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. ed. 711.

22 Trono v. U. S., 199 U. S. 521, 50 L. ed. 292.

23 Trono v. U. S., 199 U. S. 521, 50 L. ed. 292; Brantley v. Georgia, 217 U. S. 284, 54 L. ed. 768, 26 Sup. Ct. 121; Stroud v. U. S., 251 U. S. 14.

24 Burton v. U. S., 202 U. S. 344, 378, 26 Sup. Ct. 688. The preponderance of authority holds that he cannot again be tried upon those charges whereupon he was acquitted. U. S. v. Davenport Deady, 264 s. c. 1 Green Cr. R. 429; Stuart v. Commonwealth, 28 Gratt 950; Johnson v. State, 29 Ark. 31; Barnett v. People, 54 Ill. 331. *Contra*, State v. Behimer, 20 Ohio St. 52; Cooley's Constitutional Limitations, 6th ed. 401.

25 State v. Brooks, 3 Humph. (Tenn.) 70; State v. Battle, 7 Ala. 259; Mahala v. State, 10 Yerg (Tenn.) 532; State v. Spier, 1 Dev. (N. C.). See Whitten v. State, 61 Miss. 717; Cooley's Constitutional Limitations, 6th ed. 400.

upon a demurrer [26] or otherwise,[27] even after the jury has been impanelled [28] or the former acquittal was by a reason of a variance between the indictment and the evidence,[29] nor when the first trial was before a court which had no jurisdiction of the offense.[30] But a judgment sustaining the plea of the Statute of Limitations is *res adjudicata* and a bar to a subsequent prosecution for the same offense although the first decision has been overruled but not reversed.[31]

A conviction of a crime is a bar to a civil action by the United States to recover a penalty for the same offense; [31a] but a judgment dismissing on the merits a suit in equity by the Secretary of War for the removal of a bridge over a navigable stream charged to be an unreasonable obstruction is not a bar to an indictment under the same statute against the same defendant upon the same charge.[31b]

A judgment of acquittal of an individual is a bar to an action for the forfeiture of his property upon the same charge.[31c]

[26] U. S. v. Bopp, 232 Fed. 177; People v. Gluckman, 60 App. Div. 307, 70 N. Y. Supp. 173; Commonwealth v. Willcox, 111 Va. 849, 69 S. E. 1027; Bowman v. Commonwealth, 146 Ky. 486, 143 S. W. 47.

[27] Simpson v. U. S., C. C. A., 229 Fed. 940; U. S. v. Rogoff, 163 Fed. 311; Gerard v. People, 4 Ill. 363; Pritchett v. State, 2 Sneed. 285; People v. Cook, 10 Mich. 164; Mount v. Commonwealth, 2 Duv. 93; People v. McNealy, 17 Cal. 333; Kohlheimer v. State, 39 Miss. 548; State v. Kason, 20 La. Ann. 48; Black v. State, 36 Ga. 447; Commonwealth v. Rakeman, 105 Mass. 53; State v. Ward, 48 Ark. 36; People v. Clark, 67 Cal. 99; Garvey's Case, 7 Co. 384; Cooley's Constitutional Limitations, 6th ed. 399. But see U. S. v. Nickerson, 17 How. 204, 15 L. ed. 219.

[28] Simpson v. U. S., C. C. A., 229 Fed. 940, but see U. S. v. Nickerson, 17 How. 204, 15 L. ed. 219.

[29] U. S. v. Phelan, 250 Fed. 927; Schoener v. Pennsylvania, 207 U. S. 188, 52 L. ed. 163.

[30] Freeman v. U. S., C. C. A., 237 Fed. 815; Commonwealth v. Peters, 12 Met. (Mass.) 387.

[31] U. S. v. Oppenheimer, 242 U. S. 85; Commonwealth v. Goddard, 13 Mass. 455; People v. Tyler, 7 Mich. 161; Montross v. State, 61 Miss. 429; State v. Shelly, 98 N. C. 673; Brown v. State, 79 Ga. 324; Cooley's Constitutional Limitations, 6th ed. 399; U. S. v. Ball, 163 U. S. 662, 16 Sup. Ct. 1192; People v. Barrett, 1 Johnson (N. Y.) 66; Commonwealth v. Purchase, 2 Pick. (Mass.) 521, 526. *Contra,* Vaux's Case, 4 Rep. 44.

[31a] U. S. v. Porria, 255 Fed. 172.

[31b] U. S. v. Baltimore I. R. Co., 229 U. S. 244.

[31c] Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, 39 L. ed. 684.

So, it has been held, is a judgment convicting the owner[31d] or a judgment convicting an officer or stockholder of the owner;[31e] unless the statute authorizes both forfeiture and fine[31f] or imprisonment;[31g] but a judgment of forfeiture against a vessel is no defense to an indictment against its owner for aiding and abetting the act of a master for offense which caused the forfeiture.[32]

A plea of *autre fois acquit* must be upon a prosecution for the same identical offense.[33] It must appear that the offense charged was the same in law and in fact.[34] The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law however nearly they may be connected in fact.[35] The jeopardy is not the same when the two indictments are so different as to preclude the same evidence from sustaining both.[36]

An acquittal upon an indictment for passing a counterfeit note is not a bar to a second indictment for passing another, although a second note was put in evidence in the first trial,[37] nor is the conviction for counterfeiting a note a bar to a second indictment for another counterfeit of the same note subsequently made from the same plate.[38] Nor is an acquittal upon the charge of having received forbidden compensation from a person described in the indictment as an officer and employee of a corporation a bar to a prosecution upon the charge of having received similar compensation from the corporation.[39]

31d U. S. v. McKee, 4 Dillon 128, Fed. Cas. No. 15,688. See *Re* Food Conservation Act, 254 Fed. 893, 897, 905.

31e U. S. v. One Distillery, 43 Fed. 846.

31f U. S. v. Manufacturing Apparatus, Oleomargarine, and Raw Materials of Western Oleomargarine Co., 240 Fed. 235, cited *supra;* U. S. v. One Machine for Corking Bottles, 267 Fed. 501.

31g *Re* Food Conservation Act, 254 Fed. 883; *infra,* § 607a.

32 U. S. v. Olsen, 57 Fed. 579.

33 Blackstone's Commentaries, IV, 336; Burton v. U. S., 202 U. S. 344, 380, 26 Sup. Ct. 688.

34 Burton v. U. S., 202 U. S. 344, 380, 26 Sup. Ct. 688, quoting with approval Shaw, C. J., in Commonwealth v. Roby, 12 Pick. 496, 504.

35 Ibid.

36 Burton v. U. S., 202 U. S. 344, 381, 26 Sup. Ct. 688, quoting with approval Bishop's Criminal Law, I, § 1051. See Wilson v. State, 24 Conn. 57, 63, 64.

37 U. S. v. Randenbush, 8 Peters 288, 8 L. ed. 948.

38 Bliss v. U. S., C. C. A., 105 Fed. 508.

39 Burton v. U. S., 202 U. S. 344, 379, 26 Sup. Ct. 688.

Nor is the acquittal of a stockholder and director of the charge of defrauding the government of the tax a bar to a subsequent proceeding under the same statute for the forfeiture of property of the corporation because of the same offense.[40] Nor is the acquittal of the charge of conspiracy to induce a railway company to give rebates to different shippers from the same city a bar to an indictment for a conspiracy to induce one of these shippers to receive rebates from that and other railroad companies.[41]

Where the same transaction results in two different statutory offenses, there may be a separate conviction and punishment for each.[42] Thus, when after a conviction of assault the person assaulted dies as the result thereof, the offender may be tried for murder.[43] Separate punishments may be inflicted for breaking into a post office and for larceny there committed after such unlawful entry.[44] A postmaster, after conviction of the crime of issuing a money order without receiving the money therefor,[45] was indicted and convicted, under another statute,[46] for issuing at the same time to the same person other money orders "with intent to defraud" without having received the money therefor.[47] A naval officer was separately punished for conspiring to defraud the United States and for causing false and fraudulent claims to be made against the United States, both charges being violations of the same article of war.[48] A conviction for the violation of the ordinance forbidding rude and boisterous language and drunkenness does not prevent a subsequent indictment for insulting a public officer by the same conduct which is made a criminal offense by a separate ordinance.[49] It has been held that a conviction in a State court

40 U. S. v. Manufacturing Apparatus, Oleomargarine, and Raw Materials of Western Oleomargarine Co., 240 Fed. 235.

41 Thomas v. U. S., C. C. A., 156 Fed. 897, 912.

42 Carter v. McClaughry, 183 U. S. 365, 46 L. ed. 236; Diaz v. U. S., 223 U. S. 442, 56 L. ed. 500.

43 Diaz v. U. S., 223 U. S. 442, 56 L. ed. 500.

44 Morgan v. Devine, 237 U. S. 632; Morgan v. Sylvester, C. C. A., 231 Fed. 886.

45 Penal Code, § 210, Act of March 4, 1909, ch. 321, 35 St. at L. 1129, 1131.

46 Penal Code, § 218, Ibid.

47 U. S. v. Komie, 194 Fed. 567.

48 Carter v. McClaughry, 183 U. S. 365, 46 L. ed. 236.

49 Gavieres v. U. S., 220 U. S. 338, 55 L. ed. 489.

on indictment charging receiving and withholding stolen property is a bar to prosecution upon a count charging the taking into possession such property, a foreign shipment, the same having been stolen, the same character and degree of proof being necessary, but not to a count charging larceny of the property while moving in interstate commerce.[50]

A past offense which is in its nature continuous cannot be split into several intermediate crimes which are separately punished under the same statute.[51] Thus there cannot be three successive terms of imprisonments for continuous unlawful cohabitation which continued for three years.[52] This doctrine does not apply to continuance after the first trial.[53] Nor to successive separate offenses such as the cutting of different mail bags.[54] Nor to the mailing of several letters in execution of the same fraudulent scheme.[55]

The same act cannot be made the subject of separate punishments under the same statute, although it effects separate results;[56] thus, there cannot be two punishments under the same statute for the delivery of different money orders to the same person at the same time without receiving any money therefor;[57] but successive acts which produce different results although committed as part of the same transaction are not so inseparably connected that an acquittal of one will bar a conviction of another.[58] Such is the murder of several persons in the same fray.[59]

A conviction of an offense, which necessarily includes certain acts charged, is a bar to a subsequent indictment for any of such acts alone.[60] For example, a conviction of the crime of unlawful cohabitation which bars an indictment for adultery.[61] It has been held: that a conviction by a court martial of deser-

50 U. S. v. Porria, 255 Fed. 172; *supra*, § 506h.

51 *Re* Snow, 120 U. S. 274, 30 L. ed. 658. See *Re* Neilson, 131 U. S. 176, 33 L. ed. 118. See Crepps v. Durden, 2 Cowper. 640.

52 Ibid.

53 U. S. v. Swift, 186 Fed. 1002 (conspiracy).

54 Ebeling v. Morgan, 237 U. S. 625.

55 *Ex parte* Henry, 123 U. S. 372, 31 L. ed. 174.

56 U. S. v. Komie, 194 Fed. 567.

57 Ibid.

58 Hotema v. U. S., 186 U. S. 413, 46 L. ed. 1225.

59 Ibid.

60 *Re* Neilson, 131 U. S. 176, 33 L. ed. 118.

61 *Re* Nielson, 131 U. S. 176, 187.

tion is a bar to a prosecution in a District Court for failing to answer the written questions under the Selective Service Act,[62] and that there cannot be two punishments for the fake answers to repetitions of the same question.[63] But it seems that an acquittal of an offense is no bar to an indictment for a lesser crime based upon the same facts for which there could have been no conviction upon the former trial.[64]

A plea of former jeopardy, whether a former acquittal, or a former conviction, or otherwise, should be set up by a special plea in bar.[65] Such a plea should set forth the record of the former acquittal, or conviction, or proceedings, which put the defendant previously in jeopardy.[66]

This plea may be joined with a plea of not guilty since the two pleas are not repugnant.[67]

A sworn statement by the defendant setting forth facts which, if true, constitute a former acquittal may be treated as such a plea. So may be a motion to discharge the defendant based upon former proceedings in the same cause.[68] In such a case, no issue need be joined on the plea.[69]

62 U. S. v. Block, 262 Fed. 205.

63 Ulmer v. U. S., C. C. A., 219 Fed. 641.

64 *Re* Neilson, 131 U. S. 176.

65 U. S. v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15,794.

66 Vaux's Case, 4 Coke 44a; Reg. v. Connell, 6 Cox, C. C. 178; Rex v. Emden, 9 East 437; Rex v. Vandercom, 2 East, P. C. 519, 2 Leach, C. C. 816; Rex v. Wildey, 1 M. & S. 183; 1 Chitty, Criminal Law, 459; 2 Hale, P. C. 241, 243, 255; 2 Hawkins, P. C., c. 35, § 2; Smith v. State, 52 Ala. 407; Foster v. State, 39 Ala. 229; Henry v. State, 33 Ala. 389; Harp v. State, 59 Ark. 113, 26 S. W. 714; Evans v. State, 54 Ark. 227, 15 S. W. 360; Bradley v. State, 32 Ark. 722; Territory v. King, 6 Dak. 131, 50 N. W. 623; Blair v. State, 81 Ga. 628, 7 S. E. 855; Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; Evans v. State, 68 Ga. 826; Crocker v. State, 47 Ga. 568; Hensley v. State, 107 Ind. 587, 8 N. E. 692; Davis v. State, 51 Neb. 301, 70 N. W. 984; State v. Ackerman, 64 N. J. L. 99, 45 Atl. 27; People v. Smith, 172 N. Y. 210, 64 N. E. 814; Zachary v. State, 7 Baxt. (Tenn.) 1; Ford v. State (Tex. Cr. App. 1900), 56 S. W. 918; Wheelock v. State (Tex. Cr. App. 1896), 38 S. W. 182; Washington v. State, 35 Tex. Cr. 156, 32 S. W. 694; Grisham v. State, 19 Tex. App. 504; Williams v. State, 13 Tex. App. 285, 46 Am. Rep. 237; State v. Cross, 44 W. Va. 315, 29 S. E. 527; 12 Cyc. 364, 365. See U. S. v. Olsen, 57 Fed. 579; Berkowitz v. U. S., C. C. A., 93 Fed. 452, 35 C. C. A. 379.

67 Thompson v. U. S., 155 U. S. 271, 39 L. ed. 146.

68 Peters v. U. S., C. C. A., 94 Fed. 127.

69 Ibid.

An objection to the manner of the trial cannot be considered upon the writ of error unless an exception thereto was duly taken.[70]

Parol evidence is admissable to supplement the previous record and establish the defense of previous conviction or acquittal.[71]

Where the evidence in support of a plea of former jeopardy is wholly documentary, uncontradicted, and insufficient in law to sustain the plea, the court may instruct the jury to return a verdict thereupon.[72]

§ 520a. Pleas of Statutes of Limitations. Advantage may be taken of the Statutes of Limitations under the plea of not guilty.[1] This is the only method by which the accused may raise the objection in the case of indictment for a conspiracy which is alleged to have continued until the time when the indictment is found.[2] In most, if not in all, other cases the defense may be set up by a plea.[3] This is a plea in bar, not a plea in abatement.[4] A decision thereof, in favor of the defendant, may be reviewed by writ of error.[5] The expediency of such a defense by plea requires careful consideration by the practitioner in each particular case. If the question is doubtful or the decision requires the examination of many authorities, he is more likely to succeed in the court of first instance, if he raises the question by plea which gives the court an opportunity for research, and deliberation before the decision. On the other hand, if the question is raised for the first time upon the trial and he then succeeds, the decision is final and cannot be reversed.

It is doubtful whether the State of Limitations can ever be raised by demurrer.[6] It cannot be, if the statute contains ex-

70 Ibid.

71 Dunbar v. U. S., 156 U. S. 185, 191, 15 Sup. Ct. 325, 39 L. ed. 390; Dunbar v. U. S., 161 U. S. 314, 16 Sup. Ct. 508, 40 L. ed. 709; Foerster v. U. S., C. C. A., 116 Fed. 862.

72 Storm v. Territory of Arizona, C. C. A., 170 Fed. 423.

§ 520a. 1 U. S. v. Cook, 17 Wallace 168, 179, 21 L. ed. 538.

2 U. S. v. Kissel, 218 U. S. 601, 54 L. ed. 1168; U. S. v. Barber, 219 U. S. 72, 55 L. ed. 99.

3 U. S. v. Cook, 17 Wallace 168, 179, 21 L. ed. 538; Gompers v. U. S., 233 U. S. 604, 607; U. S. v. J. L. Hopkins & Co., 228 Fed. 173.

4 U. S. v. Oppenheimer, 242 U. S. 85.

5 Ibid.

6 U. S. v. Cook, 17 Wallace 168, 179, 21 L. ed. 538. "Accused per-

ceptions, or provisos.[7] It is the safer practice when such a plea is overruled to except specifically thereto.[8]

The Statutes of Limitations to crimes against the United States are previously set forth.[9]

§ 520b. Plea of guilty. The plea of guilty is a waiver of the right of trial by jury.[1] It is not forbidden by the Sixth Amendment to the Constitution.[2] It may be filed to an indictment for murder or other capital crime.[3] It is an admission of every allegation of fact in the indictment or information.[4] It is a waiver of all formal defects, and imperfect averments in the information or indictment.[5] It is no waiver of the right to object that the indictment does not charge a crime created by a statute of the United States;[6] nor of the right to have this question considered by a motion in arrest of judgment,[7] or by a writ of error.[8]

sons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was found within the period prescribed in the limitations, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception. Nor is it admitted that any different rule would apply in the case even if the statute of limitations did not contain any exception, as time is not of the essence of the offence; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offence was committed within two years next before the indictment was found and filed.''

7 Ibid; Green v. U. S., C. C. A., 154 Fed. 401; *certiorari* denied, 207 U. S. 597.

8 Gompers v. U S., 233 U. S. 604, 607.

9 *Supra,* § 180n.

§ 520b. 1 West v. Gammon, C. C. A., 98 Fed. 426.

2 Ibid. See Hallinger v. Davis, 146 U. S. 318, 13 Sup. Ct. 105, 36 L. ed. 986.

3 Hallinger v. Davis, 146 U. S. 318, 13 Sup. Ct. 105, 36 L. ed. 986; State v. Almy, 67 N. H. 274, 28 Atl. 372.

4 West v. Gammon, C. C. A., 98 Fed. 426.

5 U. S. v. Bayaud, 16 Fed. 376.

6 Becker v. U. S., C. C. A., 268 Fed. 195; U. S. v. Potter, 6 McLean 186, Fed. Cas. No. 16,078; see U. S. v. Bayaud, 16 Fed. 376.

7 U. S. v. Potter, 6 McLean 186, Fed. Cas No. 16,078; see U. S. v. Bayaud, 16 Fed. 376; see *infra,* § 531.

8 Fletcher v. State, 12 Ark. 169; Commonwealth v. Kennedy, 131 Mass. 584; Boody v. People, 43

§ 520c. Plea of not guilty. The plea of not guilty may be interposed to the whole of an indictment or information, or to any count therein.[1] This plea puts in issue every allegation in the count or indictment to which it is made and puts upon the government the burden of proving every essential element of the offense charged.[2] It is a waiver of the objection of duplicity[3] and of any other objections of form.[4]

§ 521. Proceedings upon pleas. The sufficiency of a plea in point of law can be raised by a demurrer, interposed by the prosecution.[1] This for the purposes of the argument admits the truth of the allegations of the plea.[2] The facts alleged in the plea may be traversed by an answer[3] or replication[4] on the part of the prosecution. The defendant may test the sufficiency of either of these by a demurrer.[5] If he wishes to raise an issue of fact, he should file a replication or other appropriate pleading to the answer or reply.[6]

Upon a demurrer to a plea the allegations of the plea are admitted.[7] A demurrer to a replication will be overruled if the plea is bad.[8]

A plea of confession and avoidance is a waiver by the defendant of the requirement of proof beyond a reasonable doubt.[9] Where the defendant's attorney, in his presence, claimed the opening and affirmative of an issue upon a plea in bar, it was held that the legal presumption of innocence did not apply.[10] A

Mich. 34, 4 N. W. 549; State v. Levy, 119 Mo. 434, 24 S. W. 1026; Moore v. State, 53 Nebr. 831, 4 N. W. 319; Crow v. State, 6 Tex. 334, 12 Cyc. 353.

§ 520c. 1 Prettyman v. U. S., C. C. A., 180 Fed. 30.

2 Prettyman v. U. S., C. C. A., 180 Fed. 30, 42.

3 Pooler v. U. S., C. C. A., 127 Fed. 509, 515; *supra*, § 500.

4 U. S. R. S., § 954.

§ 521. 1 Moore v. Mississippi, 21 Wall. 636, 22 L. ed. 653; U. S. v. Norton, 91 U. S. 566, 23 L. ed. 454.

2 Ibid. See *supra*, § 366.

3 Burton v. U. S., 202 U. S. 344, 379, 26 Sup. Ct. 688.

4 State v. Malia, 79 Me. 540, 11 Atl. 602; Commonwealth v. Dockham, Thach. Cr. Cas. (Mass.) 238; Lewis v. State, 1 Head (Tenn.) 329; Baker v. State, 80 Wis. 416, 50 N. W. 518; Martin v. State, 79 Wis. 165, 48 N. W. 119, 12 Cyc. 360.

5 Burton v. U. S., 202 U. S. 344, 379, 26 Sup. Ct. 688, 50 L. ed. 1057.

6 Ibid.

7 Moore v. Mississippi, 21 Wall. 636, 22 L. ed. 653; U. S. v. Norton, 91 U. S. 566, 23 L. ed. 454.

8 U. S. v. Lawrence, 13 Blatchf. 295, *supra*, § 518.

9 U. S. v. Heike, 175 Fed. 852.

10 Ibid.

submission to a jury of the issue raised upon a plea cures a previous error by the court in overruling the plea.[11]

When a special plea is overruled, the defendant may be allowed to plead to the merits.[12] This is usually done when the plea is not a confession of guilt.

§ 522. Bills of particulars. Where an indictment is sufficiently definite to be sustained upon demurrer, but does not give the defendant the information to which he is fairly entitled in order properly to prepare for trial, he should be given a bill of particulars of the facts therein charged.[1]

A bill of particulars is no part of the indictment,[2] and does not supply any defects or omissions therein.[3] After the service of a bill of particulars the prosecutor is confined to its contents as closely as if they were a part of the indictment.[4] A bill of particulars may be ordered: when the indictment charges the mailing of indecent and obscene literature, without quoting the objectionable language,[5] or a conspiracy to accomplish an unlawful purpose by public speeches,[6] or an offense against the internal revenue laws, without specifying the alcoholic liquor to which it refers;[7] or to require a statement of the time of a threat, its place within a specified city, the circumstances under which, and the person to whom it was made,[8] or in order to show upon what statutes the indictment is based.[9]

A bill of particulars was denied when asked to show the exact date of solicitations and the precise language used and the names of all the persons solicited when the indictment stated the city where the solicitations were made, and that the particular places within such city and the names of the persons solicited were

11 Jones v. U. S., C. C. A., 179 Fed. 584.

12 Ileike v. U. S., 217 U. S. 423, 54 L. ed. 821.

§ 522. 1U. S. v. Thompson, 189 Fed. 838; May v. U. S., C. C. A., 199 Fed. 53.

2 U. S. v. Comyns, 248 U. S. 349.

3 U. S. v. Adams Express Co., 119 Fed. 240.

4 U. S. v. Pierce, 245 Fed. 888; U. S. v. Gouled, 253 Fed. 239.

5 Rosen v. U. S., 161 U. S. 29, 40 L. ed. 606; Price v. U. S., 165 U. S. 311; Dunlop v. U. S., 165 U. S. 486, 41 L. ed. 799.

6 U. S. v. Eastman, 252 Fed. 232.

7 U. S. v. Thompson, 189 Fed. 838.

8 U. S. v. Stobo, 251 Fed. 689, 694, 695.

9 Morris v. U. S., C. C. A., 161 Fed. 672, 681, 88 C. C. A., 532, 541; May v. U. S., C. C. A., 199 Fed. 53, 61; Vedin v. U. S., C. A. A., 257 Fed. 550.

to the grand jurors unknown;[10] and to specify the contracts with the government in connection with which a conspiracy was formed to defraud the United States.[11]

A bill of particulars cannot cure a defect in an indictment;[12] nor can it make an indictment, which is good upon its face, demurrable.[13] Where a bill of particulars confines the prosecution to certain counts an error in refusing to quash the other counts is immaterial.[14]

The grant of a bill of particulars lies within the discretion of the court.[15]

A judgment will not be reversed for a refusal to direct the service of a bill of particulars, unless the substantial rights of the accused have been thereby prejudiced.[16]

§ 522a. Nolle prosequi. The Attorney General has the right to abandon the prosecution by the entry of a *nolle prosequi* at any time before judgment.[1] He may do this before a jury is empanelled, while the case is before a jury, and after verdict.[2]

10 U. S. v. Pierce, 245 Fed. 888, 890.

11 U. S. v. Rosenwasser Bros., 255 Fed. 233.

12 U. S. v. Comyns, 248 U. S. 349; May v. U. S., C. C. A., 199 Fed. 53, 61; U. S. v. Rintelen, 233 Fed. 793.

13 Dunlap v. U. S., 165 U. S. 486; 41 L. ed. 799; Coomer v. U. S., C. C. A., 213 Fed. 1.

14 MacDonald v. U. S., 63 Fed. 426; Krause v. U. S., C. C. A., 267 Fed. 183.

15 Dunlap v. U. S., 165 U. S. 486, 41 L. ed. 799; Breese v. U. S., 106 Fed. 680; Hedderly v. U. S., C. C. A., 193 Fed. 561; Knauer v. U. S., C. C. A., 237 Fed. 8; U. S. v. Pierce, 245 Fed. 888.

16 Dunlap v. U. S., 165 U. S. 486, 41 L. ed. 799; Hedderly v. U. S., C. C. A., 193 Fed. 561; Knauer v. U. S., C. C. A., 237 Fed. 8; Foster v. U. S., C. C. A., 253 Fed. 481; Collins v. U. S., C. C. A., 253 Fed. 609; Ciafirdini v. U. S., 266 Fed. 471; Moens v. U. S., C. C. A., 267 Fed. 317.

§ 522a. 1 *Re* Mitchell v. U. S., C. C. A., 197 Fed. 874; *Re* Cain, C. C. A., 209 Fed. 40.

2 Ibid. Commonwealth v. Tuck, 20 Pick. (Mass.) 356, 365; "After a verdict of guilty is rendered, the defendant is to be sentenced on motion of the attorney general; and we have no doubt of his authority to enter a *nolle prosequi* after verdict. It cannot operate to the injury of the defendant. If the indictment is sufficient this act of the Attorney General saves him from the sentence of the law. If it be insufficient, it can do him no harm, for no judgment could be rendered upon the indictment, and so it would not bar another indictment. This practice of entering a *nolle prosequi* after verdict has prevailed, without objection, for many years. The power is found to be highly useful,

He may do so after judgment of conviction has been reversed by the court of review and a mandate issued directing a new trial [3] or the entry of new judgment.[4] He may make the entry as to one or more of several counts in an indictment.[5] He cannot enter a *nolle prosequi* as to part of a count so as to cure the objection of duplicity.[6]

A *nolle prosequi* is not the equivalent of an acquittal.[7] It leaves the prosecution in the same position as if no part of the count nolled had been inserted in the indictment.[8]

The Attorney General, in making the entry of *nolle prosequi,* usually acts through the United States District Attorney. According to the preponderance of authority, in the State court the entry of a *nolle prosequi* after the jury has been empanelled and sworn is the equivalent of an acquittal and a bar to a subsequent prosecution for the same cause.[9]

§ 522b. Compromises of prosecutions under the Internal Revenue Laws and Prohibition Law. By the Revised Statutes, "The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any

if not necessary, to the due administration of criminal law. Many cases may occur in which its exercise would be very beneficial. It may be discovered after verdict that the defendant, though convicted, is really innocent. It may become important to use him as a witness. The power to enter a *nolle prosequi* is held by the Attorney General *virtute officii.* He exerts it upon his official responsibility. The court has no right to interfere with its exercise. They can only judge of the effect of the act when done, and of the legal consequences which may follow from it. They will take care that it shall not operate to the prejudice of the defendant's rights."

3 Mitchell v. U. S., C. C. A, 197, 874.

4 *Re* Cain, 209 Fed. 40.

5 Dealy v. U. S., 152 U. S. 539, 541, 38 L. ed. 545.

6 U. S. v. Dembowski, 252 Fed. 894, 898.

7 Dealy v. U. S., 152 U. S. 539, 541, 38 L. ed. 545.

8 Ibid.

9 People v. Barrett, 2 Caines (N. Y.) 304; Commonwealth v. Tuck, 20 Pick. (Mass.); Mounts v. State, 14 Ohio 295; State v. Connor, 5 Cold. (Tenn.) 311; State v. Callendine, 8 Iowa 288; Baker v. State, 12 Ohio St. 214; Grogan v. State, 44 Ala. 9; State v. Alman, 64 N. C. 364; Nolan v. State, 55 Ga. 521; Pizaño v. State, 20 Tex. App. 139; Cooley's Constitutional Limitations, 6th ed. 399. *Contra,* State v. Champeau, 53 Vermont 613; s. c. 36 Am. Rep. 754; State v. Garvey, 42 Conn. 232. "If the prisoner does not claim a verdict, but waives his right to insist upon it."

civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced."[1]

A compromise effected under this statute, whether before or after prosecution is as complete a discharge of the defendant as a verdict of acquittal by a jury.[2] It may be offered in evidence upon the trial of a criminal prosecution founded upon the matter which has been the subject of the compromise.[3]

No formal release by the Commissioner or by the Government or by anyone on its behalf is essential.[4] The acceptance and collection of a check to the order of the Commissioner for an amount paid in full settlement as orally agreed upon between the taxpayer and one of the former subordinates is sufficient.[5]

The statute contemplates that the advice and consent of the Secretary of Treasury and the recommendation of the Attorney General shall be obtained by the Commissioner of Internal Revenue before he makes a compromise.[6] It is presumed that when the Commissioner accepts an offer of compromise, he has previously discharged his duty of communicating with the other officers.[7]

By the National Prohibition Law, "the commissioner with the approval of the Secretary of the Treasury may compromise any civil cause arising under this title before bringing action in court and with the approval of the Attorney General he may compromise any such cause after action has been commenced."[8] It will be observed that this gives no authority to the Commissioner of Internal Revenue to compromise a criminal prosecution.

§ 522c. The right to confrontation. By the Sixth Amendment the accused has the right "to be confronted with the witnesses against him." This does not apply to proceedings before a

§ 522b. [1] U. S. R. S., § 3229, Comp. St., § 5952.

[2] Oliver v. U. S., 267 Fed. 544, 548.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Act of October 28, 1911, Title II, ch. —, § 35, 41 St. at L. 305.

grand jury.[1] The right of the accused to be confronted with the witnesses against him does not exclude the admission of dying declarations, in cases where they would be admissible at common law;[2] nor does it exclude the admission of competent evidence concerning previous testimony, by a witness, upon a former trial of the accused under a different indictment, when it appears that the absence of the witness has been wrongfully procured by the defendant;[3] nor, the reading in evidence of testi-

§ 522c. [1] U. S. v. Aviles, C. C. A., 222 Fed. 474.

[2] Kirby v. U. S., 174 U. S. 47, 61, 43 L. ed. 890, 896.

[3] Reynolds v. U. S., 98 U. S. 145, 158, 25 L. ed. 244, 247, per Chief Justice Waite: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. . . . "The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offense under another indictment; that she had no home, except with the accused; that at some time before the trial a subpœna had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpœna, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, 'Will you tell me where she is?' that the reply was 'No, that will be for you to find out;' that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, 'Oh, no; she won't, till the subpœna is served upon her,' and then, after some further conversation, that 'She does not appear in this case.' It being discovered after the trial commenced that a wrong name had been inserted in the subpœna, a new subpœna was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morn-

mony given upon such a former trial by a witness who has since died.[4]

Statutory presumptions arising from certain facts have been held to be constitutional;[5] but not where they were conclusive and irrebuttable.[6] A statute is valid which makes an extract from official records for the certificate of a public officer *prima facie* evidence.[7] So much of a statute as declared that the judgment of conviction against the principal felons should be admissible in a criminal prosecution against the receiver of property of the United States, which had been embezzled, stolen or pur-

ing the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible. In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted." Reynolds v. U. S., 98 U. S. 145, 159, 160, 25 L. ed. 244, 247, 248, per Chief Justice Waite.

4 Mattox v. U. S., 156 U. S. 237, 39 L. ed. 409.

5 Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, 219 U. S. 35, 43; "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from the proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." See also Luria v. U. S., 231 U. S. 925; State v. Wilson, 15 R. I. 180.

6 State v. Beswick, 13 R. I. 211. *Contra*, State v. Thomas, 47 Conn. 546, 36 Am. Rep. 98.

7 Johnes v. State, 55 Maryland 350.

loined, as evidence of such embezzlement, theft or purloinment,[8] was held to be unconstitutional.[9] A statute was unconstitutional, which compelled the owner of property, in proceedings for its forfeiture, to produce, upon the trial, his books and papers for the inspection of the United States Attorney; and provided that, in case of his refusal, the allegations on the part of the Government should be taken as confessed.[10] It was held to be a violation of this amendment upon a prosecution for violating the law in regard to oleomargarine to admit in evidence the monthly returns to an officer of the internal revenue made by a manufacturer of oleomargarine which showed sales to the defendant.[11]

Depositions are inadmissible;[12] but the defendant may waive by stipulation his right to object to one.[13]

The presence of the counsel for the defendant at an inspection of the place where he is charged to have committed the offense described in the indictment is a waiver of his right to be present, when not requested by him.[14]

The jury cannot be permitted after their retirement to make an experiment, such as a test of opium to see if it was suitable for smoking, in the defendant's absence.[15]

§ 522d. Compelling attendance of witnesses for the Government. Subpœnas for witnesses, issued on behalf of the United States, in a criminal case may be served in any district of the United States, no matter how distant it may be from the place of trial.[1] The language of the statute[2] seems sufficiently broad

[8] Act of March 3, 1875, c. 144, 18 St. at L. 479.

[9] Kirby v. U. S., 174 U. S. 47, 61, 43 L. ed. 890, 896.

[10] Boyd v. U. S., 116 U. S. 616, 29 L. ed. 746.

[11] U. S. v. Elder, 232 Fed. 267.

[12] People v. Murray, 52 Michigan 288, 290.

[13] Diag v. U. S., 223 U. S. 442, 56 L. ed. 500.

[14] Valdez v. U. S., 244 U. S. 432, 37 Sup. Ct. 725, 60 L. ed. —.

[15] Wilson v. U. S., C. C. A., 116 Fed. 484.

§ 522d. [1] U. S. R. S., § 876.

[2] Quoted *supra*, § 342. It has been held that, in the Southern District of New York, subpœnas issued by a United States Commissioner on behalf of a defendant cannot be served outside of the county where he holds a hearing; unless a United States judge, upon an affidavit of the prosecutor or District Attorney, or of the defendant or his counsel, stating that the affiant believes that the evidence of the witness is material and his attendance at the trial is necessary, indorses, on the

to give the same right to the defendant in a criminal case. The Revised Statutes further provide: "Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."[3]

It has been held that a Federal court should not, upon the application of the District Attorney of the United States, compel the production of a witness confined in the State penitentiary for assault with intent to murder, when the State authorities oppose the application.[4] The Revised Statutes further provide: "Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost."[5] "Any judge of the United States, on the application of a District Attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his

subpœna, an order for the attendance of such witness. U. S. v. Beavers, 125 Fed. 778; and, in the Eastern District of Pennsylvania, that such a subpœna cannot be served in another district, although within one hundred miles of the place where the hearing before him is appointed to be held. U. S. v. Stern, 177 Fed. 479.

3 U. S. R. S., § 877.

4 U. S. v. Barefield, 23 Fed. 136.

5 U. S. R. S., § 879.

hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge."[6] "In the District of Vermont, all recognizances of witnesses, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the District or Circuit Court thereof, shall be to the Circuit Court next thereafter to be held in the said district."[7]

§ 522e. Compelling attendance of witnesses for the defendant. The Revised Statutes provide that: "Every person who is indicted of treason or other capital crime, shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution."[1] It has been held that the accused has the right to compulsory process, to compel the attendance of his witnesses, even before an indictment.[2] This section of the Revised Statutes does not give the defendant the right to compel the attendance, as witnesses, of ambassadors or consuls who are exempted from subpœnas by treaty.[3] "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid.

6 U. S. R. S., § 881.
7 U. S. R. S., § 880.

§ 522e. 1 U. S. R. S., § 1034.
2 Burr's Trial, vol. I, p. 77.
3 *Re* Dillon, 7 Sawyer, 561.

In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States."[4] The statute makes the order rest in the discretion of the court, and a denial of the application will rarely, if ever, be the cause of a reversal upon writ of error.[5] Where the application was not made until the trial was nearly concluded, and it would have taken several days to bring the witnesses before the court;[6] and where the court granted the application as to some, but not as to all, of the witnesses named;[7] it was held that the rulings would not be reviewed. It has been held that the court may limit to four upon each point of the defendant's proof the number of witnesses that shall be subpœnaed for him at the expense of the government.[8]

§ 522f. Statutory presumptions in criminal cases. Amongst other presumptions which have been established by statute in criminal cases are the following:

By the Act of August 27, 1894, concerning the forging, counterfeiting or fraudulently using or selling of stamps, "if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any washed, restored, or altered stamps, which have been removed from any article, paper, instrument, or writing, then, and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting in committing any such offense as aforesaid, shall, on conviction thereof, forfeit the said counterfeit, washed, restored, or altered stamps and the articles upon which they are placed and be punished by fine not exceeding one thousand dollars, or by imprisonment and confinement to hard labor not exceeding five years, or both, at the discretion of the court. And the fact that any adhesive stamp so bought, sold, offered for sale, used, or had in possession as aforesaid, has been washed or restored by

4 U. S. R. S., § 878.

5 Crumpton v. U. S., 138 U. S. 361, 365, 34 L. ed. 958, 960; Goldsby v. U. S., 160 U. S. 70, 73, 40 L. ed. 343, 344.

6 Crumpton v. U. S., 138 U. S. 361, 364, 34 L. ed. 958, 959.

7 Goldsby v. U. S., 160 U. S. 70, 40 L. ed. 343.

8 O'Hara v. U. S., C. C. A., 129 Fed. 551, 64 C. C. A. 81.

removing or altering the canceling or defacing marks thereon, shall be prima-facie proof that such stamp has been once used and removed by the possessor thereof from some paper, instrument, or writing charged with taxes imposed by law, in violation of the provisions of this section."[1]

By the Act of August 24, 1912, "If any vessel shall be found within the waters to which this Act applies, having on board fur-seal skins or sea-otter skins, or bodies of seals or sea otters, or apparatus or implements for killing or taking seals or sea otter, it shall be presumed that such vessel was used or employed in the killing of said seals or sea-otters, or that said apparatus or implements were used in violation of this Act, until the contrary is proved to the satisfaction of the court, in so far as such vessel, apparatus, and implements are subject to the jurisdiction of the United States."[2]

By the Act of January 7, 1914, "Any person subject to the jurisdiction of the United States who shall, either as principal or as accessory, receive or have in his possession, or conceal on board of or transport on any foreign or domestic vessel or other water craft or railroad car or other vehicle destined to or bound from the United States or any possession thereof, any smoking opium or opium prepared for smoking, or who, having knowledge of the presence in or on any such vessel, water craft, or vehicle of such article, shall not report the same to the principal officer thereof, shall be subject to the penalty provided in section two of this Act. Whenever on trial for violation of this section the defendant is shown to have or to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury: Provided, however, That any master of a vessel or other water craft, or person in charge of a railroad car or other vehicle, shall not be liable under this section if he shall satisfy the jury that he had no knowledge and used due diligence to prevent the presence of such article in or on such vessel, water craft, car, or other vessel, and any such article shall be forfeited and shall be destroyed."[3]

§ 522f. [1] Ch. 349, § 42, 28 St. at L. 560, Comp. St., § 6314.

[2] Ch. 373, § 7, 37 St. at L. 501, Comp. St., § 8844.

[3] Ch. 9, § 4, 38 St. at L. 275, Comp. St., § 8801b.

By the Anti Narcotic Act of December 17, 1914, "It shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: Provided, That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this Act; or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: Provided further, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."[4] This imposes upon the defendant after he has been proved to have had possession of the drugs the burden of proving the payment of the tax.[5]

By the Act of January 17, 1914, concerning the presumption and burden of proof as to time of importation, "On and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."[6]

[4] Ch. 1, § 8, 38 St. at L. 789, Comp. St., § 6287n.

[5] Fiunkin v. U. S., C. C. A., 265 Fed. 1.

[6] Ch. 9, § 3, 38 St. at L. 275, Comp St., § 8801a.

By the Act of February 6, 1909, as amended January 17, 1917, "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or seal of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding $5,000 nor less than $50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."[7] This act is constitutional.[8]

By the Act of September 7, 1916, forbidding the transfer of vessels to foreigners during war or national emergency, "In any action or proceeding under the provisions of this Act to enforce a forfeiture the conviction in a court of criminal jurisdiction of any person for a violation thereof with respect to the subject of the forfeiture shall constitute *prima facie* evidence of such violation against the person so convicted."[9]

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."[10]

§ 523. Evidence in criminal cases. In general the rules concerning the admission and exclusion of evidence in criminal cases, in the courts of the United States, are, ordinarily, the same as

7 Act of February 6, 1909, ch. 100, § 2, 35 St. at L. 614, as amended January 14, 1917, ch. 9, § 2, 38 St. at L. 275, Comp. St., § 8801.

8 Charley Toy v. U. S., C. C. A., 266 Fed. 326.

9 Ch. 451, § 39, added July 15, 1918, ch. —, § 4, 40 St. at L. —, Comp. St., § 8146r(3).

10 Ch. 885, § 36, Comp. St., § 10136½t.

those in civil causes. The Constitution ordains, in the Fifth Amendment, that no person "shall be compelled in any Criminal Case to be a witness against himself."[1] It has been held to be improper to attack an indictment by objections to the introduction of evidence.[2] A general objection to evidence, to wit, is insufficient to save any question for review.[3] It was held that the fact that both parties permitted the introduction of incompetent evidence, without objection, did not preclude the court from subsequently excluding similar evidence upon objection duly made.[4]

The trial court may in its discretion limit the number of witnesses who give cumulative testimony.[5] Its decision in this respect is subject to review by writ of error.[6]

It has been held that the fact that a locality was within the boundaries of an Indian Reservation may be proved by oral testimony.[7]

The uncontradicted testimony of experts as to opinions derived from books and not from personal knowledge need not be accepted by the jury.[8] An expert may testify that a man in his opinion is not an Indian.[9] The jury may determine a man's physical ability to work from their observation of him on the witness stand without the aid of experts.[10]

An appointment to office [11] and the designation of a depositor for money of the United States,[12] when collateral matters, may be proved by oral testimony.

§ 523a. Cross-examination and impeachment of witnesses. The testimony of a witness upon cross-examination is regularly

§ 523. [1] McSpadden v. U. S., C. C. A., 224 Fed. 935; Simpson v. U. S., C. C. A., 229 Fed. 940; Grant v. U. S., C. C. A., 252 Fed. 693.

[2] McKnight v. U. S., C. C. A., 252 Fed. 887.

[3] Ulmer v. U. S., C. C. A., 219 Fed. 641.

[4] Franklin v. U. S., C. C. A., 193 Fed. 334.

[5] Chapa v. U. S., C. C. A., 261 Fed. 775.

[6] Chapa v. U. S., C. C. A., 261 Fed. 775.

[7] Stewart v. U. S., C. C. A., 211 Fed. 41.

[8] U. S. v. Perkins, 221 Fed. 109.

[9] Stewart v. U. S., C. C. A., 211 Fed. 41, 47.

[10] U. S. v. McHugh, C. C. A., 253 Fed. 224.

[11] Sharfsin v. U. S., C. C. A., 265 Fed. 916.

[12] Foster v. U. S., C. C. A., 256 Fed. 207.

restricted to the subject of his direct examination and to questions intended to impeach him or affect his competency or credibility.[1] A written statement, previously made by a witness, is not admissible in evidence to contradict or impeach his testimony, unless it was called to his attention when on the stand.[2] It was held: that where, on cross-examination, a witness admitted having made a sworn statement, the entire statement was admissible in evidence; but that he could not be cross-examined as to whether certain statements suggested by counsel were contained therein.[3] It has been held that when books of account are in court and subject to the inspection and use of the defendant's counsel, it is not error to allow a summary of their contents to be put in evidence.[4]

There is a most extraordinary ruling to the effect, that a letter threatening criminal proceedings written by the attorney of a witness for the Government who had appeared for the latter in a civil suit against the defendant was inadmissible to impeach the witness in the absence of proof that the witness had any knowledge thereof.[5]

Testimony by the defendant that he signed a confession at the request of a witness for the Government who knew that it contained false statements and promised him immunity was held to justify proof in rebuttal of good character of the witness.[6]

§ 523b. Documentary evidence in criminal cases. In general, the rules regulating the admission of documentary evidence in civil causes are followed in criminal prosecution.[1] "Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, certified by the Secretary or Assistant Secretary and authenticated under the seal of the Department, or when the suit involves the account of the War or Navy Department, certified by the

§ 523a. 1 Harrold v. Territory of Oklahoma, C. C. A., 169 Fed. 47; *supra*, § 473.

2 Lemon v. U. S., C. C. A., 164 Fed. 953.

3 Jones v. U. S., C. C. A., 162 Fed. 417.

4 Lemon v. U. S., C. C. A., 164 Fed. 953, 960.

5 Carey v. U. S., C. C. A., 265 Fed. 515.

6 Foster v. U. S., C. C. A., 256 Fed. 207.

§ 523b. 1 See *supra*, § 332, 333o.

auditors respectively charged with the examination of those accounts and authenticated under the seal of the Treasury Department."[2]

"Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the Post Office Department, when certified by the sixth auditor under the seal of his office shall be admitted as evidence in the courts of the United States, in civil suits, and criminal prosecutions."[3]

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with the certificate of the presiding justice of the court of the county, parish, or district in which said office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory or country, as aforesaid, from which they are taken."[4]

This does not require the adoption of the practice in the State courts as to the preliminaries required for the introduc-

2 U. S. R. S., §§ 887, 884. See U. S. v. Gaussen, 19 Wall. 198, 22 L. ed. 41, *supra*, § 333a.

3 U. S. R. S., § 889, *supra*, § 333b.

4 U. S. R. S., § 906, Comp. St., § 1520.

tion of such papers including filing before trial and notice to the other side.[5] It has been held that when books of account are in court and subject to the inspection and use of the defendant's counsel, it is not error to allow a summary of their contents to be put in evidence.[6] State statutes authorizing historical, medical, and scientific books to be read in evidence have not been followed.[7]

§ 523c. Competency of witnesses in criminal cases. The statute providing that the rules of decision as to the competency of witnesses shall be the same in the State and Federal courts,[1] does not apply to criminal cases.[2] It has been said that the law which there applies is that of the State as it was when the courts of the United States were established by the Judiciary Act of 1789.[3]

A conviction of a felony in a court of the same,[4] or another State[5] does not disqualify a witness from testifying in the Federal court. It has been held in the Second Circuit that a witness previously convicted of felony does not thereby become incompetent as a witness in a Federal court.[6] It seems to be the rule in the Second,[7] Fifth,[8] and Eighth,[9] circuits that a con-

5 Myres v. U. S., C. C. A., 216 Fed. 779.

6 Lemon v. U. S., C. C. A., 164 Fed. 953, 960. As to admissibility of books of a corporation. See *supra*, §§ 332, 333g.

7 Union Pac. Ry. Co. v. Yates, C. C. A., 79 Fed. 584; U. S. v. Perkins, 221 Fed. 109.

§ 523c. 1 U. S. R. S., § 858; *supra*, § 339.

2 U. S. v. Hughes, 175 Fed. 238; U. S. v. Miller, 236 Fed. 798, but see U. S. v. Simms, 161 Fed. 1008, holding that their competency must be determined by the common law.

3 U. S. v. Reid, 12 How. 361, 363, 366, 13 L. ed. 1023, 1024, 1025; Logan v. U. S., 144 U. S. 263, 301, 36 L. ed. 429, 442; U. S. v. Hughes, 175 Fed. 238.

4 Rosen v. U. S., 245 U. S. 467, affirming s. c. C. C. A., 237 Fed. 810; Pakas v. U. S., C. C. A., 240 Fed. 350; Brown v. U. S., C. C. A., 233 Fed. 353; Logan v. U. S., 144 U. S. 263, 36 L. ed. 429; U. S. v. Hughes, 175 Fed. 238. *Contra*, U. S. v. Hughes, 175 Fed. 238.

5 Logan v. U. S., 144 U. S. 263, 303, 36 L. ed. 429, 443.

6 Safford v. U. S., 252 Fed. 471, 474.

7 Safford v. U. S., 252 Fed. 471, 474.

8 McCoy v. U. S., C. C. A., 247 Fed. 861, in which the opinion was based upon the law in force in Florida when that State was admitted to the Union. See Rosen v. U. S., C. C. A., 237 Fed. 810.

9 Manuel v. U. S., C. C. A., 254 Fed. 273.

viction in a Federal court does not make a witness incompetent to testify. But the rule in the Eighth Circuit is otherwise in case of a conviction in a Federal court of an infamous crime.[10] The conviction of a military offense by a court martial does not disqualify a witness.[11]

A pardon even if not accepted [12] restores the competency of a witness.

It has been held in the Ninth Circuit that a witness who does not believe in a Supreme Being, who will reward or punish in another world for sins committed here, is not competent.[13]

The lawful husband, or wife of an accused is incompetent to testify against him or her, as the case may be, upon a criminal prosecution, except in special cases.[14] By the common law the wife could testify when the prosecution was for personal injury to her.[15] A few cases hold that this exception should be extended so as to permit the wife to testify against her husband upon the trial of an indictment for his inducing her to go, in transporting her from one State to another for immoral purposes.[16] A Federal statute makes the wife a competent witness in a prosecution for bigamy, polygamy or unlawful cohabitation.[17] It has been held that upon a trial for conspiracy where the husband has pleaded guilty, the wife may testify against the other defendants to facts which do not involve her husband.[18]

The act of March 3, 1887, provides, "In any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy,

10 Maxey v. U. S., C. C. A., 207 Fed. 327.

11 Reed v. U. S., C. C. A., 252 Fed. 21.

12 Logan v. U. S., 144 U. S. 263, 303, 36 L. ed. 429, 443; Logan v. U. S., 144 U. S. 63, 36 L. ed. 429; U. S. v. Hughes, 175 Fed. 238; U. S. v. Curtain, Feb., 1914, — Fed. —.

13 Louis Dug v. U. S., C. C. A., 247 Fed. 14, overruling U. S. v. Miller, 236 Fed. 798.

14 Hendricks v. U. S., 219 U. S. 79, 55 L. ed. 102; Johnson v. U. S., C. C. A., 221 Fed. 250; Denning v. U. S., C. C. A., 247 Fed. 463.

15 Cohen v. U. S., C. C. A., 214 Fed. 23; Denning v. U. S., C. C. A., 247 Fed. 463.

16 Cohen v. U. S., C. C. A., 214 Fed. 23; U. S. v. Bozeman, 236 Fed. 432; Denning v. U. S., C. C. A., 247 Fed. 463. *Contra*, Johnson v. U. S., C. C. A., 221 Fed. 250.

17 Act of Mar. 3, 1887, ch. 397, 24 St. at L. 635.

18 U. S. v. Knoell, 230 Fed. 509.

polygamy, or unlawful cohabitation under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law." [19]

Confidential communications to an attorney are excluded.[20] In the Federal courts, there is no law forbidding a conviction upon the uncorroborated testimony of an accomplice.[21]

§ 523d. Testimony of accomplices. In the Federal courts, there is no law forbidding a conviction upon the uncorroborated testimony of an accomplice,[1] although a State statute so provides.[2] Such testimony should be received with caution.[3] It is the better practice to charge the jury to this effect.[4] It has been held to be no error to refuse to instruct the jury that they should not rely upon such testimony, unless it produces in their mind a most positive conviction of its truth.[5]

§ 523e. Testimony of defendant. By the Act of March 16, 1878, Congress provides: "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and

19 24 St. at L. 635, ch. 397, § 1, Comp. St., § 1466.

20 York v. U. S., C. C. A., 224 Fed. 88.

21 Richardson v. U. S., C. C. A., 181 Fed. 1; U. S. v. Murphy, 253 Fed. 404.

§ 523d. 1 Richardson v. U. S., C. C. A., 181 Fed. 1; Mark Yick Hee v. U. S., C. C. A., 223 Fed. 732; Erber v. U. S., C. C. A., 234 Fed. 221; McGinniss v. U. S., C. C. A., 256 Fed. 621; Freed v. U. S., 266 Fed. 1012.

2 Bandy v. U. S., C. C. A., 245 Fed. 98; Knoell v. U. S., C. C. A., 239 Fed. 16.

3 Lung v. U. S., C. C. A., 218 Fed. 817; Diggs v. U. S., C. C. A., 220 Fed. 545; Knoell v. U. S., C. C. A., 239 Fed. 16; Graboyes v. U. S., C. C. A., 250 Fed. 793; Hollis v. U. S., C. C. A., 246 Fed. 832.

4 Diggs v. U. S., C. C. A., 220 Fed. 545, 552; Gretsch v. U. S., C. C. A., 242 Fed. 897; Bandy v. U. S., C. C. A., 245 Fed. 498; U. S. v. Murphy, 253 Fed. 404; McGinniss v. U. S., C. C. A., 256 Fed. 621.

5 Nee v. U. S., C. C. A., 267 Fed. 84.

courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."[1] Where there are two or more defendants any of them may take the stand against the objection of the others;[2] although the witness has been promised immunity,[3] and such promise has not been disclosed to those who refuse to testify.[4] In such a case, it was held to be incompetent for them to testify as to their intent in doing certain acts, when they had pleaded guilty.[5]

A defendant cannot compel another defendant to testify.[6] It is not essential to the admissibility of his testimony that he be first warned that what he says may be used against him.[7] When testifying voluntarily, he may be fully cross-examined as to the testimony which he gives.[8]

If the defendant does not take the stand, he is entitled to an instruction in the language of the statute, provided he requests it clearly, even although there has been no comment upon his failure to testify.[9] It is no error to refuse to give the following instructions: "The defendant has seen fit to rest his case upon the evidence which has been introduced on behalf of the government, including such testimony as may have been elicited upon cross-examination of the government's witnesses. You are instructed that he had a perfect right to do so, and that fact must in no wise prejudice you against him."[10]

If the defendant takes the stand his failure to testify as to any matter may be called to the attention of the jury.[11] Whether

§ 523e. [1] Ch. 37, 20 St. at L. 30, Comp. St., § 1465.

[2] Cooper v. U. S., C. C. A., 232 Fed. 81; Heitler v. U. S., C. C. A., 244 Fed. 140.

[3] Heitler v. U. S., C. C. A., 244 Fed. 140.

[4] Ibid.

[5] Cooper v. U. S., C. C. A., 232 Fed. 81, 85.

[6] Heitler v. U. S., C. C. A., 244 Fed. 140.

[7] Wilson v. U. S., 162 U. S. 613, 40 L. ed. 1090; Powers v. U. S., 223 U. S. 303, 56 L. ed. 448.

[8] Powers v. U. S., 223 U. S. 303, 56 L. ed. 448. See *infra*, § 523h.

[9] Stout v. U. S., C. C. A., 227 Fed. 803.

[10] Ibid.

[11] Diggs v. U. S., 220 Fed. 545, aff'd 242 U. S. 470.

the defendant testifies or not, there is no error in a charge that certain testimony given on behalf of the prosecution is uncontradicted.[12] A verdict will not be set aside because the jury during their deliberations discussed the failure of the defendant to take the stand.[13]

§ 523f. Cross-examination of defendant. By offering himself as a witness on his own behalf, the defendant waives his right to object to any question upon his cross-examination affecting matters to which he has testified upon the direct,[1] and to all which may effect his credibility,[2] although he may object to such of the latter as tend to degrade him[3] or to render him liable to prosecution for another crime.[4] It has been held that he may be asked whether he has been convicted of another crime.[5] Upon the second trial for a criminal offense, it was not error to permit the defendant, when testifying in his own behalf, to be asked upon cross-examination if he did not feign insanity upon his first trial; nor, when he denies this, to admit the testimony of other witnesses as to his demeanor on and during the first trial, as both affecting his credibility as a witness and tending to show his guilt of the offense charged.[6] Upon defendant's cross-examination, it is proper to show that his license as a detective had been revoked after a judicial investigation resulting from an article published in a newspaper owned by a person his animosity towards whom was a material fact.[7] But it has been held: that his cross-examination may not extend beyond the subject of his direct examination;[8] and that impeaching questions concerning an involuntary confession pre-

12 Shea v. U. S., C. C. A., 251 Fed. 440.

13 Stout v. U. S., C. C. A., 227 Fed. 799.

§ 523f. 1 Powers v. U. S., 223 U. S. 303, 56 L. ed. 448.

2 Waller v. U. S., C. C. A., 179 Fed. 810, 31 L. R. A. (N. S.) 113; Franklin v. U. S., C. C. A., 193 Fed. 334; MacKnight v. U. S., C. C. A., 263 Fed. 832.

3 Bombarger v. U. S., C. C. A., 219 Fed. 841, 843.

4 See MacKnight v. U. S., C. C. A., 263 Fed. 832.

5 MacKnight v. U. S., C. C. A., 263 Fed. 832, 840.

6 Waller v. U. S., C. C. A., 31 L. R. A. (N. S.) 113, 179 Fed. 810.

7 Franklin v. U. S., C. C. A., 193 Fed. 334.

8 Harrold v. Territory of Oklahoma, C. C. A., 169 Fed. 47; Paquin v. U. S., C. C. A., 251 Fed. 579.

viously made by him, to which he has not referred, if admitted, violate his constitutional rights.[9]

It has been held to be improper to ask the defendant whether sometime after the date of the alleged offense he had attempted to bribe an officer to delay his arrest;[10] and to ask a bankrupt indicted for concealing assets: "Didn't you sport in a $3,000 auto? You sported in an auto two or three days before the adjudication. Didn't you fly around Mobile just a few days after you were adjudicated a bankrupt?"[11]

A new trial may be granted because the District Attorney upon cross examination of the accused asked degrading questions which are clearly irrelevant and immaterial, and tend to prejudice the accused with the jury.[12]

§ 523g. Confessions. The confession of the defendant is not admitted in evidence unless it is voluntary[1] and supported by proof of *corpus delicti*.[2]

Upon the trial of the charge of receiving stolen property of the United States with the knowledge that it was stolen, the defendant's confession is sufficiently corroborated by proof that the property was issued to a soldier; that it was found in the defendant's possession, and that the defendant's place of business was very near where the soldier was stationed.[3] Proof that a large quantity of intoxicating liquor was found in the defendant's residence was held not sufficient corroboration of the charge of transporting liquor from a point outside the State so as to corroborate his confession.[4]

9 Harrold v. Territory of Oklahoma, C. C. A., 169 Fed. 47. But see Lepper v. U. S., C. C. A., 233 Fed. 227.

10 Paquin v. U. S., C. C. A., 251 Fed. 979.

11 Meyer v. U. S., C. C. A., 220 Fed. 822, 826. In the same case where the trustee had testified that he had brought a suit against the defendant's wife to recover an automobile it was error to exclude the question by defendant's counsel whether the suit was dismissed for want of evidence.

12 Wharton's Criminal Evidence, 10th Ed., I, p. 56; People v. Wells, 100 Cal. 459, 34 Pac. 1078, and cases cited. See Bombarger v. U. S., C. C. A., 219 Fed. 841, 843.

§ 523g. 1 Purpura v. U. S., C. C. A., 262 Fed. 473.

2 Martin v. U. S., C. C. A., 264 Fed. 950.

3 Bolland v. U. S., C. C. A., 238 Fed. 529.

4 Martin v. U. S., C. C. A., 264 Fed. 950.

A plea of guilty to indictment in the State court based upon the same facts is admissible in the Federal court as a confession.[5]

A confession was not admitted when made after the defendant had been detained twenty-four hours in the charge of government officers who told him that they believed him guilty and had evidence that made it look bad for him.[6]

By the Bankruptcy Law no testimony given by the bankrupt upon his examination in the proceedings in bankruptcy "shall be offered in evidence against him in any criminal proceeding."[7] This does not exempt him from an indictment for perjury then committed,[8] nor prevent the admission in evidence of his schedules upon the trial of an indictment for concealing his assets.[9] Upon the trial of an indictment for perjury his testimony when under examination before another officer cannot be admitted against him.[10] Voluntary statements made in bankruptcy proceedings by others than the bankrupt are admissible against him in prosecutions for a conspiracy to conceal his assets.[11]

It is ordinarily for the court to determine whether a confession is voluntary,[12] and it has been held to be error in the first instance to permit the introduction before the jury of the evidence upon that question.[13] When the evidence upon the point is conflicting, it must be submitted to the jury.[14]

Papers found upon the defendant's person when he is arrested are presumptively owned by him[15] and are evidence against him,[16] although he may deny their ownership.[17] The fact that they were seized against his will is no objection to their

5 Ibid.

6 Purpura v. U. S., C. C. A., 262 Fed. 473.

7 30 St. at L. 544, 548, § 7.

8 Glickstein v. U. S., 222 U. S. 139, *infra*, § 639.

9 Johnson v. U. S., 228 U. S. 457.

10 Cameron v. U. S., 231 U. S. 710.

11 U. S. v. Knoell, 230 Fed. 509, 512.

12 Harrold v. Territory of Oklahoma, C. C. A., 169 Fed. 47.

13 Ibid.

14 Wilson v. U. S., 162 U. S. 613, 40 L. ed. 1090; Kent v. Porto Rico, 207 U. S. 113, 52 L. ed. 127; Shaw v. U. S., 180 Fed. 348.

15 Dean v. U. S., C. C. A., 246 Fed. 568.

16 Ibid.

17 Ibid.

admission.[18] Papers seized under a valid search warrant are also admitted;[19] but not when seized under a search warrant that is invalid,[20] or otherwise taken by force from his office or residence.[21]

The books of an unincorporated association of which he is a member may be admitted in evidence against him,[22] but not entries in a book of a corporation of which he is a stock holder but not a director, officer, or employee.[23] The entries in the books of a corporation are competent evidence against its officers and employees, upon proof of such connection and familiarity therewith as to justify an inference of actual acquaintance with their contents.[24] It was held that without such proof the books of a corporation are not competent evidence against its president and superintendent.[25]

It has been said that erroneous admission of a confession is not prejudicial error when the fact to which he confesses is otherwise abundantly proved.[26]

§ 523h. Evidence of other crimes. Evidence of the commission by the defendant of an independent crime is ordinarily inadmissible;[1] but evidence which is material or relevant upon the issues is not inadmissible because it tends to prove the commission of another crime,[2] although it is material only as to the

18 Weeks v. U. S., 232 U. S. 383, 392, 34 Sup. Ct. 341, 344, 58 L. ed. 652; U. S. v. Murphy, 264 Fed. 842, *supra*, § 487b.

19 Schenck v. U. S., 249 U. S. 48; Gouled v. U. S., 253 Fed. 770; U. S. v. Stilson, 254 Fed. 120, *supra*, § 487b.

20 Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. ed. 652; Silverthorne Lumber Co. v. U. S., 251 U. S. 385; Flagg v. U. S., C. C. A., 233 Fed. 481; Fitter v. U. S., 258 Fed. 567; U. S. v. Wong Quong Wong, 94 Fed. 832, *supra*, § 339a.

21 Ibid. *Supra*, § 339a.

22 Knauer v. U. S., C. C. A., 237 Fed. 108.

23 Carey v. Williams, C. C. A., 79 Fed. 906. But see Turnbull v. Payson, 95 U. S. 418, 24 L. ed. 437; Liggett v. Glenn, C. C. A., 51 Fed. 381.

24 Foster v. U. S., C. C. A., 178 Fed. 165, *supra*, § 332.

25 Worden v. U. S., C. C. A., 204 Fed. 1.

26 U. S. v. Stilson, 254 Fed. 120.

§ 523h. 1 Taliaferro v. U. S., C. C. A., 213 Fed. 25; Coyne v. U. S., C. C. A., 246 Fed. 120.

2 U. S. v. Rhodes, 112 Fed. 513; Bryant v. U. S., C. C. A., 257 Fed. 378. But see Shea v. U. S., C. C. A., 236 Fed. 97.

question of intent,[3] or motive,[4] or is evidence of a crime which is barred by the Statutes of Limitations.[5]

It is incompetent to prove that a witness has been previously indicted for another offense.[6] Evidence of previous conviction of a felony is competent to impeach the testimony of any witness, even the defendant.[7]

§ 523i. Evidence of identity. A photograph properly authenticated may be offered in evidence to prove the identity of the accused with the person whose conduct is relevant to the issues.[1] Such a photograph may be shown to witnesses, who can then testify that it is a fair representation of the face of a man concerning whose acts they testify.[2] Such testimony does not reach a high degree of proof.[3]

The testimony of a witness that a stranger called upon him and said that he, such caller, was the man who had registered at a hotel, the identity of such registrar being an issue upon a prosecution for perjury is hearsay, incompetent and inadmissible.[4] The admission of letters previously written in the name upon the register to the woman who went to the hotel with him, the object of the offer being to prove the similarity of character, habits, expressions and chirography between the writers as proved by other witnesses and letters written by a person differ-

3 Shea v. U. S., C. C. A., 236 Fed. 97; White v. U. S., C. C. A., 263 Fed. 17.

4 People v. Thau, 219 N. Y. 39.

5 U. S. v. Hougendobler, 218 Fed. 787.

6 Smith v. State, 79 Ala. 21; Bates v. State, 60 Ark. 450, 30 S. W. 890; Dotterer v. State, 172 Ind. 357, 88 N. E. 689; Kitteringham v. Dance, 58 Iowa 632, 12 N. W. 612; Hensley v. Commonwealth, 74 S. W. 677, 25 Ky. L. Rep. 48; Welch v. Commonwealth, 110 Ky. 105, 60 S. W. 948, 63 S. W. 984, 64 S. W. 262, 23 Ky. L. Rep. 151; Ashcraft v. Commonwealth, 60 S. W. 931, 22 Ky. L. Rep. 1542; State v. Wigger, 196 Mo. 90, 93 S. W. 390; Roop v. State, 58 N. J. L. 479, 34 Atl. 49; People v. Morrison, 194 N. Y. 175, 86 N. E. 1120, 128 Am. St. Rep. 552; People v. Morrison, 195 N. Y. 116, 88 N. E. 21, 133 Am. St. Rep. 780, 16 Ann. Cas. 837; People v. Cascone, 185 N. Y. 317, 78 N. E. 287; Van Bokkelen v. Berdell, 130 N. Y. 141, 29 N. E. 254; Kober v. Miller, 38 Hun. 184; Sullivan v. Newman, 17 N. Y. Suppl. 424.

7 MacKnight v. U. S., C. C. A., 263 Fed. 832, 840.

§ 523i. 1 Yee Et (Ep.) v. U. S., C. C. A., 222 Fed. 66.

2 Yee Et (Ep.) v. U. S., C. C. A., 222 Fed. 66.

3 Ibid.

4 Safford v. U. S., C. C. A., 252 Fed. 471.

ent from the one who according to the testimony, which was the subject of the indictment had signed the register, was held not to be prejudicial.[5]

§ 523j. Evidence of presence of defendant in locality of crime. An entry in a diary or notebook in the possession of the defendant when he was arrested stating that he was in a place at a date there named was admitted as evidence of that fact although the hand writing was not proved.[1]

§ 523k. Proof of hand writing in criminal cases. In the absence of a statute as a general rule, the genuineness of hand writing cannot be determined by comparing it with any other transcript of the party except other papers admitted to be in his hand writing, which are in evidence for some other purpose.[1]

The act of February 26, 1913, provides, "In any proceeding before a court or judicial officer of the United States where the genuineness of the hand writing of any person may be involved, any admitted or proved hand writing of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, or court, or officer conducting such proceeding, to prove, or disprove such genuineness."[2] This statute applies to criminal as well as to civil cases.[3]

The cases construing this statute have been previously considered.[4]

§ 5231. Evidence in prohibition cases. By the act of October 28, 1919, sometimes known as the "Volstead Law," "No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending

5 Ibid.

§ 523j. 1 In Dean v. U. S., C. C. A., 246 Fed. 568, a prosecution for altering a postal money order issued at Macon on Saturday, December 26th, where accused denied that the order was issued to him, or that he was in Macon on that day, an entry in a notebook taken from his possession, "Macon 45 Stat. 12.26" held that this was at least slight evidence that accused was in Macon on the day the order was issued.

§ 523k. 1 Hickory v. U. S., 151 U. S. 303, 38 L. ed. 170. See Moore v. U. S., 91 U. S. 271, 23 L. ed. 346; Rogers v. Ritter, 12 Wall. 317, 20 L. ed. 417.

2 The Act of February 26, 1913, 37 St. at L. 683, ch. 79, Comp. St., § 1471.

3 Dean v. U. S., C. C. A., 246 Fed. 368.

4 *Supra*, § 332a.

and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying."[1]

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."[2]

Where intoxicating liquor was stored in the basement of a hotel, the location and character of the place raised presumption that the liquor was kept in violation of the National Prohibition Act, although the hotelkeeper disclaimed ownership, and it was claimed by one having a permit to use it for certain stated purposes.[3]

§ 523m. Evidence in prosecutions for conspiracy. Under an indictment charging a conspiracy to defraud the United States, evidence may be admitted of overt acts not specifically named in the indictment.[1] Under an indictment charging defendants as individuals with conspiracy to defraud the United States by means of fraudulent and collusive bids for the furnishing of coal, evidence was admitted which showed that the bids were made in the name of corporations of which defendants were officers and were signed by defendants as such officers.[2] The declarations[3] or admissions[4] of conspirators during the existence of their unlawful combination and in furtherance thereof, are evidence against the rest, but not a declaration or admission

§ 5231. 1 41 St. at L. 305, ch. —, Title II, § 30. See *supra*, § 339a.

2 Ch. 885, § 36, Comp. St., § 10136½t. *Supra*, §§ 487a, 506q.

3 U. S. v. Masters, 267 Fed. 581. But see U. S. v. Rykowski, 267 Fed. 866.

§ 523m. 1 Houston v. U. S., 217 Fed. 852.

2 Houston v. U. S., 217 Fed. 852.

3 Samara v. U. S., C. C. A., 263 Fed. 12.

4 Am. Fur. v. U. S., 2 Peters 358, 7 L. ed. 450; Wiborg v. U. S., 163

made before the conspiracy was formed.[5] Nor after it was terminated.[6] Nor a declaration not made in furtherance of the conspiracy, nor to effectuate its purposes.[7]

§ 523n. Evidence in trials for treason. By the Constitution, "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open court.

"The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." [1]

By the Criminal Code, which re-enacts the Revised Statutes in this respect, "§ 1. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." [2]

"§ 2. Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States." [3]

"§ 3. Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the

U. S. 632, 16 Sup. Ct. 1127, 41 L. ed. 289.

5 Halsman v. U. S., C. C. A., 248 Fed. 193, 196.

6 Erber v. U. S., C. C. A., 234 Fed. 221; Lew Moy v. U. S., C. C. A., 237 Fed. 50.

7 Halsman v. U. S., C. C. A., 248 Fed. 193, 196.

§ 523n. 1 Article 3, Section 3.

2 Criminal Code, § 1, Act of March 4, 1909, ch. 321, 35 St. at L. 1088, U. S. R. S., § 5331, Comp. St., § 10165.

3 Criminal Code, § 2, Act of March 4, 1909, ch. 321, 35 St. at L. 1088, U. S. R. S., § 5332, Comp. St., § 10166.

United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be imprisoned not more than seven years and fined not more than one thousand dollars."[4]

"§ 4. Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and shall, moreover, be incapable of holding any office under the United States."[5]

"§ 6. If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars, or imprisoned not more than six years, or both."[6]

It seems that Congress has no power to enact a statute punishing under a different name conduct which the Constitution declares to be treason, and make the defendant liable to conviction without the testimony of two witnesses against him.[7] A statute penalizing a conspiracy to commit treason is valid, and the two witnesses are not required to support a conviction thereunder,[8] provided that no treasonable act has been committed.[9] The statute was valid which made it a criminal offense to "by word or act support or favor the cause of any country

4 Criminal Code, § 3, Act of March 4, 1909, ch. 321, 35 St. at L. 1088, U. S. R. S., § 5333, Comp. St., § 10167.

5 Criminal Code, § 4, Act of March 4, 1909, ch. 321, 35 St. at L. 1088, U. S. R. S., § 5334, Comp. St., § 10168.

6 Criminal Code, § 6, U. S. R. S., § 5336, Act of March 4, 1909, 35 St. at L. 1089, Comp. St., § 10170.

7 Wimmer v. U. S., C. C. A., 264 Fed. 11, 12.

8 U. S. v. Fries, Wharton State Trials, Fed. Cas. No. 5,127. See *Ex parte* Bollman, 4 Cranch 75, 2 L. ed. 554; Bryant v. U. S., C. C. A., 257 Fed. 378, 386, 387.

9 See *supra*, § 506c.

with which the United States is at war or by word or act oppose the cause of the United States therein."[10]

The words, "overt act," are derived from the act of Edward III, 25, which uses the phrase "and thereof be probably attainted of open deed by people of their condition."

The requirement of two witnesses to prove an overt act is contained in Chapter 12 of the first year of Edward VI and Chapter 11 of the fifth and sixth year of Edward VI.

The overt act must be an act committed in furtherance of the crime.[11] Overt acts have been thus defined: "Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."[12] An overt act may be an act innocent in itself.[13] It is enough if the overt act shows the intention of the defendant, thereby to aid in giving the aid and comfort.[14] The aid and comfort need not reach the enemy.[15]

To levy war upon the United States there must be an actual assemblage of men in force,[16] to resist the Government.[17] A riot is not treason.[18]

10 Act of June 15, 1917, ch. 30, Title 1, § 3, 40 St. at L. 219, as May 16, 1918, ch. 75, § 1, 40 St. at L. 553, Comp. St., § 10212c; Wimmer v. U. S., C. C. A., 264 Fed. 11, 12.

11 U. S. v. Robinson, 259 Fed. 685, 690.

12 Reading, C. J., in Rex v. Casement, quoted with approval by Learned Hand, J., in U. S. v. Robinson, 259 Fed. 685, 690.

13 U. S. v. Fricke, 259 Fed. 673, 677.

14 Ibid.; U. S. v. Robinson, 259 Fed. 685, 690.

15 Lord Preston's Case, 12 How. St. Tr. 64; Rex v. Hensey, 1 Burr. 643, 19 How. St. Tr. 1342; Rex v. Stone, 25 How. St. Tr. 1171; U. S. v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254; U. S. v. Robinson, 259 Fed. 685, 690.

16 *Ex parte* Bollman, 4 Cranch 75, 2 L. ed. 554; Burr's Trial.

17 Bryant v. U. S., C. C. A., 257 Fed. 378, 387.

18 U. S. v. Castner Hanway, U. S. C. C., E. D., Pa., November and December, 1851. Hanway had headed a mob of whites and blacks which successfully prevented the capture of some fugitive slaves by a deputy marshal of the United States in Lancaster county, Pennsylvania, in September, 1850. In the course of the affair the slave-owner was killed. The trial was before Mr. Justice Grier and Judge Kane with a jury. The argument of John M. Read for the defendant is said to have been one of the ablest speeches ever made at the American bar, and to have contained a learned and lucid exposition of the law of treason. Unfortunately but a brief

It has been held that two witnesses are required to each overt

abstract of it is preserved. Convinced by his argument, Mr. Justice Grier charged the jury as follows:

"But when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government, by numbers and armed force, it will not amount to treason."

"The conspiracy and the insurrection connected with it must be to affect something of a public nature, to overthrow the government or to nullify some law of the United States, and to totally hinder its execution or compel its repeal. A band of smugglers may be said to set the laws at defiance, and to have conspired together for that purpose, and to resist by armed force the execution of the revenue laws; they may have battles with officers of the revenue, in which numbers may be slain on both sides, and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but merely for private lucre or advantage. A whole neighborhood of debtors may conspire together to resist the sheriff and his officers in executing process on their property; they may perpetrate their resistance by force of arms; may kill the officer and his assistants, and yet they will be liable only as felons and not as traitors. Their insurrection is of a private not of a public nature; their object is to hinder or remedy a private not a public grievance. A number of fugitive slaves may infest a neighborhood and be encouraged by the neighbors in combining to resist the capture of any of their number; they may resist with force and arms their master or the public officer, who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object and connected with no public purpose. It is true that, constructively, they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws, and the antirenters the execution laws. Their insurrection, their violence, however great their number may be, so long as it is merely to attain some personal or private end of their own, cannot be called levying war. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is the public and National, the other private and personal. Without desiring to invade the prerogatives of the jury in judging the facts of this case, the court feel bound to say that they do not think the transaction with which the prisoner is charged with being connected rises to the dignity of treason or a levying of war, for want of a proof of previous conspiracy to make general and public resistance to any law of the United States."

A verbatim report of the trial, excepting the speech of Mr. Read, is to be found in a rare pamphlet published by King & Baird at Philadelphia in 1852.

In 1892, an attempt was made to suppress the activities of the Trade Unions at Homestead, Pennsylvania, by indicting their leaders for treason

act upon which a conviction is based;[19] but that when the overt act is single, continuous, and composite, made up of several circumstances and passing through several stages it is not necessary that there should be two witnesses to each circumstance at each stage.[20]

§ 523o. Right to a speedy trial. By the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial." "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses."[1] Nor prevent a removal to another district subsequent to an indictment for another offense.[2] It has no relation to the place of trial.[3]

It has been said that it means a trial so soon after indictment as the prosecution can, by a fair exercise of reasonable diligence, prepare for trial; regard being had to the terms of the court.[4] By acquiescence in adjournments,[5] or by the interposition of a dilatory plea,[6] defendant waives the objection that he has not

against the State of Pennsylvania because of riots which accompanied a strike. The Chief Justice of the State charged the grand jury in language which authorized and was followed by such an indictment. People v. Hugh O'Donnell and 30 others, 12 Pa. Co. Ct. 97, per Paxson, C. J. The author then wrote for the Albany Law Journal a history of Treason Trials in the United States. (46 Alb. L. J. 345, Oct. 29, 1892.) This referred to the Pennsylvania indictments and quoted the charge of Grier, J., which had just been quoted here. The article was supported by vigorous editorials by that accomplished scholar Irving Browne in the Albany Law Journal and Ex Judge Seymour D. Thompson in the American Law Review (26 Am. Law. Rev. 912), which criticised with great severity the charge by Chief Justice Paxson. This accomplished the abandonment of the indictments.

19 U. S. v. Fricke, 259 Fed. 673, 677; U. S. v. Robinson, 259 Fed. 685, 694. But see U. S. v. Mitchell, 2 Dallas 348, Fed. Cas. No. 15,788; Regine v. McCafferty, 10 Cox Cr. Cas. 603.

20 U. S. v. Fricke, 259 Fed. 673, 677.

§ 523o. 1 Beavers v. Haubert, 198 U. S. 77, 87.

2 Ibid.

3 Ibid.

4 Cooley's Constitutional Limitations, 6th ed., 377; citing U. S. v. Fox, 3 Mont. 512; Creston v. Nye, 74 Iowa 369.

5 Philips v. U. S., C. C. A., 201 Fed. 259.

6 MacKnight v. U. S., C. C. A., 263 Fed. 832.

had a speedy trial, except under extraordinary circumstances. A fugitive from justice cannot object that he has had no speedy trial.[7]

It seems that the proper remedy in case a speedy trial is denied would be an application for a writ of mandamus,[8] or for a reduction of the bail, or for release on bail in case bail has been denied.[9]

§ 524. List of jurors and witnesses. By the Revised Statutes, "When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."[1]

"The provision is not directory only, but mandatory to the government, and its purpose is to inform the defendant of the testimony which he will have to meet and to enable him to prepare his defense."[2]

It refers to the list of the regular panel of jurors in attendance at the opening of the trial.[3] It does not require a list of the jurors subsequently brought in on a special venire to complete the jury.[4] If the defendant seasonably objects to a failure to furnish him with a copy and list, the trial cannot lawfully proceed until the statute has been obeyed;[5] but such an objection may be waived.[6] It must be raised before the jury is sworn.[7]

When a witness is called, whose name is not upon the list that has been delivered to the defendant, his counsel must im-

7 Hart v. U. S., C. C. A., 183 Fed. 368.

8 *Supra*, § 457.

9 *Ex parte* Caplis, 58 Miss. 358; *supra*, § 493.

§ 524. 1 U. S. R. S., § 1033.

2 Logan v. U. S., 144 U. S. 263, 36 L. ed. 429.

3 Stewart v. U. S., C. C. A., 211 Fed. 41.

4 Ibid.

5 Logan v. U. S., 144 U. S. 263, 36 L. ed. 429.

6 Hickory v. U. S., 151 U. S. 303, 38 L. ed. 170; U. S. v. Cornell, 2 Mason 91.

7 U. S. v. Curtis, 4 Mason 232.

mediately object.[8] It is too late to raise the objection after the testimony in chief of such witness has been concluded.[9]

The two days' time must be exclusive of the day when the papers are delivered and of that when the trial begins.[10]

The arraignment is no part of the trial and the accused is not entitled to these papers before he is obliged to plead.[11]

The caption must be included in the copy of the indictment furnished.[12] The places of abode of the jurors and witnesses should also be designated.[13] It is insufficient to state the names of the counties alone.[14] The townships should also be stated.[15] Their occupations need not be.[16] The names of witnesses, who are used for rebuttal, need not be stated in the list.[17]

In cases not capital, the prisoner is not entitled to a list of the witnesses,[18] nor, to a list of the jurors;[19] nor to a copy of the indictment at the expense of the government.[20]

A rule forbidding the disclosure of the names of the jurymen more than two days before the beginning of the term is valid and may be enforced in all cases which are not capital.[21]

A State statute or practice requiring that the names of the witnesses be indorsed on the indictment is not followed by the Federal court.[22]

A copy of the indictment may be given the accused at his expense after his arrest.[23]

The defendant, no matter what the charge against him may be, is not entitled to a list of witnesses examined by the grand

8 Hickory v. U. S., 151 U. S. 303, 38 L. ed. 170.

9 Ibid.

10 U. S. v. Dow, Taney, 34.

11 U. S. v. Curtis, 4 Mason 232; U. S. v. Neverson, 1 Mackey, D. C. 152. *Contra*, U. S. v. Dow, Taney, 34.

12 U. S. v. Insurgents, 2 Dallas 335, 1 L. ed. 404.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid.

17 Goldsby v. U. S., 160 U. S. 70, 40 L. ed. 343.

18 U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; U. S. v. Williams, 1 Cranch, C. C. 178; U. S. v. Wood, 3 Wash. C. C. 440; Balliet v. U. S., C. C. A., 129 Fed. 689, 64 C. C. A. 201.

19 Ibid.

20 U. S. v. Van Duzee, 140 U. S. 169, 35 L. ed. 399; Shelp v. U. S., C. C. A., 81 Fed. 694.

21 Hendrikson v. U. S., C. C. A., 249 Fed. 34.

22 U. S. v. Aviles, 222 Fed. 474.

23 U. S. v. Williams, 7 Cranch, C. C. 178; U. S. v. Curtis, 4 Mason 232.

jury upon the subject of his indictment;[24] but when there has been no preliminary examination the court may order that he be given a list of such witnesses,[25] either absolutely or as an alternative to permitting a continuance for further preparation for trial.[26]

§ 525. Place of trial. The Constitution ordains: "The Trial, of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by law have directed."[1]

The Sixth Amendment ordains: "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[2]

This amendment does not apply to crimes committed in territory outside of the States of the Union although within the jurisdiction of the United States.[3]

It applies to corporations.[4]

It does not prevent the trial of an offense committed in different districts in either of them;[5] nor a trial for a conspiracy in any district where an overt act has been committed.[6]

By the Judicial Code: "All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division

24 U. S. v. Aviles, 222 Fed. 474.

25 U. S. v. Southmayd, 6 Bissell 321.

26 U. S. v. Aviles, 222 Fed. 474.

§ 525. 1 Article III, Section 2.

2 See § 507 *supra*.

3 U. S. v. Dawson, 15 How. 467, 487; Cook v. U. S., 138 U. S. 157, 34 L. ed. 906.

4 John Gund Brewing Co. v. U. S., C. C. A., 204 Fed. 17.

5 Hyde v. U. S., 225 U. S. 347, 56 L. ed. 1114.

6 Robinson v. U. S., C. C. A., 172 Fed. 105.

to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein."[7] This does not prevent the finding of an indictment division of the district different from that where the crime has been committed.[8] The statutory provision dividing the Southern District of Ohio into two divisions[9] does not require that prosecutions instituted in one shall be transferred to the other when the next term is held in the latter division.[10]

§ 525a. Place of trial of offenses committed upon the high seas. By the Judicial Code: "The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."[1]

By the Criminal Code: "The crimes and offenses defined in this chapter shall be punished as herein prescribed:

First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board, any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.

Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the International boundary line.

Third. When committed within or on any lands reserved or

7 Jud. Code, § 53, St. at L., Comp. St., § 1035.

8 Biggerstaff v. U. S., C. C. A., 260 Fed. 927. Following Logan v. U. S., 144 U. S. 263, 36 L. ed. 429. *Contra,* U. S. v. Chennault, 230 Fed. 942.

9 Jud. Code, § 100, 36 St. at L. 1121.

10 Patterson v. U. S., C. C. A., 222 Fed. 599.

§ 525a. 1 Jud. Code, § 41, reenacting 36 St. at L. 1087.

acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States."[2]

These statutes are not repugnant to the Sixth Amendment.[3]

The open waters of the Great Lakes are high seas within the meaning of the statute;[4] but the waters within a marine league of the coast of the State are within the State and an offense there committed must be in such State tried.[5]

The statute giving the District Courts of the Southern and Eastern Districts of New York concurrent jurisdiction over the waters within certain counties and over all seizures made and all matters done in such waters does not give the District Court for the Southern District jurisdiction of an offense committed on the high seas where the vessel, after the commission of such offense, was brought directly to her pier in the Eastern District.[6]

Where the offense had been committed on a vessel, which afterwards anchored for quarantine in New York harbor, within the Eastern District of that State, and the offender was there delivered to the marshal for the Southern District, and in that district a warrant for his arrest was first issued, another statute giving both courts concurrent jurisdiction over those waters, it was held that the Federal court of the latter, the Second District, had jurisdiction.[7]

The words "out of the jurisdiction of any particular State" mean "out of the jurisdiction of any particular State of the United States."[8] It has been held, that the statute does not

2 Criminal Code, § 272, U. S. R. S., § 5339; Act of September 4, 1890, ch. 874, 26 St. at L. 424; Act of March 4, 1909, ch. 321, § 272, 35 St. at L. 1142, Comp. St., § 10445.

3 Cook v. U. S., 138 U. S. 157, 34 L. ed. 906, 20 Op. A. G. 590; Jones v. U. S., 202 U. S. 203; Hyde v. U S., 225 U. S. 347, 56 L. ed. 1114.

4 U. S. v. Rogers, 150 U. S. 249, 37 L. ed. 1071.

5 U. S. v. Newark Meadow Imp. Co., 173 Fed. 426; Miller v. U. S., C. C. A., 242 Fed. 907.

6 U. S. v. Townsend, 219 Fed. 761.

7 U. S. v. Bird, 1 Sprague 299.

8 U. S. v. Furlong, 5 Wheaton 184. In case of murder on Navassa Island, it was held that the Circuit

apply to a crime committed in a continental Territory of the United States.[9]

The statute contemplates two classes of cases: one in which the offender is apprehended without the limits of the United States and brought in custody into some judicial district; the other in which he is first taken in legal custody after his arrival within some district of the United States; and it does not give the District Attorney of the United States the election in which of two districts to proceed to trial.[10]

The offender may be tried in the district where he is first arrested, although he landed in another district.[11]

If a vessel on which the offense was committed was bound to a port in the district and the accused is there in custody, this is *prima facie* evidence that he was there first arrested.[12] It is not usual to offer evidence to prove that the accused was first arrested in the district where he was tried.[13]

An averment that an offense was committed on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, is sufficient without any other particular designation of the place of the offense,[14] but it is the safer practice to name the vessel, island, or territory where the crime was committed.[15]

Where there was a special verdict finding that the offense was committed at a certain place described and designated, but not finding whether that place was within the jurisdiction of a State, or within a district of the United States, or upon the high seas: it was held to be insufficient.[16]

When no objection upon this ground had been taken upon the trial, it was held that a motion in arrest of judgment, on

Court of the United States for the District of Maryland had jurisdiction to try the charge; but where the offense was committed upon the New Hebrides Islands, the Attorney General advised that no Federal Court could have jurisdiction to try the case. 20 Op. A. G. 590.

9 U. S. v. Alberty, 1 Hempstead 44.

10 U. S. v. Bird, 1 Sprague 299.

11 U. S. v. Thompson, 1 Sumner 168; U. S. v. Carrie, 23 Law. Rep. 145; U. S. v. Baker, 5 Blatch. 6.

12 U. S. v. Mingo, 2 Curtis 1. See U. S. v. M'Gill, 4 Dallas 425, 428, note, 1 L. ed. 894, 895, note, s. c., 1 Wash. C. C. 463.

13 U. S. v. Mingo, 2 Curtis 1.

14 U. S. v. Gibert, 2 Sumner 19.

15 Anderson v. U. S., 170 U. S. 481; 42 L. ed. 1116.

16 U. S. v. Jackalow, 1 Black 484, 17 L. ed. 225.

the ground that no proof had been adduced in support of the averment that the place of trial was the District and Circuit in which the defendants were first brought and apprehended, must be denied.[17]

§ 525b. Place of trial of offenses begun in one district and completed in another. By the Judicial Code: "When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner, as if it had been actually and wholly committed therein."[1]

In a case where the crime consists in the mailing of a letter offering a bribe, it may be punished in the place where the letter was delivered although the briber and letter writer was never there.[2] Where it consists in the impersonation of an officer of the United States by telephone, it is committed where the telephone message is received.[3] The same rule applies where the crime consists in an agreement consummated by the acceptance of an offer.[4] Where a fraud consisted in the issue of a certificate of deposit signed in blank by the cashier of a national bank in one State, filled in by another in a second State and negotiated in a third State, an indictment in the first State was sustained.[5] This applies to the thief as well as the receiver.[6]

Where the crime consists in a failure to file a paper[7] in a public office or to make a report to a public officer,[8] the indictment must be found in the district where the office is located; and the omission is not a continuing offense, although the busi-

17 U. S. v. Crawford, 1 N. Y. Legal Observer 288, 2 Fed. Cas. No. 14,890.

§ 525b. 1 Jud. Code, § 42, 36 St. at L. 1087, re-enacting U. S. R. S., § 731.

2 *Re* Palliser, 136 U. S. 257, 34 L. ed. 514, in which the writer was counsel; Benson v. Henkel, 198 U. S. 1, 15, 49 L. ed. 919, 924. As to proof of place of mailing a letter, see Underwood v. U. S., C. C. A., 267 Fed. 412, 416.

3 Lamar v. U. S., 240 U. S. 60.

4 Burton v. U. S., 202 U. S. 344, 50 L. ed. 1057.

5 Simpson v. U. S., C. C. A., 229 Fed. 940.

6 Morris v. U. S., C. C. A., 229 Fed. 516; U. S. v. Sullivan, 250 Fed. 632.

7 U. S. v. Lambardo, 241 U. S. 73, affirming 228 Fed. 980. But see U. S. v. Buchanan, 238 Fed. 877.

8 Rumely v. McCarthy, 250 U. S. 283.

ness to which the paper or report relates is pursued in another district.

§ 525c. Place of trial of offenses under the Interstate Commerce Law. By the Act of February 19, 1903, commonly known as the Elkins Law, which was intended to prevent discrimination between shippers by carriers, after providing for the punishment of the grant, or acceptance, offer, solicitation, or receipt of rebates, concessions, or discriminations, in respect to the transportation of any property in interstate or foreign commerce by any common carrier;[1] it is provided, "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."[2] This statute is constitutional.[3]

It authorized a prosecution for the transportation of property at less than the published rate in any district through which the property is carried at the unlawful rates.[4]

By the Act of February 13, 1913, punishing the larceny of goods in interstate or foreign shipment and their receipt knowing that they have been stolen, "prosecutions therefor may be instituted in any district wherein the crime shall have been committed. The carrying or transporting of any such freight, express, baggage, goods, or chattels from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties above described for unlawful taking, and prosecutions therefor may be instituted in any district into which such freight, express, baggage, goods, or chattels shall have been re-

§ 525c. 1 Ch. 708, § 1, 32 St. at L. 847, Comp. St., § 8597.

2 Ibid. See Northern Central Ry. Co. v. U. S., C. C. A., 241 Fed. 25.

3 Armour Packing Co. v. U. S., 209 U. S. 56, 70, 73.

4 Ibid. But see U. S. v. Albert Steinfeld & Co., 209 Fed. 904, under Neutrality Resolution, March 14, 1912, No. 10, 37 St. at L. 630.

moved or into which they shall have been brought by such offender."[5]

§ 525d. Place of trial for capital offenses. The Judicial Code provides: "The trial of offenses, punishable with death shall be had in the county where the offense was committed when that can be done without inconvenience."[1]

This section does not apply to offenses committed upon the high seas or the Guano Islands.[2] It has been doubted whether this section applies to a crime committed in a place within the exclusive jurisdiction of the United States.[3]

The statute does not contemplate a transfer of the cause to another court and the court where the indictment was found does not lose jurisdiction by ordering such a transfer for trial.[4]

It has been said, that, since it is no longer necessary to draw the jury from the county, this rule is of less importance than formerly;[5] and that the place of trial is to be determined by the discretion of court upon considerations of inconvenience.[6]

If a party goes to trial without demanding that he be tried in the county where the offense was committed, he waives his rights under this statute.[7]

"In all cases of murder or manslaughter the crime shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered, or other means employed which caused the death, without regard to the place where the death occurs."[8] An indictment for murder must aver the place of death,[9] but it is not necessary that an indictment which charges a capital offense shall allege the county where a crime was committed, provided that the judicial district of its commission is averred.[10]

5 Ch. 50, § 1, 37 St. at L. 670, Comp. St., § 8603.

§ 525d. 1 Jud. Code, § 40, 36 St. at L. 1087; re-enacting U. S. R. S., § 729.

2 Criminal Code, § 272, ch. 321, 35 St. at L. 1142, Comp. St., § 10445, 20 Op. A. G. 590. *Supra*, § 525a.

3 U. S. v. Cornell, 2 Mason 91.

4 Brown v. U. S., C. C. A., 257 Fed. 46.

5 U. S. v. Cornell, 2 Mason 91; U. S. v. Wilson, Baldwin, 78.

6 U. S. v. Cornell, 2 Mason 91; Brown v. U. S., C. C. A., 257 Fed. 46.

7 U. S. v. Cornell, 2 Mason 91.

8 Criminal Code, § 336, ch. 321, 35 St. at L. 1152, Comp. St., § 10510.

9 Ball v. U. S., 140 U. S. 118, 35 L. ed. 377.

10 U. S. v. Wilson, Baldwin, 79.

§ 525e. Place of trial for conspiracies. In the case of a conspiracy, where the overt acts are committed in different districts, the accused may be punished in either;[1] even in one where they have never been;[2] or in the place where the conspiracy was formed.[3]

A conspiracy to commit fraud by the use of the mails may be indicted wherever a letter has been mailed for such purpose.[4]

An indictment for a conspiracy to conceal a bankrupt's assets from his trustee may be tried in the district where the voluntary petition in bankruptcy was filed, although none of the goods were there concealed;[5] but an indictment for concealment of such property can be tried only in a district where part of the property was concealed.[6]

An indictment for a conspiracy to attach in the waters of the United States to munition ships infernal machines to explode while on the high seas may be tried within the United States, at the place of such attachment.[7]

An indictment for a conspiracy to defraud the United States by means of the bribery of an employee of the government cannot be tried at the place where drafts given as a bribe were paid when the employee received these and parted with the title thereto in another district where the conspiracy was formed and performed.[8]

§ 525f. Place of trial of offenses against the Prohibition Law. By the act of October 28, 1919: "In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such car-

§ 525e. 1 Lipman v. U. S., C. C. A., 219 Fed. 882; Easterday v. McCarthy, C. C. A., 256 Fed. 651.

2 Hyde v. U. S., 225 U. S. 347, 56 L. ed. 1114; U. S. v. Campbell, 179 Fed. 762; U. S. v. Wells, C. C. A., 192 Fed. 870, *certiorari* denied 225 U. S. 714, 56 L. ed. 1269; U. S. v. Reddin, 193 Fed. 798; U. S. v. Linton, 223 Fed. 677. *Supra*, § 506s.

3 De Orozco v. U. S., C. C. A., 237 Fed. 1008; Shea v. U. S., C. C. A., 236 Fed. 97.

4 Shea v. U. S., C. C. A., 236 Fed. 97.

5 Gretsch v. U. S., C. C. A., 231 Fed. 57.

6 Gretsch v. U. S., C. C. A., 242 Fed. 897.

7 Daeche v. U. S., C. C. A., 250 Fed. 566.

8 Salas v. U. S., C. C. A., 234 Fed. 842, reversing U. S. v. Burke, 218 Fed. 83.

rier to the consignee, his agent or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district."[1]

The offense of knowingly shipping from one State to another a package containing intoxicating liquor which is not labeled, so as plainly to show the name of the consignee, the nature of its contents, and the quantity therein contained,[2] may be punished in the district of shipment, and in the district into which the goods are shipped.[3]

§ 525g. Place of trial of offenses against the Pure Food and Drugs Act.

Under the Pure Food and Drugs Law,[1] jurisdiction exists in the court of the district from which the goods were shipped, although the defendant does not there reside.[2] The provision in the statute for the seizure of the adulterated or misbranded goods in any district where they may be found relates to civil proceedings only and does not affect the jurisdiction of a criminal prosecution.[3]

The place of the offense like any other fact may be proved by evidence, direct, indirect, or circumstantial.[4]

§ 525f. [1] 41 St. at L. 305, ch. —, title II, § 31, Comp. St., § 10138½r; *supra*, § 506q.

[2] Criminal Code, § 240, ch. 321, § 240, 35 St. at L. 1137, Comp. St., § 10410.

[3] U. S. v. Freeman, 239 U. S. 117.

§ 525g. [1] Act of June 30, 1906, ch. 3915, § 2, 34 St. at L. 768, Comp. St. Supp. 1911, p. 1354.

[2] U. S. v. J. L. Hopkins & Co., 199 Fed. 649.

[3] Ibid.

[4] Wallace v. U. S., C. C. A., 243 Fed. 300, 305, 306. "It is earnestly contended for plaintiff in error that the record fails to disclose any proof of the venue and that therefore there should be a reversal of the judgment. Careful perusal of the record reveals that no witness testified in so many words that the alleged conspiring and selling and giving away occurred within the Northern district of Illinois. While direct testimony of such fact (in most cases easily available) is desirable for greater certainty, yet venue, like any other fact, may be shown by evidence, direct, indirect or circumstantial. On cross-examination Davis was specifically asked the various places in Chicago where he had lived, and he named different streets which in his own testimony, as well as in the testimony of other persons, were referred to in connection with the acts charged, one of the streets being the same one on which it was testified Wallace's drug store was located; indeed, Davis testified that one of the places where he lived in Chicago, was

§ 525h. Right to a public trial. By the Sixth Amendment the accused must enjoy the right to a "public trial."

"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."[1]

"The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed. As the expression necessarily implies, a public trial is a trial at which the public is free to attend. It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken as the exclusive representatives of the public. Men may have no interest whatever in the trial, except to see how justice is done in the courts of their country. The qualifications of the broad scope of the constitutional provisions and of like provisions in the Constitutions of the State are few and are based upon considerations of public morals and peace and good order in the courtrooms."[2]

in such close proximity to Wallace's drug store that from it he could see into the store, and that in the telephone booth of that store, and sometimes in the cellar, Wallace would pass to Davis cocaine which Davis was to dispose of. Defendant's character witness Whitaker testified he knew Wallace was in the drug business at Thirty-Ninth and State streets. Taylor testified to working for the city of Chicago, and to getting packages of drugs from Wallace's drug store on his way to work. With the various streets thus identified by some evidence as being in the city of Chicago, it was not necessary, in order to prove the venue, that each of the witnesses who hereafter referred to the same streets in connection with incriminating acts occurring thereon must again identify the streets as being in Chicago. The record fully warranted the jury in finding that the venue of the offense was proved in Chicago, which is in the First revenue district of Illinois."

§ 525h. 1 Cooley's Constitutional Limitations, 6th ed., ch. X, p. 379.

2 Davis v. U. S., C. C. A., 247 Fed. 394, 395, 396.

So long as there is space in the courtroom without undue crowding the public should be freely admitted.[3] There can be no discrimination except for litigant attendants of the court, witnesses, and members of the bar;[4] provided that those applying for admission are orderly and not in such a condition to be a menace to public health.[5] Discriminations in favor of relatives of the accused,[6] friends of the accused,[7] and of respectable men selected by the marshal [8] have been held to be a denial of the right to a public trial. When the courtroom is overcrowded it can be cleared;[9] and disorderly spectators may be excluded;[10] but after the clearance there can be no discrimination between those re-admitted, except as is above described.[11]

Cases where the testimony was of such an obscene or indelicate nature that witnesses were likely to be embarrassed in giving it in public have by some courts been held to be an exception to the general rule.[12] Some courts have limited this

3 U. S. v. Davis, C. C. A., 247 Fed. 394.

4 Reagan v. U. S., C. C. A., 202 Fed. 488, 44 L. R. A. (N. S.) 583; Callahan v. U. S., C. C. A., 240 Fed. 683; Benedict v. People, 23 Colo. 126, 46 Pac. 637; State v. Callahan, 100 Minn. 63, 110 N. W. 342; State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487.

5 Lide v. State, 133 Ala. 43, 31 So. Rep. 953; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Tilton v. State, 5 Ga. App. 59, 62 S. E. 651; Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630.

6 Davis v. U. S., C. C. A., 247 Fed. 394.

7 People v. Yeager, 113 Mich. 228, 71 N. W. 491.

8 People v. Murray, 89 Mich. 276, 50 N. W. 995, 28 Am. State Rep. 294, 14 L. R. A. 809.

9 Benedict v. People, 23 Colo. 126, 46 Pac. 637; Myers v. State, 97 Ga. 76, 25 S. E. 252; Jackson v. Commonwealth, 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336; State v. Callahan, 100 Minn. 63, 110 N. W. 342; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330; Kugadt v. State, 38 Tex. Cr. 681, 44 S. W. 989.

10 Lide v. State, 133 Ala. 43, 31 So. Rep. 953; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Tilton v. State, 5 Ga. App. 59, 62 S. E. 651; Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630.

11 Davis v. U. S., C. C. A., 247 Fed. 394.

12 Reagan v. U. S., C. C. A., 202 Fed. 488, 44 L. R. A. (N. S.) 583; Callahan v. U S., C. C. A., 240 Fed. 683; Benedict v. People, 23 Colo. 126, 46 Pac. 637; State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487. See State v. Callahan, 100 Minn. 63, 110 N. W. 342; Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; State v. Hensley, 75 Ohio State 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277. *Contra,* State v. Osborne, 54

exception to the exclusion of minors;[13] others to minors and women.[14]

It is the duty of the defendant to make the objection that the trial is not public as soon as he learns of an improper order of the court or of improper conduct by the officers in that respect.[15]

§ 526. Challenges to petit jurors. "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."[1]

"If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made."[2]

"At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers."[3]

When a criminal prosecution is removed from a State court, the number of challenges is regulated by the statutes of the United States and not by the State law.[4]

The phrase "any other felony" in the statute first cited

Oregon 289, 103 Pac. 62, 20 Ann Cas. 627.

13 People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. State Rep. 108; Tilton v. State, 5 Ga. App. 59, 62 S. E. 651.

14 Tilton v. State, 5 Ga. App. 59, 62 S. E. 651; State v. McCool, 34 Kansas 617, 9 Pac. 745.

15 State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

§ 526. 1 Jud. Code, § 287, 36 St. at L. 1087, re-enacting U. S. R. S., § 819.

2 U. S. R. S., § 1031.

3 U. S. R. S., § 4303.

4 Georgia v. O'Grady, 3 Woods 496, Fed. Cas. No. 5,352.

designates other offenses than treason or capital offenses,[5] when the offense is declared by statute, either expressly or by implication, to be a felony, in cases where the punishment is not capital, the defendant is entitled to ten challenges. A crime is a felony where Congress does not define an offense, but merely punishes it by its common law name, and at common law it is a felony; and where Congress adopts a State law as to an offense, and under such State law it is a felony.[6] The charges of counterfeiting coin of the United States,[7] of breaking into a postoffice,[8] and of embezzling the funds of a bank,[9] are misdemeanors, and a party charged with one of these offenses is entitled to but three challenges, not to ten, as is the case with a defendant charged with a felony.[10]

When several defendants are tried together, they are all entitled to no more challenges than a single defendant,[11] and it has been held that the challenge of any one of them shall be counted against all.[12]

In another case, when they refused to unite in their challenges, the court allowed each defendant a single peremptory challenge and restricted him thereto.[13]

"There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress. That body has seen fit to treat several defendants, for this purpose, as one party. If the defendants would avail themselves of this privilege they must act accordingly. It may be, as is said to have been the fact in the trial of the present case, that all defendants may not wish to exercise the right of peremptory challenge as to the same person or persons, and that some may wish to challenge those who are unobjectionable to others. But this

5 U. S. v. Coppersmith, 4 Fed. 198.

6 U. S. v. Coppersmith, 4 Fed. 198.

7 U. S. v. Coppersmith, 4 Fed. 198.

8 Considine v. U. S., C. C. A., 112 Fed. 342, 50 C. C. A. 272.

9 Tyler v. U. S., C. C. A., 106 Fed. 137, 45 C. C. A. 247.

10 U. S. R. S., § 819.

11 Stilson v. U. S., 250 U. S. 583; Wilcox v. U. S., C. C. A., 161 Fed. 109. See *supra*, § 473b.

12 Wilcox v. U. S., C. C. A., 161 Fed. 109.

13 Schwartzberg v. U. S., C. C. A., 241 Fed. 348.

situation arises from the exercise of a privilege granted by the legislative authority and does not invalidate the law. The privilege must be taken with the limitations placed upon the manner of its exercise.''[14]

The accused has the right to see the jurors when he exercises his right of challenge[15] and to be present when the challenges are tried.[16] When the court prescribed an erroneous method of procedure in this respect, it was held that a general exception to its direction was sufficient and that the defendant was not required specifically to demand his right and then except to such denial.[17]

Challenges for cause and to the favor are regulated by the rules of the common law.[18] By the common law, a man is not a competent juror who is master, servant, steward or counsellor or either party, and may be challenged for the favor.[19] This rule still prevails in the courts of the United States[20] upon a criminal prosecution. A juror may be challenged for cause when he is in receipt of a salary from the United States.[21]

It is a good ground for a challenge for principal cause, that a juror has formed a positive, decided, substantial, deliberate and well-settled opinion as to the issue to be tried.[22] Chief

14 Stilson v. U. S., 250 U. S. 583, 586.

15 Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011; U. S. v. Pointer, 151 U. S. 396, 409, 14 Sup. Ct. 410, 38 L. ed. 208.

16 Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

17 Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

18 Reynolds v. U. S., 98 U. S. 145, 25 L. ed. 244.

19 Blackstone's Commentaries; Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465.

20 Ibid.

21 Ibid.

22 Reynolds v. U. S., 98 U. S. 145, 155, 25 L. ed. 244, 246. ''The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of

Justice Marshall stated the rule to be: that "light impressions which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair con-

partiality. The question thus presented is one of mixed law and fact and to be tried, so far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." Reynolds v. U. S., 98 U. S. 145, 155, 156, 25 L. ed. 244, 246, 247, per Chief Justice Waite. "In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so." Ibid., 98 U. S. 145, 156, 157, 25 L. ed. 244, 246, 247, per Chief Justice Waite.

It was held that, under the Alaska Criminal Code, it was no ground of challenge to the favor if a juror had expressed an opinion, as to the guilt of the defendant, that it would require evidence to remove, when the juror testified that he would decide the case impartially on the evidence, uninfluenced by such opinions; Dolan v. U. S., C. C. A., 116 Fed. 578, 54 C. C. A. 34; nor that the defendant was indicted with two others for robbery, one of whom had been previously tried and convicted, that the juror had read all the public accounts for the former trial, heard the matters discussed by persons then present, formed a fixed opinion as to the guilt or innocence of the one then tried, and had formed an opinion as to the guilt or innocence of the defendant, when he testified that he had no such opinion at the time, and if selected as a juror would try the case impartially from the law and evidence produced on the trial. Hawkins v. U. S., C. C. A., 116 Fed. 569, 53 C. C. A. 663; Dolan v. U. S., C. C. A., 116 Fed. 578, 54 C. C. A. 34.

sideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, constitute a sufficient objection to him.''[23] If the opinion is only hypothetical, a challenge for cause will not necessarily be sustained.[24] Expression of an opinion by the juror is immaterial.[25] Upon the trial of an indictment for murder in the first degree, the District Attorney may ask a juror whether he has any conscientious scruples which would preclude him from rendering a verdict of guilty on circumstantial evidence, ''in a case where the penalty prescribed by law is death.''[26] The examination as to prejudice against capital punishment should be confined to the ascertainment of their opinions and the strength thereof with the sole object of determining whether they would approach the issue in a proper frame of mind.[27] The court should not in the course of such an examination criticize the jurors because of their opinions upon this subject.[28] Upon prosecution of defendants who are Socialists, it was held to be no error to ask the jurors whether they distinguished between Socialists and Anarchists.[29]

''In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either sections one or three of an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to

23 Burr's Trial, vol. I, p. 416.

24 Reynolds v. U. S., 98 U. S. 145, 155, 25 L. ed. 244, 246.

25 Reynolds v. U. S., 98 U. S. 145, 157, 25 L. ed. 244, 247, per Waite, C. J. ''The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.''

26 Hardy v. U. S., 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137.

27 Manuel v. U. S., C. C. A., 254 Fed. 273.

28 Ibid.

29 Ruthenberg v. U. S., 245 U. S. 480.

bigamy and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled 'An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah'; or, Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman. Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent.'' [30]

Upon the trial of an indictment for polygamy, it is not error to exclude jurors who are living in polygamy.[31] Upon a trial of Socialists, their rights are not infringed because the juries, grand and petit, are composed exclusively of property owners who are members of other political parties.[32] A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause.

No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such

30 Jud. Code, § 288, 36 St. at L. 1087, re-enacting 22 St. at L. 31, § 5. See Clawson v. U. S., 114 U. S. 477, 29 L. ed. 179.

31 Reynolds v. U. S., 98 U. S. 145, 157, 25 L. ed. 244, 247.

32 Ruthenberg v. U. S., 245 U. S. 480.

challenge.[33] The right to a peremptory challenge, on the part of the prosecution at least, is open until the jury is sworn to try the case.[34] Under the Alaska Criminal Code the court may require a defendant to exhaust all grounds of challenge, both for cause and peremptorily to each juror, as he is called, before the prosecution is called upon to challenge, and before another juror is called into the box;[35] and a subsequent peremptory challenge by him may be denied.[36] After a juror has been accepted by both sides and has taken his seat in the box, but has not been sworn, he may, upon announcing himself as feeling disqualified to act impartially, be directed by the court to stand aside.[37] It is too late for the defendant to challenge a juror after the latter has been sworn and the district attorney has opened the case, although he had not been previously informed that the juror had expressed an opinion unfavorable to him;[38] but in an extraordinary case this might perhaps be a ground for the withdrawal of a juror.[39]

No exception will lie to a preliminary ruling restricting the number of defendant's peremptory challenges.[40] In order properly to raise the objection that he was thus improperly restricted, he must exhaust the number allowed him by court and then make another, to the overruling of which he must specifically except.[41] A defendant has no right to a trial by any particular juror.[42] An error in sustaining the Government's challenge for cause[43] or in granting the Government an excessive number of challenges[44] will ordinarily be disregarded when the defendant has not exhausted his peremptory challenges.

33 Jud. Code, § 286, 36 St. at L. 1087, re-enacting U. S. R. S., § 286.

34 U. S. v. Davis, 103 Fed. 457.

35 Dolan v. U. S., C. C. A., 116 Fed. 578, 54 C. C. A. 34. But see Lewis v. U. S., 146 U. S. 370, 36 L. ed. 1011.

36 Hawkins v. U. S., C. C. A., 116 Fed. 569, 53 C. C. A. 663; Dolan v. U. S., C. C. A., 116 Fed. 578, 54 C. C. A. 34.

37 U. S. v. Davis, 103 Fed. 437.

38 Hawkins v. U. S., C. C. A., 116 Fed. 569, 53 C. C. A. 663.

39 See *supra*, § 473e.

40 Pearce v. U. S., 192 Fed. 561.

41 Ibid.

42 Heitler v. U. S., C. C. A., 244 Fed. 140.

43 Simpson v. U. S., C. C. A., 184 Fed. 817; Campbell v. U. S., C. C. A., 221 Fed. 186. See U. S. v. Davis, 103 Fed. 457.

44 Heitler v. U. S., C. C. A., 244 Fed. 140.

An error in overruling the defendant's challenge for favor or for cause is a proper subject for exception [45] which may be sustained even if inartificial; [46] provided all his peremptory challenges are exhausted before the jury is finally selected; [47] but not otherwise.[48]

It is the safer practice to insist that the jurors be sworn to testify the truth upon their examination as to cause and favor before the right of challenge is exercised. A practice in favor with the judges of insisting that certain general questions be put to the jurors collectively is dangerous to the defendant because of the liability of some jurors to misunderstand such a question and the absence of the sanctity of an oath and the difficulty of punishing them for silence. It is not likely that such a practice would be sustained by the courts of review if exception thereto were duly taken and firmly insisted upon.

The Supreme Court of the United States has said: "There is no statute of the United States which prescribes the method of procedure in empanelling jurors in criminal cases, and it is customary for the United States courts in such cases to conform to the methods prescribed by the statutes of the United States." [49] "While the court in the present instance did not exceed its jurisdiction in directing the empanelling of the jury by a method different from that prescribed by the state statute, and while we do not feel called upon to make suggestions as to the proper practice to be adopted by the Circuit Courts in empanelling juries in criminal cases, yet obviously all rules of practice must necessarily be adopted to secure the rights of the accused; that is, where there is no statute, the practice must not conflict with or abridge the right as it exists at common law." [50]

§ 526a. Right to counsel. By the Sixth Amendment the accused has the right "to have the Assistance of Counsel for his defense."

45 Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465.

46 Ibid.

47 Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465, where a challenge upon the ground that the talesman was a salaried official of the United States was held sufficient to sustain an exception when it was overruled, the juror receiving a salary from the United States, but not being technically an official thereof.

48 Simpson v. U. S., C. C. A., 184 Fed. 817. See *supra*, § 473b.

49 Lewis v. U. S., 146 U. S. 370, 377, 13 S. Ct. 136, 36 L. ed. 1011.

50 Ibid.

The Revised Statutes provide: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours."[1] Where the objection was not raised upon the trial, it was held to be too late, upon an application for the writ of *habeas corpus*, to object that the prisoner charged with a capital offense had been represented by a counsellor who had been assigned by the court, and had not been allowed to consult with an attorney whom he had selected.[2] Counsel assigned by the court have no right to recover compensation from the United States.[3]

§ 527. Trials in criminal cases. The Constitution ordains: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[1] It has been said: that a judgment after a trial without a jury would be a nullity;[2] and that where the trial is conducted by a judge without a jury, by consent of the parties, he acts as an arbitrator, and his conclusions of fact and rulings upon the admission of evidence cannot be reviewed upon a writ of error.[3] A jury may be waived in prosecutions for petty offenses only.[4]

It has been held that a jury cannot be waived where the offense is punishable by imprisonment for more than one year.[5]

Ordinarily the denial of a motion by the defendant for an adjournment or a continuance is a matter within the discretion of the trial court;[6] but in an extraordinary case where in the exercise of due diligence he has been unable to compel the attendance of material witnesses such a decision may be reviewed by a writ of error.[7]

§ 526a. [1] U. S. R. S., § 747.

[2] Andersen v. Treat, 172 U. S. 24, 43 L. ed. 351.

[3] Knabb v. U. S., 1 Court Claims, 173.

§ 527. [1] Article III, § 2.

[2] Frank v. U. S., C. C. A., 192 Fed. 864.

[3] Low v. U. S., C. C. A., 169 Fed. 86; *supra*, § 474.

[4] Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99.

[5] Low v. U. S., C. C. A., 169 Fed. 86.

[6] Latham v. U. S., C. C. A., 210 Fed. 159.

[7] Younge v. U. S., C. C. A., 223 Fed. 941.

The right to separate trials by several defendants joined in the same indictment usually rests in the discretion of the trial courts.[8] Where their defenses are different, and in some respects antagonistic, separate trials should be granted.[9]

In case of a felony, the trial cannot take place in the absence of the defendant[10] and the record must show his presence.[11] Upon the trial of a prosecution for a misdemeanor, the defendant has the right to be present at the trial; but he may waive this by his voluntary absence.[12]

"No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or District Attorney, for which no fees shall be charged by the clerk or marshal."[13] It has been held that this may be done without a special order of the court when the prisoner is in jail under an ordinary *mittimus* issued by a State magistrate to the sheriff,[14] that the jailor may insist upon a written order from the judge or district attorney,[15] that no other officer can make such an order[16] and that the statute has no application to proceedings before commissioners.[17]

The prosecuting officer should be the District Attorney of the United States,[18] or some person designated by the Attorney General to assist him generally, or for the special trial.[19] This may be a counsel retained by private individuals who have been injured by the crime, although a State statute prohibits such an appearance.[20]

8 Lee Dock v. U. S., C. C. A., 224 Fed. 431; Schwartzberg v. U. S., C. C. A., 241 Fed. 348; Oppenheim v. U. S., C. C. A., 241 Fed. 625.

9 U. S. v. Rockefeller, 222 Fed. 534.

10 Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262; Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

11 Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

12 U. S. v. Leckie, 1 Sprague 227, Fed. Cas. No. 15,583; U. S. v. Mayo, 1 Curtis 433, Fed. Cas. No. 15,754; U. S. v. Shepherd, 1 Hughes 520, Fed. Cas. No. 16,274. See 12 Cyc. 529.

13 U. S. R. S., § 1030.

14 U. S. v. Harden, 10 Fed. 802, 4 Hughes 455.

15 U. S. v. Martin, 17 Fed. 150, 9 Sawyer 90.

16 U. S. v. Harden, 10 Fed. 802, 4 Hughes 455.

17 U. S. v. Martin, 17 Fed. 150, 9 Sawyer 90.

18 See *supra*, § 483f.

19 See supra, § 483f.

20 Terry v. U. S., C. C. A., 235 Fed. 701. See § 536a, *infra*.

The defendant has the right to be represented by counsel.[21] All exhibits should be read in the presence of the jury, or handed to the jury, and each juror required to read them in the court room.[22] The defendant by failing to except waives objection to a failure to observe this practice when the exhibits are sent to the jury room.[23]

The court may limit the number of witnesses the defendant may call upon for a single point.[24]

The commitment of a witness for contempt,[25] or for perjury,[26] and a direction that an information for perjury be filed against him,[27] when made in the presence of the jury, were held to be prejudicial errors. So was a reminder by the court to a witness in the presence of other witnesses and the jury that his testimony did not agree with the previous affidavit which he had signed.[28] Expressions of sympathy by the court to a witness were held to be no ground for a new trial.[29] When, after a trial has been begun, it is discovered that a juror is disqualified, the court may, under proper circumstances, discharge the jury and order a new trial, against the defendant's objections.[30]

The court may permit the jurors to separate during adjournments and recesses of the trial,[31] and it is not error to refuse to exclude the jurors from the court-room during the argument and decision of motions and questions of law.[32] The court may limit the time for argument by counsel.[33]

21 U. S. R. S., § 747.

22 Winters v. U. S., C. C. A., 201 Fed. 845, 850.

23 Ibid.

24 Samuels v. U. S., C. C. A., 232 Fed. 536.

25 Rutherford v. U. S., C. C. A., 258 Fed. 855. But see Wallace v. U. S., C. C. A., 243 Fed. 300.

26 McNutt v. U. S., C. C. A., 267 Fed. 670.

27 Ibid.

28 Ibid.

29 Wong Goon Let v. U. S., C. C. A., 245 Fed. 745.

30 Thompson v. U. S., 155 U. S. 271, 39 L. ed. 146. It was said not to be an abuse of discretion to refuse to discharge a jury which had read newspaper articles calculated to prejudice the defendant, where they stated, when being interrogated, that this would not influence them in arriving at a verdict. Marrin v. U. S., C. C. A., 167 Fed. 951, where the objection had been waived. See *supra*, § 478.

31 U. S. v. Holt, 168 Fed. 141.

32 Ibid.

33 U. S. v. Samuels, C. C. A., 232 Fed. 536, 542; Lucas v. Commonwealth of Kentucky, 149 Ky. 498, 149 S. W. 861, 42 L. R. A. (N. S.) 209 (30 minutes in a capital case).

A Federal court need not follow the State practice of permitting argument of counsel to follow the charge.[34] The denial of the defendant's application after the conclusion of the final argument to the jury by the District Attorney to explain and exhibit or to offer further evidence rest within the court's discretion.[35]

A motion at the close of the testimony for the prosecution for the direction of the verdict of acquittal is waived by the offer of evidence in defense.[36] But it may be renewed at the conclusion of the defendant's evidence.[37] It was held to be no error to refuse a request for a direction that the jury find the verdict of not guilty under one of several counts contained in the indictment although the evidence did not sustain a conviction thereunder.[38] The objection that there is no evidence to prove that the defendant committed the crime charged may be considered upon writ of error; although no motion to direct a verdict in his favor upon that ground was made, and no exception in the case raises the point.[39] The judge has no power to direct a verdict in favor of the prosecution, although the evidence is uncontradicted,[40] or there is an agreed statement of facts.[41] The judge cannot charge as matter of law that any allegation has been proved.[42]

It has been held that there can be no conviction of a crime which was provoked or induced by a Government agent or officer and which otherwise would not have been committed.[43]

34 Bryant v. U. S., C. C. A., 257 Fed. 378.

35 Safford v. U. S., C. C. A., 252 Fed. 471.

36 Andrews v. U. S., C. C. A., 224 Fed. 418; Kasle v. U. S., C. C. A., 233 Fed. 878; Hughes v. U. S., C. C. A., 231 Fed. 50.

37 Kasle v. U. S., C. C. A., 233 Fed. 878.

38 Baldwin v. U. S., C. C. A., 238 Fed. 793.

39 Clyatt v. U. S., 197 U. S. 207, 49 L. ed. 726. But see Simpson v. U. S., C. C. A., 184 Fed. 817, holding that such a motion is essential and that the introduction of evidence by the accused in his own behalf is a waiver of such a motion previously made.

40 Konda v. U. S., C. C. A., 22 L. R. A. (N. S.) 304, 166 Fed. 91.

41 Blair v. U. S., C. C. A., 241 U. S. 217.

42 Konda v. U. S., C. C. A., 22 L. R. A. (N. S.) 304, 166 Fed. 91.

43 Sam Yick v. U. S., C. C. A., 240 Fed. 60; Peterson v. U. S., C. C. A., 255 Fed. 433; U. S. v. Lynch, 256 Fed. 983; Fiunkin v. U. S., C. C. A., 265 Fed. 1.

Evidence of facts as consistent with innocence as with guilt is insufficient to sustain a conviction.[44] In such a case it is the duty of the court to instruct the jury to return a verdict of not guilty.[45] It has been said that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is its duty to instruct the jury to acquit.[46]

No verdict of guilty can be returned unless the evidence establishes the defendant's guilt beyond a reasonable doubt,[47] but this rule does not apply to an action to recover a penalty under the Alien Immigration Act of February 20, 1907.[48]

§ 527a. Statements and arguments of counsel. The court may limit the time for argument by counsel to the jury in a criminal case.[1]

In case of an improper statement by the prosecutor in the presence of the jury, at any time pending the trial,[2] or in his closing argument [3] a new trial may be directed.

44 Isbell v. U. S., C. C. A., 227 Fed. 788.

45 Ibid.

46 Ibid.

47 Stout v. U. S., C. C. A., 227 Fed. 799; Looker v. U. S., C. C. A., 240 Fed. 932.

48 U. S. v. Regan, 232 U. S. 37.

§ 527a. 1 U. S. v. Samuels, C. C. A., 232 Fed. 536, 543; Lucas v. Commonwealth of Kentucky, 149 Ky. 498, 149 S. W. 861, 42 L. R. A. (N. S.) 209 (30 minutes in a capital case).

2 Merritt v. U. S., C. C. A., 264 Fed. 870. See Quinette v. Pullman Co., 229 Fed. 333; Skuy v. U. S., C. C. A., 261 Fed. 316. The demand upon the defendant for the production of a paper is highly improper; but if so described by the trial judge and he directs the jury to disregard it, it is not necessarily a prejudicial error. Green v. U. S., C. C. A., 266 Fed. 779.

3 Stewart v. U. S., C. C. A., 211 Fed. 41; Fish v. U. S., C. C. A., 215 Fed. 544; Johnson v. U. S., C. C. A., 216 Fed. 679; Latham v. U. S., C. C. A., 226 Fed. 421; Paquin v. U. S., C. C. A., 251 Fed. 519; Manuel v. U. S., 254 Fed. 272; *supra*, § 473i.

In Hall v. U. S., C. C. A., 256 Fed. 748, 750, a new trial was ordered because of the following language by the United States attorney: "Gentlemen of the jury, is it not a significant fact that defendant has failed to introduce a single witness in his behalf who has ever heard him make a patriotic utterance? Not a single friend or citizen has come here to testify in his behalf. No man has interceded with the office of the United States attorney in his behalf. Could a man be innocent and be put on his trial without numerous friends and citizens protesting against it?"

In August v. U. S., C. C. A., 257 Fed. 388, 392; a new trial was ordered because of the following language in a speech otherwise inflammatory by the assistant United

As a general rule, a motion for a new trial cannot be granted because of improper remarks by the prosecuting attorney, un-

States attorney, although the defendant did not except thereto nor request an instruction upon the subject, "But to-day, gentlemen, the world is engaged in a war, the whole world is engaged in a war for humanity; a war which holds in its balance the very future of the race; a war for the rights, the sacred rights, of man, and the honor of womanhood, and the security and sanctity of little children; and we are here engaged in the prosecution of one who, as I am convinced, was willing to place his influence and his efforts and his filthy gold in the scales against those things which all men hold most dear."

"This prosecution, gentlemen, will not only affect St. Joseph. It will not only affect Buchanan county. It will not only affect northwest Missouri, and reflect either dishonor or credit upon her; but the result of you gentlemen's deliberations will be heralded to every nook and every corner of this land; yea, and in some way I doubt not it shall waft its way to the agents of hell opposed to us across the mighty waters, and there, gentlemen, the verdict of this jury will be read and heard by the war lords of Germany as a beat from the pulse of the American people. So I say that the gravity of this occasion cannot be measured, and I trust gentlemen, that you will consider this case carefully—that you will consider very, very deliberately."

In Elmer v. U. S., C. C. A., 260 Fed. 646, 649, the following language by the assistant Attorney General was held to be prejudicial (although the court said it was improper but did not instruct the jury to disregard it): "I want to say this to you: If I had a boy, and a man should come to him and say: 'My boy, you are shackled; you are manacled; you are being sent to certain slaughter. You are not a free American at all. You are the slave of a system that is vicious and wrong.' If a man said that to my boy in my presence, if I could kill that man with my naked hands, I would do it." But see Hunter v. U. S., C. C. A., 264 Fed. 831.

In Skuy v. U. S., C. C. A., 261 Fed. 316, a new trial was granted because of a statement by the Assistant District Attorney that he did not care how many Jews the defendant brought there to testify, or what they swore to, that he believed that the soldier boy swore to the truth that the soldier had no interest in the case and that every word that the soldier testified to was the truth; emphasizing the word soldier.

In Horowitz v. U. S., C. C. A., 262 Fed. 48, 51, held that it was no error in a prosecution for stealing army supplies for the District Attorney to say, "It is a crime which it seems to me demands your utmost consideration in this hour. It is a crime which—well, I cannot get a word bad enough to describe it, gentlemen, at this time when the boys need clothing, when they need this cloth for clothing, when men are giving their blood, and when all you men are giving your money—," and again, "You know that every great war is attended with its profiteers, and its thieves, and you know how

less the defendant's counsel at once called the attention to the court to objectionable language and requested the court to interfere, and upon the court's refusal, noted an exception.[4] If the court then interferes and directs the District Attorney to desist using such language, and he obeys, it is usually held that the mischief is cured.[5]

A recent case holds that it is the duty of the court of review to reverse a conviction because of prejudicial language by the District Attorney, although there was no objection or exception thereto upon the trial.[6]

A statement in the closing argument of a fact prejudicial to the defendant of which there is no evidence,[7] a statement in the opening of a fact of which there is no evidence,[8] or evidence of which would be clearly inadmissible,[9] and suggestions by questions upon cross-examinations of injurious facts, clearly irrelevant and immaterial,[10] are usually considered to be incurable.

difficult it is—.'' When the court said ''confine yourself to the issues, but you may state that they are important issues to both sides; I will allow that, as I allowed the defendants to state that it was important to them. I don't think you ought to refer to the instance of the war.''

4 Crumpton v. U. S., 138 U. S. 361, 364, 34 L. ed. 958, 959; Dunlop v. U. S., 165 U. S. 486, 498, 41 L. ed. 799, 803; Sawyer v. U. S., 202 U. S. 150, 50 L. ed. 972. See Cudahy Packing Co. v. Skoumal, C. C. A., 125 Fed. 470; Thompson v. U. S., C. C. A., 144 Fed. 14; Johnston v. U. S., C. C. A., 154 Fed. 445; Chambers v. U. S., C. C. A., 237 Fed. 513.

5 Ibid.

6 Warren v. U. S., C. C. A., 250 Fed. 89.

7 Paquin v. U. S., C. C. A., 251 Fed. 519; McKibben v. Philadelphia & R. Ry. Co., C. C. A., 225 Fed. 577. *Supra*, § 473i. In Hunter v. U. S., C. C. A., 264 Fed. 832, a new trial was denied although the District Attorney in his argument had said that defendant was arrested for having liquor in his possession, when there was no evidence of such arrest; but there was evidence of possession.

In Foley v. U. S., C. C. A., 241 Fed. 587, a new trail was denied; although upon the trial of an indictment for selling without payment of taxes the counsel for the Government in his opening had said that in the building owned by defendant there were small rooms upstairs occupied at times by immoral women. Upon objection, the court had directed him to omit this statement. Later testimony had been given that defendant had admitted the place was an immoral resort, but upon objection, the court had ruled that it was irrelevant.

8 Johnson v. U. S., C. C. A., 215 Fed. 679. But see Nichamin v. U. S., C. C. A., 263 Fed. 880.

9 Manuel v. U. S., C. C. A., 254 Fed. 272.

10 Skuy v. U. S., C. C. A., 261 Fed.

So is usually a comment by the District Attorney upon the failure of the accused to testify.[11] Where, however, the accused takes the stand, the counsel for the Government has the right to comment upon his silence concerning any point [12] although such point is not connected with the matters as to which he testified.[13]

When the defendant has not taken the stand, a statement that the evidence on behalf of the prosecution has not been contradicted is permissible.[14] The counsel for the Government has no right to state his opinion of the guilt of the accused and it has been held that a new trial may be granted because of such a statement.[15]

316. See Bombarger v. U. S., C. C. A., 219 Fed. 843.

11 Wilson v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. ed. 650. There, however, the court failed to prohibit any further reference to the matter and failed to instruct the jury to ignore it.

12 Diggs v. U. S., 242 U. S. 470; affirming C. C. A., 220 Fed. 545.

13 Ibid. *Contra*, Myrick v. U. S., C. C. A., 219 Fed. 1.

14 Carlisle v. U. S., C. C. A., 194 Fed. 827; Rose v. U. S., C. C. A., 227 Fed. 357, 363; Bradley v. U. S., C. C. A., 254 Fed. 289.

15 Morse v. U. S., C. C. A., 255 Fed. 681; State v. Gunderson (North Dakota, Nov., 1913), 144 N. W. 659; People v. Romero, 143 Cal. 560, 77 Pac. 163; People v. Weber (Cal. June, 1906), 86 Pac. 671. See 75 Fed. 588, 592.

"Such prosecuting officer has the indisputable right to urge that the evidence convinces his mind of the accused's guilt." See Warthan v. State, 41 Tex. Crim. App. 385, 55 S. W. 55.

In Judge Sharswood's Professional Ethics:

"Indeed, the occasions are very rare in which he ought to throw the weight of his own private opinion into the scales in favor of the suit he has espoused. If that opinion has been formed on the statement of facts not in evidence, it ought not to be heard—it would be illegal and improper in the tribunal to allow any force whatever to it; if on the evidence only, it is enough to show from that the legal and moral grounds on which such opinion rests."

Senator George F. Hoar in an article on Oratory in Scribner's Magazine for June, 1901, said:

"The question in the American or English court is not whether the accused be guilty. It is whether he be shown to be guilty, by legal proof, of an offense legally set forth. It is the duty of the advocate to perform his office in the mode best calculated to cause all such considerations to make their due impression. It is not his duty or his right to express or convey his individual opinion. On him the responsibility of the decision does not rest. He not only has no right to accompany the statement of his argument with any assertion as to his individual belief, but I think the most experienced observers will agree that such ex-

Counsel have no right to address to the jury arguments upon questions of law.[16] If the summing up is made after the court has announced its rulings upon the questions of law involved, counsel are confined to a discussion of the facts and the application of the instructions to the evidence;[17] but they may elaborate and emphasize the law as laid down by the trial judge.[18] The extent to which they may go in this respect is within the judge's discretion. He cannot however prevent any discussion of any important question.[19] He may not prevent the defendant's counsel from elaborating and emphasizing the proposition that the jury is not bound by the judge's opinion on the fact, and that it is their duty to come to their own conclusion on the question of guilt or innocence, giving to the opinion of the judge no more weight than they think fit.[20]

§ 527b. Charges in criminal cases. The charge to the jury should be oral [1] and delivered in open court.[2] It should be delivered to the jury as a body, and not addressed to each juror individually.[3] The court may in its discretion permit written instructions to be taken by the jury to read during their retirement.[4] This is not unusual when answers are given to requests by the jury for further instructions after their retirement. The State practice concerning the form of instructions and otherwise regulating the charge is not followed.[5]

The judge may express to the jury his opinion upon the facts;[6]

pressions, if habitual, tend to diminish and not to increase the just influence of the lawyer. There never was a weightier advocate before New England juries than Daniel Webster. Yet it is on record that he always carefully abstained from any positiveness of assertion. He introduced his weightiest arguments with such phrases as 'It will be for the jury to consider,' 'The court will judge.' 'It may, perhaps, be worth thinking of, gentlemen,' or some equivalent phrase by which he kept scrupulously off the ground which belonged to the tribunal he was addressing.''

16 Morse v. U. S., C. C. A., 255 Fed. 681, 682.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

§ 527b. 1 See Winters v. U. S., C. C. A., 201 Fed. 845, 850.

2 Dodge v. U. S., C. C. A., 258 Fed. 300.

3 Shepard v. U. S., C. C. A., 160 Fed. 584, 595.

4 Garst v. U. S., C. C. A., 180 Fed. 339, 345.

5 Steers v. U. S., C. C. A., 192 Fed. 1; *supra*, § 473e.

6 Keller v. U. S., C. C. A., 168 Fed. 697; Fielder v. U. S., C. C. A.,

but it is the better practice for him not to do so until after the counsel have summed up;[7] and never, it has been held, after the jury have reported their inability to agree.[8] He must, how-

227 Fed. 832; Morse v. U. S., C. C. A., 255 Fed. 681. See *supra*, § 473c.

In Horning v. District of Columbia, Sup. Ct. of U. S., Nov. 22, 1920, decided by a court divided five to four. It was held that an instruction by the trial justice that the jury could not capriciously say that the testimony was not true; that it was their duty to accept the trial judge's exposition of the law; that the trial judge could not peremptorily instruct them to find the defendant guilty, *but that he would if he could*, and that the failure to bring in a verdict of guilt would arise only from a flagrant disregard both of the evidence and the law, and also their obligations as jurors, was only a *formal error* and was *not reversible error* under the Judicial Code, § 269, as amended by the Act of February 26, 1919.

[7] U. S. v. Foster, 183 Fed. 626; reversed upon another point, C. C. A., 188 Fed. 305.

[8] Garst v. U. S., C. C. A., 180 Fed. 339, 346; Foster v. U. S., C. C. A., 188 Fed. 305; reversing 183 Fed. 626; U. S. v. Reid, 210 Fed. 486; Shepard v. U. S., C. C. A., 236 Fed. 73; Bernal v. U. S., C. C. A., 241 Fed. 339. The following supplemental charges have been held not to be reversible errors; Suslak v. U. S., C. C. A., 213 Fed. 913, 919:

"This is an important case; this is a costly case, both to the government and to the defendants; I realize that this is a strain upon all; but the jury must remember that witnesses of the character which have been introduced by the government in this case are likely to disappear and could not be had in another trial, and the jury must therefore attempt to agree; they must attempt to agree upon honest convictions. The jurors have a power under the law to stand out for acquittal or conviction, but no juror should take an arbitrary stand to acquit or convict a man; he may listen to the arguments of the other jurors, and he must listen and come to an understanding, if he can, and be convinced by their argument; it is wrong to convict as well as to acquit a man upon an arbitrary stand taken by a juror; they must not consider the penalty in the case whatever."

In Peterson v. U. S., C. C. A., 920, 924: "The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest, than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from $7,000 to $10,000. The government has a right to a verdict without farther expenditure of time and money. The defendants, if guilty, have a right to have that fact determined by a verdict before they are bankrupt in pocket, and

ever, instruct the jury that the facts are to be decided by them,[9]

likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the court's question, that you stand seven to five. If seven are for acquittal, the five should seriously inquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for a conviction, the five should equally seriously inquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement.''

In Shea v. U. S., C. C. A., 260 Fed. 807, 808: ''You have now been out about 30 hours on this case, and while I have no doubt that any differences between you are honest and sincere, I want to call your attention to the fact that in no case can absolute certainty be expected. . . . If a large number or majority are of a certain opinion, the juror dissenting should carefully consider whether his doubt or difference from such opinion is a reasonable one, which makes no impression upon the minds of so many men equally honest and equally intelligent as himself. Upon the question of the expense in the trial of this case, I deem it proper to call your attention to the fact that this case has involved a very great expense upon the government. A large number of witnesses have been called from their homes and business important to themselves already for a considerable time; that they reside at Cordova, and a steamer is expected to pass through Valdez en route to Cordova within the next 12 hours, and there will probably not be another for a week or more; also, in connection with the matter of expense, I call your attention to the difficulty of getting qualified jurors in a case of this kind, in so small a community, after so many have been disqualified, having already been called and excused on this case. We all desire to see justice administered, honestly, and fairly. At the same time, Justice to both the government and defendant requires that it be not attended with too great outlay or expense. The defendant has already been in custody over six months, and is entitled to have the case speedily determined. I call these facts to your attention as matters for your careful and honest consideration; but I wish to impress upon you, that nothing I have said should be understood as seeking to influence the conscientious and honest opinion which you, as reasonable men, may entertain. If you have a reasonable doubt of the defendant's guilt, as the same is defined to you in instructions already given, you should acquit the defendant; if you have not, you should convict him, and the degree of the crime is a matter which should not cause you to entirely disagree and fail to reach a proper verdict.'' See U. S. v. Oppenheimer, 228 Fed. 220. *Supra*, § 473c.

9 Keller v. U. S., C. C. A., 168 Fed. 697.

and a judgment may be reversed when his language was so positive and emphatic as to tend to intimidate the jury,[10] or when he so colors his charge as unfairly to influence the verdict in favor of the prosecution.[11]

He should not charge that the evidence of Indian witnesses

10 Rudd v. U. S., C. C. A., 173 Fed. 912. See Richardson v. U. S., C. C. A., 181 Fed. 1; Foster v. U. S., C. C. A., 188 Fed. 305; Sandals v. U. S., C. C. A., 213 Fed. 569, 571.

11 Hart v. U. S., C. C. A., 240 Fed. 911; Whiting v. U. S., C. C. A., 263 Fed. 477; Stokes v. U. S., C. C. A., 264 Fed. 18; Gross v. U. S., C. C. A., 265 Fed. 606.

In Starr v. U. S., 153 U. S. 614, 625, 38 L. ed. 841; the following instructions were disapproved: "How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be on the part of this government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and say to them, Men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may hinder you in making the arrest; they may delay you by doing it by threats of armed violence upon you, and yet I am unable as chief executive of this government to assure you that you have any protection whatever." . . . "What was this posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him that on a certain day the judge of the Federal court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horse stealing, and you will be kind enough, sir, to put in your attendance on that day; and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court that is to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do? No. This court did not have anything to do with that command; it does not go in the name of this court; it goes in the name of the chief executive officer, the President of the United States. What does he say, of course acting for the people?" . . . "Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is no protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by the defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you are to stand by the nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated."

is entitled to as much credit as the evidence of white men; since the jurors are the exclusive judges of the weight to be given to evidence.[12]

It is error to instruct the jury to disregard certain evidence because it is contrary to the laws of nature when its truth is not impossible.[13]

The defendant is entitled to an instruction that there can be no conviction unless the evidence proves his guilt beyond a reasonable doubt.[14]

It was held to be erroneous to charge that the Government need not prove every material allegation beyond a reasonable doubt, that it must prove them by evidence satisfactory to the jury; but that, upon the whole evidence, before a verdict of guilty could be returned the jury must be satisfied beyond a reasonable doubt of the defendant's guilt.[15] The defendant is not entitled to a charge that his character is presumed to be good.[16]

12 Campbell v. U. S., C. C. A., 221 Fed. 186.

13 Post v. U. S., C. C. A., 135 Fed. 1.

14 Spear v. U. S., C. C. A., 228 Fed. 485; Heard v. U. S., C. C. A., 228 Fed. 503. In Lamb v. U. S., C. C. A., 264 Fed. 660, 664, the following instruction was approved:

"Where a case is dependent entirely upon circumstantial evidence, as is the case in this case, the evidence must be of that degree of strength to exclude every other reasonable doubt save that of the guilt of the accused. The true question in every criminal case is whether the evidence is sufficient to convince you beyond a reasonable doubt of the defendant's guilt. If the evidence is of that degree of strength, then it would be your duty to convict. On the other hand, if it does not approach that degree of strength, then it would be equally your duty to acquit him."

15 Spear v. U. S., C. C. A., 228 Fed. 485. See Heard v. U. S., C. C. A., 228 Fed. 503.

16 U. S. v. Smith, 217 Fed. 839; Greer v. U. S., C. C. A., 240 Fed. 320. It was held to be erroneous to charge that evidence showing accused's good character for honesty, integrity, and morality is admissible and should be considered by the jury, and if it is of such a nature as to lead the jury to believe that it is impossible that a man of such high character would commit such a crime, and for that reason raises a reasonable doubt in the minds of the jury whether accused is guilty of the crime charged, accused is entitled to the benefit thereof, which was coupled with a further statement, pointing out that persons of high character frequently commit crimes, and that for accused to have obtained his position in the Post Office Department, it was necessary to furnish recommendation of two reputa-

The court may illustrate the manner in which a fact may be proved by stating a hypothetical case;[17] but references to other trials which are recent are not approved.[18]

When the jury report their inability to agree the court may instruct them to consider the case further.[19] It is improper for the court then to inquire in what proportion they are divided.[20]

§ 527c. Verdicts in criminal cases. The verdict must be approved by all the members of the jury.[1] The constitutional guaranty of trial by jury necessitates a jury of twelve.[2] It has been held that in a capital case where one juror is disabled the defendant cannot waive his right to a verdict by twelve and consent that the remaining eleven may try the facts.[3] A unanimous verdict by jury is not however essential to due process of law.[4] In the absence of a guaranty in the State constitution of trial by jury a State statutory provision that the votes of a majority might bring in a verdict in the State would be valid.[5]

The verdict is not obtained by undue compulsion because of a charge, that "in criminal cases in this court we follow the common law practice of keeping the jurors all together until the jury have agreed; but the marshal will endeavor to provide you a place to sleep to-night, so as not to keep you up in the jury room."[6] Nor by directing the jury further to consider the case when they have announced their inability to agree after they have deliberated for forty-eight hours.[7]

In all criminal causes the defendant may be found guilty of any

ble citizens to vouch for his integrity, is prejudicial since this in effect deprived the accused of the benefit of the evidence as to his character. Perara v. U. S., C. C. A., 235 Fed. 515.

17 Pointer v. U. S., 151 U. S. 396, 416, 14 Sup. Ct. 410, 38 L. ed. 208.

18 Ibid.; Whiting v. U. S., D. C. C. A., 263 Fed. 477.

19 Campbell v. U. S., C. C. A., 221 Fed. 186.

20 Burton v. U. S., 196 U. S. 283, 306, 307, 25 Sup. Ct. 243, 249, 250, 49 L. ed. 482.

§ 527c. 1 Blackstone's Commentaries; American Publishing Co. v. Fisher, 166 U. S. 464; Cancemi v. People, 18 N. Y. 128.

2 Cancemi v. People, 18 N. Y. 128.

3 Ibid.; *Contra,* Commonwealth v. Dailey, 12 Cushing (Mass.) 80. A misdemeanor, State v. Sackett, 39 Minn. 69.

4 Minn. & St. Louis R. R. Co., 241 U. S. 211.

5 Ibid.

6 Ammerman v. U. S., C. C. A., 262 Fed. 124, 126.

7 Campbell v. U. S., C. C. A., 221 Fed. 186.

offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, That such attempt be itself a separate offense.[8] A verdict for man-slaughter will be sustained under an indictment charging murder which contains all the allegations essential to aver the lesser crime.[9]

It has been said that when a verdict has been returned finding the defendant guilty of offense higher than is justified by the evidence, the court has power to enter judgment for a minor offense, which the evidence justifies, provided it is covered by the indictment.[10]

"On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury." [11]

Where an indictment against two defendants charged several joint violations of a statute, the evidence except as to two counts proved only separate offenses and a joint verdict was rendered; the conviction was sustained only as to the counts with reference to which the evidence justified findings of joint offenses.[12] Where an indictment charges the defendants with conspiracy together and with no one else, an acquittal of one is an acquittal of both.[13] But it has been held: that where they are also charged with conspiracy with others unknown to the grand jury, one may be acquitted and the other convicted.[14]

A verdict of guilty may be set aside for repugnancy or inconsistency;[15] but such an objection is not favored.[16] Applica-

8 U. S. R. S., § 1035.

9 U. S. v. Leonard, 2 Fed. 669, 18 Blatchf. 187; Brimie v. U. S., C. C. A., 200 Fed. 726.

10 U. S. v. Linnier, 125 Fed. 83, citing State v. Keasling, 74 Iowa 528, 38 N. W. 397; Commonwealth v. Squire, 1 Mete. (Mass.) 258; Commonwealth v. Mahar, 8 Gray (Mass.) 469.

11 U. S. R. S., § 1036.

12 Brimie v. U. S., C. C. A., 200 Fed. 726.

13 U. S. v. Hamilton, 8 Chicago Legal News, 211, Fed. Cas. No. 15,288.

14 Ibid.

15 U. S. v. Hamilton, 8 Chicago Legal News 211, Fed. Cas. No. 15,288.

16 U. S. v. Tyler, 7 Cranch. 285, 3 L. ed. 344; Statler v. U. S., 157

tions to set aside verdicts were denied when the defendant was found guilty of the charge of aiding and abetting an offense, but not guilty of committing the same,[17] although, the Criminal Code[18] makes an aider and abettor liable as a principal; and when he was found not guilty on several counts, each of which was limited to a single transaction, and guilty upon one count charging all such transactions,[19] and when he was found guilty of breaking into a car containing an interstate shipment, stealing the goods shipped therein and having possession of the goods stolen therefrom.[20] An acquittal on a count charging an intent is not repugnant to a conviction upon a count charging the same fact without the intent.[21] An acquittal of one defendant for a criminal intent in writing a book is not repugnant to a finding that another defendant is guilty of such intent in printing and publishing the same.[22]

Surplusage may be disregarded.[23] A verdict of guilty is not qualified or limited by the addition of a finding of facts which alone are insufficient to justify it,[24] nor by a finding of a fact which is immaterial.[25]

A verdict of "guilty as charged in the indictment" is tantamount to a conviction on each of the counts therein charged.[26] A verdict "guilty of conspiracy" is a general and not a special verdict.[27] It will be construed as referring to the conspiracy charged in the indictment if such a charge is contained in any of the counts and will be sufficient for a conviction upon such count.[28] Where there are several counts in an indictment, one of which is good and the other bad, and the jury find a general

U. S. 277, 39 L. ed. 700. See Doan v. U S., C. C. A., 266 Fed. 982.

17 Davey v. U S., C. C. A., 208 Fed. 237.

18 § 332, 35 Stat. L. 1152, Comp. St., § 10506.

19 Flickinger v. U. S., C. C. A., 150 Fed. 1.

20 Greenburg v. U. S., C. C. A., 253 Fed. 728.

21 Hinkhouse v. U. S., C. C. A., 266 Fed. 977.

22 American Socialist Soc. v. U. S., C. C. A., 266 Fed. 212.

23 U. S. v. Tyler, 7 Cranch. 285, 3 L. ed. 344; Statler v. U. S., 157 U. S. 277, 39 L. ed. 700.

24 Statler v. U. S., 157 U. S. 277, 39 L. ed. 700.

25 U. S. v. Tyler, 7 Cranch. 285, 3 L. ed. 344.

26 Schraubstadter v. U. S., C. C. A., 199 Fed. 568.

27 Huff v. U. S., C. C. A., 228 Fed. 893.

28 Ibid.

verdict of guilty, the verdict will be sustained upon the presumption of law that it was based upon the good count;[29] but the sentence imposed cannot exceed that which might properly be imposed on the good count.[30]

Where an indictment contains several counts each charging the same offense as committed in different ways an acquittal upon one count is not inconsistent with a conviction upon another.[31] Where an indictment contained a number of counts each charging the mailing of a letter on different dates all in furtherance of a scheme to defraud, an acquittal on some of them did not negative a charge of having on a prior date devised the fraudulent scheme.[32] When a single count charged different acts as offenses, some of which were innocent, it was held that verdict of guilty must be applied to these and consequently could not be sustained.[33]

A sealed verdict may be received by the consent of the defendant when it is returned before the separation of the jury;[34] but the jury should be present when it is opened.[35] A verdict may be received on Sunday.[36]

§ 527d. Requests for instructions to the jury. Requests for instructions to the jury when they are numerous or lengthy must be submitted to the trial judge in time for him properly to examine them.[1] Otherwise he is justified in refusing them as a whole.[2] In the Southern District of New York it is customary to receive requests after the charge has been delivered,[3] but the trial judge is not then held to the same degree of accountability

29 Tubbs v. U. S., C. C. A., 105 Fed. 59, 44 C. C. A., 357; Holloway v. Reg, 17 Q. B. 317; 2 Den. C. C. 287, 17 Jur. 825, 79 E. C. L. 317; Reg v. Bullock, Dears. C. C. 653, 25 L. J. M. C. 92; Cribb v. State, 9 Fla. 409; Josslyn v. Commonwealth, 6 Mete. (Mass.) 236; Boose v. State, 10 Ohio St. 575.

30 Tubbs v. U. S., C. C. A., 105 Fed. 59, 44 C. C. A. 357. See §§ 532, 536, *infra*.

31 Boone v. U. S., C. C. A., 257 Fed. 963; Huffman v. U. S., C. C. A., 259 Fed. 35, 41.

32 Lyman v. U. S., C. C. A., 241 Fed. 945.

33 Morgan v. U. S., C. C. A., 148 Fed. 189.

34 Pounds v. U. S., 171 U. S. 35, 43 L. ed. 62.

35 Doyle v. U. S., 10 Fed. 269.

36 Ball v. U. S., 140 U. S. 118, 35 L. ed. 377; Stone v. U. S., C. C. A., 64 Fed. 667.

§ 527d. 1 MacFadden v. U. S., C. C. A., 165 Fed. 51.

2 Ibid.

3 Linn v. U. S., C. C. A., 251 Fed. 476.

for the erroneous refusal of a request then presented as for one submitted at a more appropriate time.[4] Lengthy requests are disapproved.[5]

The refusal to give an instruction to which the defendant is entitled and which has been duly and specifically requested is reversible error.[6] So it is when in his charge he refers to them as mere abstract propositions.[7] The judge need not adopt the language of the request but may state the proposition in his own words provided that he fully covers the ground which the request indicates.[8] When he has once correctly charged about a certain point he need not repeat such charge when an instruction thereupon is requested.[9] Nor need he give an instruction which does not relate to the matters in controversy;[10] nor unless there is evidence in the case to which it applies.[11]

He should not give an instruction which recites as facts matters upon which the evidence is conflicting.[12] A request which singles out certain facts without considering the facts which modify them and asks the court to charge that if the former are true the jury could not find the defendant guilty was held to be properly refused.[13] A request is properly refused if it is not technically correct in all its parts and the court is not obliged then to give it in a modified form.[14]

§ 528. Summary trials of offenses against navigation laws. The Revised Statutes enact: "Whenever a complaint shall be made against any master, officer, or seaman of any vessel belonging, in whole or in part, to any citizen of the United States, of the commission of any offense, not capital or otherwise infamous, against any law of the United States made for the pro-

4 Ibid.

5 Hamburg-American Steam Packing Co. v. U. S., C. C. A., 250 Fed. 747, 769.

6 Stevenson v. U. S., C. C. A., 86 Fed. 106.

7 Burton v. U. S., 196 U. S. 283, 306, 49 L. ed. 482.

8 Tucker v. U. S., 151 U. S. 164, 38 L. ed. 112; Thiede v. Utah, 159 U. S. 510, 40 L. ed. 237.

9 Allen v. U. S., 164 U. S. 492, 41 L. ed. 528.

10 Agnew v. U. S., 165 U. S. 36, 41 L. ed. 624; Bird v. U. S., 187 U. S. 119, 47 L. ed. 100; O'Leary v. U. S., C. C. A., 158 Fed. 797.

11 Crain v. U. S., 162 U. S. 625, 40 L. ed. 1097.

12 Blanton v. U. S., C. C. A., 213 Fed. 320.

13 Hoss v. U. S., C. C. A., 232 Fed. 328.

14 Blanton v. U. S., C. C. A., 213 Fed. 320.

tection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same, and the general nature thereof, and if, in his opinion, the case is such as should be summarily tried, he shall report the same to the district judge, and the judge shall forthwith, or as soon as the ordinary business of the court will permit, proceed to try the cause, and for that purpose may, if necessary, hold a special session of the court, either in term-time or vacation."[1]

"At the summary trial of offenses against the laws for the protection of persons or property engaged in commerce or navigation, it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath in writing, shall be presented to the court, setting out the offense in such manner as clearly to apprise the accused of the character of the offense complained of, and to enable him to answer the complaint. The complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement. The trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty."[2]

"It shall be lawful for the court to allow the district attorney to amend his statement of complaint at any stage of the proceedings, before verdict, if, in the opinion of the court, such amendment will work no injustice to the accused; and if it appears to the court that the accused is unprepared to meet the charge as amended, and that an adjournment of the cause will promote the ends of justice, such adjournment shall be made, until a further day, to be fixed by the court."[3] "At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers."[4]

"It shall not be lawful for the court to sentence any person convicted in such trial to any greater punishment than imprison-

§ 528. [1] U. S. R. S., § 4300. See U. S. v. Harriman, 1 Hughes 525.
[2] U. S. R. S., § 4301.
[3] U. S. R. S., § 4302.
[4] U. S. R. S., § 4303.

ment in jail for one year, or to a fine exceeding five hundred dollars, or both, in its discretion, in those cases where the laws of the United States authorize such imprisonment and fine."[5]

"All the penalties and forfeitures which may be incurred for offenses against this Title may be sued for, prosecuted, and recovered in such court, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties, except when otherwise expressly prescribed."[6]

A later statute applies the provisions of these sections to the trial of offenses for failure to observe signals made in laying and repairing submarine cables and for failing to keep fishing implements or nets out the way of such operations.[7]

"The law which dispenses with an indictment for petty offenses on high seas has been found very useful both to the government and to the accused. The district judges who have sat here since this law was first passed in June, 1864, have had very grave doubts of the constitutionality of that part of Section 4301 which provides for a trial by the court; and it has been usual to try all contested cases by jury."[8]

It has been said that these summary proceedings are put by the statute substantially on the footing of civil cases, and that the want of a due verification of complaint is waived by voluntary appearance of accused.[9] It has been held, that such an error can be cured by amendment and cannot be urged for the first time upon a motion in arrest of judgment.[10]

§ 529. Practice in prosecutions under the civil rights laws. "The jurisdiction in civil and criminal matters conferred" on the District Courts "by the provisions of this title," that on the "Judiciary" "and of title 'Civil Rights,' and of title 'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are

5 U. S. R. S., § 4304.
6 U. S. R. S., § 4305.
7 Act of Feb. 29, 1888, c. 17, § 11, 25 St. at L. 42.
8 *Re* Smith, 13 Fed. 25. D. Mass.
9 U. S. v. Smith, 17 Fed. 510.
10 Ibid.

deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."[1] This section is not repealed or affected by the Judiciary Act of March 3, 1887.[2] It relates to the forms of process and remedy and not to the extent or scope of the jurisdiction, nor to the rules of decision.[3] It has been said: that, as there are no acts of Congress regulating challenges to grand jurors, the Federal court should follow the State practice as to objections to indictments because of irregularity in the selection of the members of the grand jury.[4]

§ 530. New trials. The rules regulating motions for new trials in criminal cases are substantially the same as those in civil actions at common law.[1] Irrespective of the State statutes the motion must be made at the term at which judgment is entered;[2] but when no judgment had been entered it was held that the motion might be made after the trial term.[3] An order denying a motion for a new trial should not be reviewed upon writ of error,[4] but a refusal to consider affidavits offered in support of a motion for a new trial may be a ground for reversal when an exception was duly taken to such exclusion.[5] Where uncontradicted affidavits, which the court of original jurisdiction refused to consider, prove that a new trial must be granted, the court of review granted the same.[6] The denial of a new trial in a

§ 529. 1 U. S. R. S., § 722.
2 24 St. at L. 552, § 5.
3 *Re* Stupp, 12 Blatch. 509.
4 U. S. v. Egan, 30 Fed. 608.

§ 530. 1 *Supra*, § 478.
2 U. S. v. Mayer, 235 U. S. 55; U. S. v. Rogers, 164 Fed. 520; *supra*, § 478.
3 U. S. v. Rogers, 164 Fed. 520.
4 Whitworth v. U. S., C. C. A., 114 Fed. 302, *supra*, § 478.
5 Clyde Mattox v. U. S., 146 U. S. 140, 147, 36 L. ed. 917, 920. See Hendrix v. U. S., 219 U. S. 79, 91, 55 L. ed. 102, 106; Dwyer v. U. S., C. C. A., 170 Fed. 160.
6 Ogden v. U. S., C. C. A., 112 Fed. 523; Taylor v. U. S., C. C. A., 244 Fed. 321; *supra*, § 478.

criminal case is not assignable as error, although affidavits of newly discovered evidence are filed in support of the motion for a new trial.[7] Affidavits which were not submitted in the court of original jurisdiction cannot be considered by the court of review.[8]

§ 531. Motions in arrest of judgment. A motion in arrest of judgment must be based upon an omission in the record of fact essential to show the jurisdiction of the court, or upon some error in the proceedings, which appears upon the record.[1] After the verdict, matter outside of the record can properly only be brought to the attention of the court by a motion for a new trial,[2] although such motions are sometimes erroneously called motions in arrest of judgment.[3]

A motion in arrest of judgment is not favored by the court.[4] It is the appropriate method of raising upon the record an objection to the indictment which has not been the subject of a motion to quash,[5] or a demurrer.[6]

A motion in arrest of judgment will be granted where an objection to the legality of the organization of a grand jury appears on the record,[7] or the indictment, conviction and sentence, were made by a court sitting at an unauthorized time,[8] or where the record fails to show that a plea of not guilty was entered either by the defendant, or by order of the court on his behalf and in his presence;[9] or where it appears from the indictment that it is based upon a statute that had been repealed;[10] or where the indictment fails to charge any offense under a statute of the United States.[11]

When the indictment does not charge a crime under a statute of the United States the motion may be made by a defendant

7 Andrews v. U. S., C. C. A., 224 Fed. 418; Lee U. Ong v. U. S., C. C. A., 264 Fed. 315.

8 Kult v. U. S., C. C. A., 210 Fed. 249.

§ 531. 1 U. S. v. Kilpatrick, 16 Fed. 765; U. S. v. Barnhart, 17 Fed. 579 (9 Sawyer 159); U. S. v. McKnight, 112 Fed. 982.

2 *Supra*, § 130.

3 Cooper v. U. S., C. C. A., 247 Fed. 45.

4 Baker v. Warner, 231 U. S. 385.

5 *Supra*, § 515.

6 *Supra*, § 516.

7 U. S. v. London, 176 Fed. 976.

8 See *Ex parte* Harlan, 180 Fed. 119.

9 Dansby v. U. S., 2 Indian Territory, 456, 51 S. W. 1083.

10 U. S. v. Goodwin, 20 Fed. 237.

11 U. S. v. Bartow, 10 Fed. 874, 20 Blatchf. 349; Morris v. U. S., C. C. A., 168 Fed. 682.

who has pleaded guilty.[12] A motion in arrest of judgment will not be granted because of mere technical defects in the indictment, which do not tend to prejudice the defendant;[13] nor because of defects or uncertainties therein, which might be fatal upon a motion to quash, when it contains allegations of all the essential elements of the crime charged;[14] nor, for misjoinder or duplicity.[15] Where there is a general verdict of guilty, and the indictment contains several counts, of which only one is good, the judgment will not be arrested, if the evidence is sufficient to support the good count.[16] Nor, at least when no exception was taken at the time, will such a motion be granted for errors or irregularities in the conduct of the trial,[17] and as the fact that the indictment was not sent to the jury room, when it was in court during the trial and was read to the jury;[18] or a failure to read the indictment to the jury, when the accused did not demand that it be read;[19] or the insufficiency of the evidence to support the verdict.[20]

A motion in arrest of judgment will be granted when, in the case of a felony at least, a verdict was rendered in the absence of the defendant,[21] provided that a prompt objection upon this ground was made.[22]

Upon a motion in arrest of judgment, the court will not look beyond the record,[23] of which the evidence forms no part,[24] not even into a stipulation admitting certain facts.[25]

12 Moore v. State, 53 Nebr. 831, 74 N. W. 319.

13 Baker v. U. S., C. C. A., 231 U. S. 388; U. S. v. Chase, 27 Fed. 807; Schraubstadter v. U. S., C. C. A., 199 Fed. 568.

14 U. S. v. Kilpatrick, 16 Fed. 765.

15 U. S. v. Bayaud, 16 Fed. 376, 21 Blatchf. 287; Paul v. U. S., C. C. A., 127 Fed. 509; Chitty's Criminal Law, I, p. 253, 12 Cyc. 762.

16 U. S. v. Potter, 6 McLean 186, Fed. Cas. No. 16,078; *cf.* U. S. v. Fischer, 245 Fed. 423.

17 Chitty's Criminal Law, I, p. 661, 12 Cyc. 759.

18 U. S. v. Angell, 11 Fed. 34.

19 U. S. v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14,591.

20 DeMolli v. U. S., C. C. A., 144 Fed. 363; U. S. v. Maxey, 200 Fed. 997; U. S. v. Erie R. Co., 222 Fed. 444, 447; Towe v. U. S., C. C. A., 238 Fed. 557.

21 U. S. v. McClure, 107 Fed. 268.

22 U. S. v. Shepherd, 1 Hughes 520, Fed. Cas. No. 16,274.

23 U. S. v. Barnhart, 17 Fed. 579, 9 Sawyer 159. See U. S. v. Holt, 168 Fed. 141; U. S. v. Erie R. Co., 222 Fed. 444, 447.

24 De Molli v. U. S., C. C. A., 144 Fed. 363; U. S. v. Maxey, 200 Fed. 997.

25 U. S. v. Barnhart, 17 Fed. 579, 9 Sawyer 159.

The failure of the defendant to demand a bill of particulars does not deprive him of the right to move in arrest of judgment because of a defect in the indictment.[26]

Where, after a motion in arrest of judgment, the defendant forfeited his bail and absconded, the court refused to decide the motion in his absence.[27]

Such a motion should be made before sentence.[28] It cannot be made after the term at which the sentence was entered has expired.[29]

A motion in arrest of judgment is part of the record.[30] It should not be incorporated in the bill of exceptions.[31] It has been said that it is not assignable as error,[32] and that it is not reviewable by writ of error.[33]

§ 532. Sentence and judgment in criminal cases. Ordinarily, the sentence is pronounced by the judges who presided at the trial; but, in an extraordinary case, where the jurisdiction is not lost, it seems that the judge sitting at a regular term of the court may pass sentence, although the conviction was had at another term and before him and another judge.[1]

The sentence must be imposed in the presence of the defendant.[2] It cannot be altered or corrected in his absence.[3] Except, perhaps, in a capital case, it is unnecessary for the court to ask the prisoner if he has anything to say before the sentence is pronounced.[4] In one case after verdict of guilty, the court took testimony, for the purpose of information, as to the amount of the fine that should be imposed upon the corporation, which was the defendant.[5]

The judgment should be entered at the trial term[6] but in

26 U. S. v. Tubbs, 94 Fed. 356.

27 U. S. v. Erskine, 4 Cranch C. C. 299, Fed. Cas. No. 15,057.

28 McInerney v. U. S., C. C. A., 147 Fed. 183.

29 Ibid.

30 Collins v. U. S., C. C. A., 219 Fed. 670, 674.

31 Ibid.

32 Beyer v. U. S., C. C. A., 251 Fed. 39.

33 Andrews v. U. S., C. C. A., 224 Fed. 48. But see the authorities cited under this section *passim*.

§ 532. 1 U. S. v. Gordon, 5 Blatchf. 18, Fed. Cas. No. 15,231; U. S. v. May, 2 McArthur 512.

2 Turner v. U. S., C. C. A., 66 Fed. 287, 289, 13 C. C. A. 443, 445.

3 Price v. Zerbst, 268 Fed. 73.

4 Ibid.

5 U. S. v. Standard Oil Co. of Indiana, 155 Fed. 305, 317.

6 Kreuzer v. U. S., C. C. A., 254 Fed. 34, 36, 39.

the interest of justice the imposition of the sentence and the entry of judgment may be postponed for one or more definite periods of time.[7] Where the judgment is void a new judgment may be entered at a subsequent term.[8] A valid judgment which has been entered cannot at a subsequent term be vacated.[9]

A void judgment may lawfully be cancelled on motion after notice even after expiration of the term at which it was entered.[10] A judgment convicting a defendant of a crime for which there is no statutory authority, although entered on a plea of guilty, and the fine imposed has been paid, is void.[11]

The time when the sentence of imprisonment shall commence, although specified in the judgment, is no part thereof and may be changed at a subsequent term if for any reason execution thereof has been delayed.[12] Where a fine has been imposed and paid, the court cannot even at the same term modify the judgment by imposing imprisonment instead of the former sentence;[13] nor after he has served part of a term in a county jail as directed by a sentence can the judgment be modified at the same, or at a subsequent term so as to impose a longer imprisonment in a penitentiary of the United States.[14] The court may impose sentence upon some of the counts upon which a conviction has been obtained, postpone sentence on the other counts to a subsequent term and then impose an additional sentence therefor, although in the meantime a writ of error and supersedeas upon the former sentence has been obtained.[15]

The judgment in a criminal case, in which two defendants are jointly tried and jointly convicted, must be several and not joint;[16] except so far as the costs are concerned, for which, perhaps, a joint judgment might be entered.[17]

7 Minor v. U. S., C. C. A., 244 Fed. 422; Kreuzer v. U. S., C. C. A., 254 Fed. 34, 36, 39; Anderson v. Denver, C. C. A., 265 Fed. 3.

8 Bryant v. U. S., C. C. A., 214 Fed. 51.

9 U. S. v. Mayer, 235 U. S. 55.

10 Mossew v. U. S., C. C. A., 266 Fed. 18.

11 Ibid.

12 Bernstein v. U. S., C. C. A., 254 Fed. 966.

13 *Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872.

14 Blackman v. U. S., C. C. A., 250 Fed. 449.

15 Kreuzer v. U. S., C. C. A., 254 Fed. 34, 36, 39.

16 U. S. v. Ismenard, 1 Cranch C. C. 150, Fed. Cas. No. 15,450.

17 Calico v. State, 4 Ark. 430.

Where two indictments for offenses under the same statute have been consolidated, the court may sentence each defendant to the whole statutory term.[18]

Where there is a general verdict of guilty under an indictment, with two or more counts charging different crimes of the same character and growing out of the same transaction, even if they differ in degree, the sentence must impose a single penalty.[19] But, where there is a general verdict, upon two or more counts charging crimes of the same character arising out of distinct and separate transactions, a separate penalty may be imposed for each count.[20] Where judgment is imposed for a specified term of imprisonment upon different counts, it is a single sentence.[21] A separate term for each count must be specifically stated by the court in the sentence;[22] and whether it is the intention of the court that the term shall be consecutive or concurrent, should be stated in the judgment.[23] Where a cumulative sentence is imposed after conviction upon an indictment containing several counts and the imprisonment inflicted is shorter than might have been imposed upon all the counts but longer than the statutory penalty for one, it will not be limited to the maximum for a single count, although it uses the word "concurrently."[24] Where the sentence after such a conviction was silent in this respect, it was presumed that the terms were concurrent.[25] Upon a verdict of guilty of several counts it is error to impose the sentence for a certain period in gross, which is in excess of the statutory penalty

18 Turner v. U. S., C. C. A., 66 Fed. 280, 13 C. C. A. 436.

19 Burton v. U. S., 202 U. S. 344, 379, 26 Sup. Ct. 688; *Ex parte* Joyce, Fed. Cas. No. 7,556; Ulmer v. U. S., C. C. A., 219 Fed. 641 (repetition of the same false statement upon the same examination); Charley Toy v. U. S., C. C. A., 266 Fed. 326; manufacture of smoking opium without compliance with statutory requirements.

20 U. S. v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14,572; *Re* Greenwald, 77 Fed. 590; U. S. v. Carpenter, C. C. A., 9 L. R. A. (N. S.) 1043, 151 Fed. 214; U. S. v. Peeke, C. C. A., 153 Fed. 166; U. S. v. Phelan, 250 Fed. 927.

21 U. S. v. Thompson, 202 Fed. 346.

22 U. S. v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14,572; *Re* Greenwald, 77 Fed. 590.

23 Kirkman v. McClaughry, 152 Fed. 255.

24 Brinkman v. Morgan, C. C. A., 253 Fed. 553.

25 Kirkman v. McClaughry, 152 Fed. 255.

for a single crime.[26] Another court cannot cure the defect by apportioning the term upon the different counts;[27] after serving the lawful part of the term, the prisoner may be discharged upon *habeas corpus*,[28] unless the term of the court, at which the judgment was entered, has not yet expired, in which case, before the discharge of the prisoner, an opportunity to correct the sentence might be afforded.[29] Where the prisoner was sentenced to three successive terms of imprisonment upon different counts, and the sentence for the second or middle term was void, it was held that the third term began at once upon the expiration of the first.[30]

Where a prisoner convicted for two offenses was sentenced to a term of imprisonment for each offense, the terms to run concurrently, and the statute required that the terms of the imprisonment should be cumulative; it was held that, since the error did not prejudice the convict, he should not be discharged by *habeas corpus*.[31]

The plaintiff in error cannot complain because the statute directed that he be punished by fine and imprisonment and no fine was imposed upon him,[32] nor because different punishment is imposed upon him from that prayed in the information;[33] but where the statute directed that the imprisonment be at hard labor, it was held that it was error to omit the direction for hard labor.[34] The judgment was consequently reversed and remanded in order that the proper punishment might be imposed.[35] Where the statute does not authorize imprisonment at hard labor upon *habeas corpus*, the trial court can amend

26 U. S. v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14,572; *Re* Greenwald, 77 Fed. 590; U. S. v. Peeke, C. C. A., 12 L. R. A. (N. S.) 314, 153 Fed. 166; U. S. v. Rockefeller, 226 Fed. 328.

27 U. S. v. Peeke, C. C. A., 153 Fed. 166.

28 Ibid.

29 U. S. v. Carpenter, C. C. A., 12 L. R. A. (N. S.) 314, 151 Fed. 214; *supra*, § 481.

30 U. S. v. Carpenter, C. C. A., 151 Fed. 214.

31 Connella v. Haskell, C. C. A., 158 Fed. 285.

32 Bartholonew v. U. S., C. C. A., 177 Fed. 902; Linnigen v. Morgan, C. C. A., 241 Fed. 645.

33 Standard Oil Co. v. Missouri, 224 U. S. 270, 285, 56 L. ed. 760, 769.

34 Sorenson v. U. S., C. C. A., 168 Fed. 785.

35 Ibid.

the sentence *nunc pro tunc* by striking out that part of the sentence.[36] "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law."[37]

In a recent case, after verdict of guilty, the court took testimony, for the purpose of information, as to the amount of the fine that should be imposed upon the corporation, which was the defendant.[38]

The judgment should state the crime of which the defendant is guilty and for which sentence is imposed;[39] but an omission in this respect does not make it void when these facts clearly appear upon the record.[40] The time when the term of imprisonment imposed shall begin need not be therein stated.[41]

It seems that the signature of the judge is unnecessary to the validity of a judgment in a criminal case, when the sentence is correctly recited in the record duly authenticated by the clerk.[42]

36 *Ex parte* Harlan, 180 Fed. 119.

37 *Ex parte* Karstendick, 93 U. S. 396, 399, 23 L. ed. 889, 890, per Waite, C. J.

38 U. S. v. Standard Oil Co. of Indiana, 155 Fed. 305, 317, citing Bishop's New Criminal Law, I, §§ 948 and 950. The court imposed a fine of $29,240,000, which was more than the capital stock of the defendant, and which had a capital of only $1,000,000. The reason assigned was that the owner of the defendant's capital stock, the Standard Oil Company of New Jersey, whose capital was 100,000,000, was the real defendant. This case was reversed by the Circuit Court of Appeals, 104 Fed. 376.

39 *Ex parte* Thurston, 233 Fed. 847.

40 Ibid.

41 Bernstein v. U. S., C. C. A., 254 Fed. 966.

42 Connella v. Haskell, C. C. A., 158 Fed. 285.

§ 533. Suspension of judgments in criminal cases. Territorial [1] and District Courts of the United States have no power to suspend sentence indefinitely.[2] This is an invasion of the functions of the President who alone has the right to pardon.[3] A District Court has the power temporarily to suspend its judgment from time to time for the purpose of hearing motions and entertaining other proceedings after verdict which may properly be considered before judgment or for other good cause.[4] When the order is for a short period of time, it will be presumed to have been granted for a sufficient reason and cannot be collaterally attacked.[5] An indefinite order of suspension during the good behavior of the defendant which keeps the term of the court open during the time of his sentence is beyond the powers of the court.[6] A clause in the judgment which suspends the execution of the sentence does not invalidate the sentence.[7] It was formerly held that the court might sentence the defendant upon a single count and suspend sentence from the others.[8]

§ 534. Punishments for Crimes against the United States. Fine,[1] imprisonment [2] and death [3] are the respective punishments imposed for crimes against the United States.

"The punishment of whipping and of standing in the pillory shall not be inflicted." [4]

"No conviction or judgment shall work corruption of blood or any forfeiture of estate." [5]

§ 534a. Excessive fines, and cruel and unusual punishment. By the Eighth Amendment it is ordained: "Excessive bail

§ 533. 1 *Ex parte* U. S., 242 U. S. 27; U. S. v. Wilson, 46 Fed. 748.

2 Ibid.

3 Ibid.

4 U. S. v. Wilson, 46 Fed. 748; Miner v. U. S., C. C. A., 244 Fed. 422; *supra*, § 532.

5 Miner v. U. S., C. C. A., 244 Fed. 422, an adjournment from term to term for four terms.

6 *Ex parte* U. S., 242 U. S. 27, 37 Sup. 72, 61 L. ed. 129.

7 Morgan v. Adams, C. C. A., 226 Fed. 719.

8 U. S. v. Blaisdell, 3 Benedict 132, Fed. Cas. No. 14,608.

§ 534. 1 *Infra*, § 534c.

2 *Infra*, § 534c.

3 *Infra*, § 534b.

4 Criminal Code, § 325, 35 St. at L. 1151, Com. St., § 10499.

5 Criminal Code, § 324, 35 St. at L. 1151, Comp. St., § 10498.

shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As a general rule, a fine imposed by the court within the limits of a statute is not excessive unless the statute itself is unconstitutional.[1] A court of review may, however, review the question whether the fine is out of proportion to the offense[2] and perhaps, when the statute does not permit immunity by taking the poor debtor's oath, to ascertain whether it has any reference to the defendant's ability to pay.[3]

The natural construction of the Amendment would seem to be that the words "cruel and unusual" are used cumulatively and not alternatively; but the expressions of the courts indicate a contrary opinion.[4] "Probably any punishment declared

§ 534a. 1 Pervear v. The Commonwealth, 5 Wall. 475, 480; Jackson v. U. S., C. C. A., 102 Fed. 473, 487; Cooley's Constitutional Limitations, 6th ed., p. 402.

2 Weems v. U. S., 217 U. S. 349, 54 L. ed. 793, 357, 366, a fine of four thousand pesos besides imprisonment for the offense of making a false entry in a public record as to the payment of six hundred and sixteen pesos.

In State v. O'Neil, 58 Vermont 140, affirmed on another point, O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, a judgment was affirmed which upon a conviction of 307 legal sales of intoxicating liquor sentenced him to a fine of $6,140, being $20 for each offense and costs $497.96, and in case of failure to pay the fine to confinement at hard labor for 19,914 days, three days for each dollar of the fine and costs; besides two months imprisonment in any event. See 66 Vt. 356, March 2, 1894.

In Pervear v. Commonwealth, 5 Wall. 475, 18 L. ed. 608, held not cruel and unusual punishment to impose a fine of $250 and imprisonment in a house of correction for six months, as a punishment for keeping a liquor saloon without a license.

So in State v. Bergstrom, 69 Minn. 508, 520, a fine of $500 and one year's imprisonment at hard labor for the embezzlement by a county treasurer of $250.

And in Whitten v. State, 47 Georgia 297, a fine of $250 and costs, with the alternative of imprisonment for assault and battery.

3 Cooley's Constitutional Limitations, 6th ed., p. 402, citing Magna Charta.

4 See Weems v. U. S., 217 U. S. 349, 357, 366, 54 L. ed. 793 per McKenn; Ibid. per Chief White, then a puisne Justice: 402:

"The term unusual, as used in the clause, was not a qualification of the provision against cruel punishments, but was simply synonymous with illegal, and was mainly intended to restrain the courts, under the guise of discretion, from indulging in an unusual and consequently illegal exertion of power."

Ibid. 409, 410. "In my opinion, the review which has been made dem-

by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense.'' [5]

A cruel punishment formerly imposed, which has become obsolete, would undoubtedly not be sustained if imposed by a modern statute such as burning alive and breaking on the wheel.[6]

A punishment which involves a torture or a lingering death is forbidden by the constitution.[7]

The punishment by death is not cruel or unusual.[8] Nor death by shooting.[9] Nor flogging in a State where it was cus-

onstrates that the word cruel, as used in the Amendment, forbids only the lawmaking power, in prescribing punishment for crime and the courts in imposing punishment from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are the nature of the cruel methods of the bodily torture which had been made use of prior to the bill of rights of 1869, and against the recurrence of which the word cruel was used in that instrument. To illustrate. Death was a well known method of punishment prescribed by the law, and it was of course painful, and in that sense was cruel. But the infliction of this punishment was clearly not prohibited by the word cruel, although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture, in executing even the penalty of death.

''In my opinion the previous considerations also establish that the word unusual accomplished only three results: First, it primarily restrains the courts when acting under the authority of a general discretionary power to impose punishment, such as was possessed at common law, from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal because to that degree it cannot be inflicted without express statutory authority; second, it restrains the courts in the exercise of the same discretion from inflicting a mode of punishment so unusual as to be impliedly not within its discretion and to be consequently illegal in the absence of express statutory authority; and, third, as to both the foregoing it operated to restrain the lawmaking power from endowing the judiciary with the right to exert an illegal discretion as to the kind and extent of punishment to be inflicted.''

5 Cooley's Constitutional Limitations, 6th ed., p. 402.

6 Wilkerson v. Utah, 99 U. S. 130, 25 L. ed. 345; Weems v. U. S., 217 U. S. 349. 379, 54 L. ed. 793, 357, 366; Done v. People, 5 Parker Cr. Cas. (N. Y.) 364, see State v. Danforth, 3 Conn. 112, 116, 122-124.

7 *Re* Kaemmler, 136 U. S., 436, 34 L. ed. 519.

8 Wilkerson v. Utah, 99 U. S. 130, 25 L. ed. 345; *Re* Kaemmler, 136 U. S. 436, 34 L. ed. 519.

9 Wilkerson v. Utah, 99 U. S. 130, 25 L. ed. 345.

tomary before the Revolution.[10] Nor sterilization for the offense of rape.[11] Nor a sentence of ten years in prison for assault with a dangerous weapon.[12] Nor a cumulative sentence of five years upon each of two counts for a violation of the White Slave Act in connection with the same woman during the same year.[13] Nor a concurrent sentence of five years and a cumulative sentence of $1,000 on each, or $7,000 in all upon a conviction of seven counts for mailing different letters in connection with the same fraudulent scheme.[14]

It has been said: that the Amendment is progressive and not only forbids what was considered to be cruel and unusual when it was adopted but "may acquire meaning as public opinion becomes enlightened by a humane justice."[15] That the Amendment ordains that the Legislative shall proportion the punishment to the crime and that a penalty which is disproportionate to the offense should be set aside by the court.[16] That there may be a cruelty, forbidden by the Amendment, in an excess of imprisonment imposed by statute.[17]

10 Claridge v. Commonwealth, 2 Va. Cases 447, Larceny by negroes; Commonwealth v. Wyatt, 6 Rand. (694 Va.); Foote v. State, 59 Md. 264, Punishment for wife-beating; Garcia v. Territory, 1 New Mexico 415, Punishment for horse stealing. *Contra,* Hobbs v. State (Ind.), 32 Nerep. 1019.

11 State v. Fellen (Washington, Sept., 1912), 126 Pac. 75. *Contra,* Mickle v. Henrichs, 262 Fed. 687.

12 Jackson v. U. S., C. C. A., 102 Fed. 473.

13 Myers v. Morgan, C. C. A., 224 Fed. 413.

14 Badders v. U. S., 240 U. S. 391, 36 Sup. Ct. 367, 60 L. ed. 706.

15 Weems v. U. S., 217 U. S. 349, 378, 54 L. ed. 793, *per* Justice McKenna, but see the able descent of Chief Justice White, then a puisne Justice, with whom Mr. Justice Holmes concurred. Ibid., 217 U. S. 410, 411.

16 Weems v. U. S., 217 U. S. 367, 372, 377, 379, 381, 54 L. ed. 793, per Mr. Justice McKenna, but see the same descent of White and Holmes, J. J. Ibid., 217 U. S. 387, 388, 402.

17 Weems v. U. S., 217 U. S. 349, 377, 54 L. ed. 793. Holding it to be cruel and unusual to punish by imprisonment at hard and cruel labor for twelve years in chains a public officer for making false entries in public records affecting six hundred and sixteen pesos currency; State v. Driver, 78 Nc. 432, punishing for assault and battery by imprisonment for five years in the county jail. People v. Murray, 72 Michigan 10, a dictum that a sentence of fifty years for the crime of rape was in violation of a similar clause of the State Constitution. State v. Whitaker, 48 La. Ann. 527, a dictum when a judgment was void for a similar reason because it imposed imprisonment for 2,160 days in de-

In a recent extraordinary case, it was held by the majority of the Supreme Court, to be cruel and unusual punishment for a court of the Philippine Islands to sentence a public officer for the crime of making a false entry of payments of Government money amounting to six hundred sixteen pesos of Philippine currency to fifteen years imprisonment in chains employed at hard and painful labor in accordance with the statute of the Islands.[18]

The Eighth Amendment does not apply to the States of the Union[19] whether the imposition of an excessive fine or of cruel and unusual punishment is due process of law, or is forbidden by the Fourteenth Amendment is an open question.[20]

§ 534b. Capital punishment. Treason,[1] murder in the first degree,[2] and rape[3] are punishable by the infliction of death.

In the case of treason, the court may, in its discretion, instead of imposing capital punishment sentence the convict to an imprisonment of "not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States."[4]

"In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."[5]

fault of the payment of fines aggregating $720.

18 Weems v. U. S., 217 U. S. 349, 357, 366, 54 L. ed. 792.

19 Pervea v. Commonwealth, 5 Wallace 475, 18 L. ed. 608.

20 Pervea v. Commonwealth, 5 Wallace 475, 18 L. ed. 608; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450.

§ 534b. 1 Criminal Code, § 2, 35 St. at L. 1088, re-enacting U. S. R. S., § 5332, Comp. St., § 10166. See *supra*, § 523n.

2 Criminal Code, § 275, 35 St. at L. 1143, re-enacting U. S. R. S., §§ 5339, 5343, Comp. St., § 10448.

3 Penal Code, § 278, 35 St. at L. 1143, Comp. St., § 10450.

4 Criminal Code, § 2, 35 St. at L. 1088, re-enacting U. S. R. S., § 5332, Comp. St., § 10166, see *supra*, § 523n.

5 Criminal Code, § 330, 35 St. at L. 1152, Comp. St., § 10504.

"Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree." [6]

"The manner of inflicting the punishment of death shall be by hanging." [7]

"The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion, add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution, to such surgeon as the court may direct; and such surgeon, or some person appointed by him, shall receive and take away the body at the time of execution." [8]

"Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct." [9]

Unless a statute so describes, the time and place of the execution are not a part of the judgment.[10] When the day appointed for execution in the sentence expires pending proceedings to review the judgment or otherwise to set it aside, a State or

6 Criminal Code, § 273, 35 St. at L. 1143, Comp. St., § 10446.

7 Criminal Code, § 323, 35 St. at L. 1151, Comp. St., § 10497.

8 Criminal Code, § 331, 35 St. at L. 1152, Comp. St., § 10505.

9 U. S. R. S., § 1040.

10 Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734; Schwab v. Berggren, 143 U. S. 442, 36 L. ed. 218, see Cross v. Burke, 146 U. S. 82, 36 L. ed. 896.

Federal court may, without violating the defendant's constitutional rights, fix a new date for execution.[11] A State statute directing that the date of execution be named by the Executive is no infringement of the Federal Constitution.[12] A law passed subsequent to the commission of a crime changing the place of execution is not an *ex post facto* law nor invalid.[13]

§ 534c. Punishment by imprisonment. "In every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose."[1]

A judgment of conviction of two of several misdemeanors, prosecuted under separate indictments, which have been consolidated for trial at which the defendant is sentenced to two successive terms in the same prison, each for less than one year but aggregating more, contains two sentences and the imprisonment cannot be directed in a penitentiary.[2]

It has been held that this act does not apply to felonies;[3] nor to offenses which are required by other statutes to be punishable in prison by hard labor.[4]

"In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose."[5]

"Where a judicial district has been or may hereafter be divided, the circuit and district courts of the United States shall have power to sentence any one convicted of an offense

11 Creamer v. Washington, 168 U. S. 125, 42 L. ed. 407.

12 Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734.

13 Rooney v. North Dakota, 196 U. S. 319, 49 L. ed. 494.

§ 534c. 1 U. S. R. S., § 1040.

2 *Re* Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. ed. 107.

3 U. S. v. Thompson, 202 Fed. 346.

4 *Ex parte* Friday, 43 Fed. 916, 919, 920.

5 U. S. R. S., § 5542.

punishable by imprisonment at hard labor to the penitentiary within the State, though it be out of the judicial district in which the conviction is had."[6] "All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, including consular courts, whose punishment is imprisonment in a District or Territory or country where, at the time of conviction or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and the delivery shall be by the warden of the jail of that District, the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia only, to be paid by the Attorney-General out of the judiciary fund. But if, in the opinion of the Attorney-General, the expense of transportation from any State, Territory, or the District of Columbia in which there is no penitentiary will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: *Provided, however*, That no change shall be made in the case of any prisoner on the ground of unhealthiness of the prisoner or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf."[7] "The At-

6 U. S. R. S., § 5540.

7 U. S. R. S., § 5546, as amended.

torney-General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined." [8]

"Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose." [9]

"Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be convicted of crime, the punishment whereof is imprisonment, shall be confined during the term of sentence in some house of refuge to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only, shall be paid by the Attorney-General, out of the judiciary fund." [10] "The Attorney-General shall contract with the managers or persons having control of such houses of refuge for the imprisonment, subsistence, and proper employment of all such juvenile offenders, and shall give the several courts of the United States and of the District of Columbia notice of the places so provided for the confinement of such offenders; and they shall be sentenced to confinement in the house of refuge nearest the place of conviction so designated by the Attorney-General." [11]

31 St. at L. 450, ch. 873; U. S. v. Lane, 221 Fed. 299. See Ozello v. U. S., C. C. A., 268 Fed. 242.

[8] U. S. R. S., § 5547.

[9] U. S. R. S., § 5548.

[10] U. S. R. S., § 5549.

[11] U. S. R. S., § 5550.

"Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."[12]

This does not authorize compulsory labor by a Federal convict, not sentenced to hard labor, although the State statute requires the inmates of the jail to be employed in labor.[13] The power of a Federal court to direct imprisonment in the United States penitentiary at Atlanta of a defendant convicted of an infamous crime is not limited to cases where hard labor is a part of the sentence imposed.[14]

A certified copy of the record of the sentence is sufficient to authorize the warden of the prison to hold the convict without any warrant or formal mittimus.[15]

§ 534d. Punishment by fine. By the Revised Statutes, "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided,* That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."[1] After the expiration of the specific term of imprisonment, the convict may serve the remainder of his term in the penitentiary in which he was previously confined.[2]

A judgment of conviction which imposes a fine will support

12 U. S. R. S., § 5539.

13 U. S. v. Nelson, 254 Fed. 889.

14 Rogers v. Desportes, 268 Fed. 83.

15 *Ex parte* Wilson, 114 U. S. 417, 421, 29 L. ed. 89; *Ex parte* Thurston, 233 Fed. 847; People v. Nevins, 1 Hill. (N. Y. 154). See *supra,* § 488a.

§ 534d. 1 U. S. R. S., § 1041.

2 Haddox v. Richardson, C. C. A., 168 Fed. 635.

a creditor's bill in aid of an execution which has been returned unsatisfied.[3] Where a corporation, pending a criminal prosecution against it, which resulted in a judgment imposing a fine, sold all of its property and distributed the proceeds among its stockholders, the courts sustain a creditor's bill to collect the fine.[4] After the expiration of the term at which a judgment fining a defendant is rendered, the court has no power by an order to declare such judgment abated because of his subsequent death,[5] unless the judgment is reversed,[6] when it may do so, or perhaps when the death occurs pending a supersedeas upon a writ of error.[7]

It has been held that a judgment for a fine, imposed in a civil contempt proceeding, does not abate by the death of the defendant.[8]

An order of abatement may be reviewed by a writ of error.[9]

The subject of costs in criminal cases is previously discussed.[10]

§ 534e. Commutation of term of imprisonment. By the Revised Statutes, "All prisoners who have been, or may be, convicted of any offense against the laws of the United States, and confined in any State jail or penitentiary in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made from the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such jail or penitentiary, with the approval of the Attorney-General."[1] "The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but, in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any State for offenses against the United States, shall be en-

3 Pierce v. U. S., C. C. A., 257 Fed. 515.

4 Ibid.

5 U. S. v. N. Y. Cent. & H. R. R. Co., C. C. A., 164 Fed. 324; reversing U. S. v. Pomeroy, 152 Fed. 279.

6 U. S. v. Dunne, C. C. A., 173 Fed. 254; Dyar v. U. S., C. C. A., 186 Fed. 614, 623.

7 U. S. v. Dunne, C. C. A., 173 Fed. 254.

8 Wasserman v. U. S., C. C. A., 161 Fed. 722.

9 U. S. v. Dunne, C. C. A., 173 Fed. 254.

10 *Supra*, § 408a.

§ 534e. 1 U. S. R. S., § 5543. See U. S. v. Schroeder, 14 Blatchf. 344.

titled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary."[2]

By the Act of March 3, 1875, "All prisoners who have been or shall hereafter be convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any State or Territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison [or] penitentiary of such deduction shall be entered on the warrant of commitment: *Provided,* That, if during the term of imprisonment the prisoner shall commit any offense for which he shall be convicted by a jury, all remissions theretofore made shall be thereby annulled."[3] "That on the discharge from any prison of any person convicted under the laws of the United States on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and five dollars in money, for which charge shall be made and allowed in the accounts of said prison with the United States: *Provided,* That this section shall not apply to persons sentenced for a term of imprisonment of less than six months."[4]

§ 534f. Release of poor convicts. By the Revised Statutes, "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the District Attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall

2 U. S. R. S., § 5544.

3 18 Stat. at L. 479, Comp. St., § 10531.

4 Ibid.

appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailor or keeper of the jail a certificate setting forth the facts." [1]

§ 535. Bills of exceptions in criminal cases. Whenever the plaintiff in error wishes to have the court of review examine the proceedings upon the trial, it is necessary for him to prepare and serve a bill of exceptions.[1]

By the common law no bills of exceptions in criminal cases were permitted.[2] In the Federal courts, a defendant who sues out a writ of error is entitled to a bill of exceptions.[3] "When Congress authorizes the proceedings in a criminal case to be reviewed upon a writ of error, it thereby sanctioned the use of a bill of exceptions; for the writ or error brings up the 'record,' and the bill of exceptions is the method by which the proceedings at the trial, which otherwise would not be in the record, are made a part of it and so reviewed. A statute which authorizes a writ of error to be sued out thereby allows a bill of exceptions to be signed and used in connection therewith, for it is only through it that the erroneous rulings of the judge made at the trial upon points of law become a part of the record to be reviewed. While no act of Congress in express terms authorized the judges to sign bills of exceptions in civil or criminal cases, Congress recognizes the use of such bills by providing how they are to be authenticated by the judges." [4]

§ 534g. [1] U. S. R. S., § 1042.

§ 535. [1] See § 479 *supra*.

[2] Buessel v. U. S., C. C. A., 258 Fed. 811, 815; Wharton's Criminal Procedure, 10th ed., Vol. III, § 1705.

[3] Buessel v. U. S., C. C. A., 258 Fed. 811, 816.

[4] Ibid., per Rogers, J.

The same rules regulate bills of exceptions in civil actions and criminal proceedings.[5] The State practice is not followed.[6]

It has been held that when there are two defendants represented by separate counsel either can avail themselves of an exception taken by the other to an instruction to the jury.[7] The defendant must except before the jury retires to every error in the charge which he wishes to bring before the court of error for review;[8] and the bill of exceptions must show that such exception was then taken.[9]

It is too late to take the exception after the jury has retired, although, it has been held, the delay is made at the request of the judge[10] and by consent of the other side;[11] but an exception may be taken to the refusal of the court to hear exceptions before the jury has retired.[12] The exceptions to the charge must be clear and specific so as to call the attention of the court to the particular error of which complaint is made;[13] but the courts are not so exacting in this respect as they are in civil cases.[14] A general exception to the whole charge is insufficient.[15] Where the charge consists of a single proposition of law, a general exception might be sufficient.[16] A court sustained an exception noted to each and every other instruction given by the court and to the refusal of the court to give each and every of the instructions requested by the defendant.[17]

5 See § 479, *supra*.

6 Buessel v. U. S., C. C. A., 258 Fed. 811.

7 Gardner v. U. S., C. C. A., 230 Fed. 576.

8 Phelps v. Mayer, 15 Howard 160, 14 L. ed. 643; MacDonald v. U. S., C. C. A., 63 Fed. 426; Owens v. U. S., C. C. A., 130 Fed. 279; Hunnicutt v. U. S., C. C. A., 253 Fed. 556; *supra*, § 479.

9 Ibid.; Collins v. U. S., 219 Fed. 670.

10 Phelps v. Mayer, 15 Howard 160, 14 L. ed. 643; Mann v. Dempster, C. C. A., 181 Fed. 76; Star Co. v. Madden, C. C. A., 188 Fed. 910. *Contra*, Owens v. U. S., C. C. A., 130 Fed. 279; Dalton v. Moore, C. C. A., 141 Fed. 311.

11 Mann v. Dempster, C. C. A., 181 Fed. 76.

12 Mann v. Dempster, C. C. A., 179 Fed. 837.

13 U. S. v. Hammond, 226 Fed. 849. *Supra*, § 473j.

14 Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465; Thompson v. U. S., C. C. A., 202 Fed. 401.

15 Hunnicutt v. U. S., C. C. A., 253 Fed. 556; *supra*, § 473j.

16 Humes v. U. S., C. C. A., 182 Fed. 485; McNutt v. U. S., C. C. A., 267 Fed. 670.

17 Sam Yick v. U. S., C. C. A., 240 Fed. 60. But see Gardner v.

An exculpatory affidavit sworn to by another, confessing the commission of the crime of which the defendant has been convicted, cannot be included in the bill of exceptions.[18] It can only be used upon a motion for a new trial,[19] or an application for a pardon.

§ 536. Writs or error by the Government in criminal cases. Originally the Government of the United States had no right to obtain a review of a judgment or order of acquittal, except possibly when a constitutional, jurisdictional or treaty question was involved.[1]

By the Act of March 2, 1907, "That a writ of error may be taken by and on behalf of the United States from the District or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."[2] This statute is constitutional.[3] But where a case, such

U. S., C. C. A., 230 Fed. 576; Beyer v. U. S., 251 Fed. 39.

18 Whitaker v. U. S., 220 Fed. 114.

19 Ibid.

§ 536. 1 U. S. v. Sanges, 144 U. S. 310, 36 L. ed. 445.

2 Act of March 2, 1907, c. 2564, 34 St. at L. 1246.

3 Morse v. U. S., C. C. A., 174 Fed. 539. As to the erroneous admission of testimony in such a case, see Dwyer v. U. S., C. C. A., 170 Fed. 160, cited *supra*, § 532.

as a contempt proceeding, is tried before a single judge, who finds the defendant guilty of separate acts and imposes a single sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, there is no room for such a presumption, and the judgment will be reversed if it appears that the defendant has been sentenced upon any charge which in law or in fact did not constitute a contempt.[4] Under this statute, an order or judgment quashing an indictment or sustaining a plea in bar may be reviewed in a proper case.[5] A decision sustaining a plea of the statutes of limitation may be thus reviewed. The right to review decisions sustaining special pleas in bar is not limited to cases in which these are based upon the invalidity or construction of the statutes upon which the indictment are founded.[6]

The statute may be misconstrued so as to warrant a writ of error, not only by misinterpretation but by failing to apply its provisions to an indictment which sets forth facts constituting a violation of its terms.[7] Where the validity of the rules of a Department is involved in the decision, a construction of the statute under color of which they were made is also necessary and a writ of error will lie.[8] Where the indictment was dismissed because not sustained by the statute and also as bad on principles of general law, the Supreme Court can only re-

[4] U. S. v. Bitty, 208 U. S. 393, 52 L. ed. 543. "Congress was not required by the Constitution to grant to an accused the privilege of bringing here upon the overruling of a demurrer to the indictment and before the final determination of the case against him, the question of the sufficiency of the indictment simply because, in the interest of the prompt administration of the criminal law, it allowed the United States to prosecute a writ of error directly to this court for the review of a final judgment which stopped the prosecution by quashing or dismissing the indictment upon the ground of the unconstitutionality or construction of the statute." U. S. v. Bitty, 208 U. S. 393, 399, 400, 52 L. ed. 543, 545, 546.

[5] U. S. v. Heinze, No. 2, 218 U. S. 547, 54 L. ed. 1145; U. S. v. Kissel, 213 U. S. 601, 54 L. ed. 1168; U. S. v. Barber, 219 U. S. 72, 55 L. ed. 99.

[6] U. S. v. Oppenheimer, 242 U. S. 85.

[7] Ibid.; U. S. v. Comyns, 248 U. S. 349.

[8] U. S. v. Nixon, 235 U. S. 231; U. S. v. Birdsall, 233 U. S. 223; U. S. v. Foster, 233 U. S. 515; U. S. v. New South Farm & Home Co., 241 U. S. 64. See U. S. v. Portale, 235 U. S. 27.

view the decision so far as it is based upon the invalidity or construction of the statute.[9]

The right of the Government to review a decision cannot be defeated by the entry of a general order of dismissal without any reasons or reference to any statute;[10] but where it does not appear from the record that judgment sustaining a demurrer to an indictment turned upon any disputed construction of a statute the Supreme Court cannot take jurisdiction of the case.[11]

Upon the argument of the writ of error the reviewing court will assume that the construction of the counts given by the court below is correct.[12]

It has been doubted whether the Attorney General can ask that the indictment be sustained under other statutes than those upon which the Government relied in the court below;[13] but an erroneous decision cannot be sustained because the attention of the court below was not called to an amendment of the statute.[14]

§ 536a. Writs of error by defendant in criminal cases. A judgment in criminal cases is reviewed by writ of error and not by appeal.[1]

A defendant, who has been convicted of any crime may bring the judgment for review before the Circuit Court of Appeals for the appropriate district by a writ of error.[2] His writ must be sued out within six months after the entry of the judgment sought to be reviewed.[3]

By the Revised Statutes, as amended, February 18, 1875, "There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."[4] This applies to the Circuit Courts

9 U. S. v. Stevenson, 215 U. S. 190, 54 L. ed. 153; U. S. v. Nixon, 235 U. S. 231.

10 U. S. v. Moist, 231 U. S. 701.

11 U. S. v. Carter, 231 U. S. 492.

12 U. S. v. Patten, 226 U. S. 525, 57 L. ed. —; U. S. v. Winslow, 227 U. S. 202, 57 L. ed. —; U. S. v. Davis, 201 U. S. 183.

13 U. S. v. George, 228 U. S. 14, 57 L. ed. —.

14 U. S. v. Nixon, 235 U. S. 231.

§ 536a. 1 See *infra*, § 687.

2 26 St. at L. 829, § 5; 29 St. at L. 492.

3 27 St. at L. 824, § 11.

4 Ch. 80, § 1, U. S. R. S., § 1011, Comp. St., § 1672.

of Appeals.[5] It prevents the court of review from re-examining questions of fact decided by a jury,[6] or upon the trial by the court of the issues on a plea in abatement, when the evidence is conflicting.[7].

The submission of a case upon an agreed statement of facts leaves the question of law thereupon arising open for review.[8]

The overruling of a demurrer will not be reviewed when the defendant was subsequently allowed to plead "not guilty."[9]

An order in the discretion of the court below, such as the denial of a motion to quash an indictment,[10] the denial of a motion for a continuance[11] or of a motion for a new trial,[12] will rarely, if ever, be reviewed. In an extraordinary case when injustice has clearly been committed below, a new trial may be granted because of the refusal to grant a continuance.[13] The court of review has power to reverse a judgment because the punishment was excessive. This will be done when the sentence was beyond the power of the court below if greater than that authorized by the statute;[14] or when the statute authorizes fine or imprisonment and, either after a fine has been imposed and paid, or part of a term of imprisonment has been served in the prison designated in the sentence, the sentence is modified so as in the former case to substitute imprisonment for a fine,[15] and in the latter to direct the imprisonment in another prison.[16] When the punishment is in excess of the statutory penalty the Circuit Court of Appeals may modify the sentence.[17] Upon an affirm-

5 Mounday v. U. S., 225 Fed. 965.

6 Miles v. U. S., 103 U. S. 304, 313, 26 L. ed. 481.

7 Mounday v. U. S., 225 Fed. 965. See *infra*, §§ 687, 695, 711.

8 Frank v. U. S., C. C. A., 192 Fed. 864.

9 Hillegass v. U. S., C. C. A., 18 Fed. 199.

10 U. S. v. Gooding, 12 Wheaton 460, 6 L. ed. 693; Betts v. U. S., C. C. A., 132 Fed. 228, 231; Hillegass v. U. S., C. C. A., 183 Fed. 199. See *supra*, § 515; *infra*, § 711.

11 Callahan v. U. S., C. C. A., 195 Fed. 924; McClendon v. U. S., C. C. A., 229 Fed. 523; Bond v. U. S., 282 Fed. 804; Spear v. U. S., C. C. A., 246 Fed. 250; Hale v. U. S., C. C. A., 242 Fed. 891.

12 Mitchell v. U. S., C. C. A., 196 Fed. 874. See §§ 478, 530, *supra*.

13 Younge v. U. S., C. C. A., 223 Fed. 941; *supra*, § 473a, 25 Fed. 244.

14 Reynolds v. U. S., 98 U. S. 145; Wechsler v. U. S., C. C. A., 158 Fed. 57.

15 *Ex parte* Lange v. U. S., 18 Wall. 663, 21 L. ed. 872.

16 Ibid.

17 Salazar v. U. S., C. C. A., 236 Fed. 541. See Mitchell v. U. S., C. C. A., 196 Fed. 874. *Supra*, § 532.

ance, the Circuit Court of Appeals may, with the consent of the District Attorney, authorize the trial judge to modify the sentence.[18]

An error in an instruction relating to a single count does not justify a reversal of the judgment where there was a general verdict of guilty and there are other counts unaffected by it.[19] The same rule applies where the evidence sustains one count but is insufficient to prove the rest.[20]

Where there is a general verdict of guilty upon an indictment containing several counts, some of which are bad, the conviction will not be reversed if there is one good count warranting the judgment.[21]

When there has been a sentence of concurrent imprisonment on two or more counts and one count is bad [22] or not sustained by the evidence,[23] the other good and properly supported, the judgment will usually be affirmed. "In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction." [24] But where a case, such as a con-

18 Scott v. U. S., C. C. A., 165 Fed. 172. In Rosenstein v. U. S., C. C. A., 193 Fed. 1022, the counsel for the plaintiff in error having called the attention of the court of review that the punishment should have been less in view of extenuating circumstances which his client excusably failed to bring before the District Court, the judgment was vacated and the case remanded for a resentence.

19 Morse v. U. S., C. C. A., 174 Fed. 539; Apgar v. U. S., C. C. A., 255 Fed. 16. As to the erroneous admission of testimony in such a case see Dwyer v. U. S., C. C. A., 170 Fed. 160, cited *supra*, § 532.

20 Morse v. U. S., C. C. A., 174 Fed. 539, 554; Johnson v. U. S., C. C. A., 215 Fed. 679; Morris v. U. S., C. C. A., 229 Fed. 516.

21 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L. R. A. (N. S.) 874.

22 Hocking Valley Ry. Co. v. U. S., C. C. A., 210 Fed. 735; Ryan v. U. S., C. C. A., 216 Fed. 13; Frankfurt v. U. S., C. C. A., 231 Fed. 903; Aezel v. U. S., 232 Fed. 652; Thurston v. U. S., C. C. A., 241 Fed. 335; Roberts v. U. S., C. C. A., 248 Fed. 873; Bonfoey v. U. S., C. C. A., 252 Fed. 802; Doe v. U. S., C. C. A., 253 Fed. 903; Kreuzer v. U. S., C. C. A., 254 Fed. 34; Greenburg v. U. S., C. C. A., 253 Fed. 720.

23 Edwards v. U. S., C. C. A., 223 Fed. 309; Brand v. U. S., C. C. A., 236 Fed. 219; Baldwin v. U. S., C. C. A., 238 Fed. 793; Sparks v. U. S., C. C. A., 241 Fed. 779; Daeche v. U. S., C. C. A., 250 Fed. 566; Gee Woe v. U. S., C. C. A., 250 Fed. 428.

24 Gompers v. Bucks & Range Co., 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L. R. A. (N. S.) 874.

tempt proceeding, is tried before a single judge, who finds the defendants guilty of separate acts and imposes a single sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, there is no room for such a presumption, and the judgment will be reversed if it appears that the defendants have been sentenced upon any charge which in law or in fact did not constitute a contempt.[25]

When the rulings in relation to an insufficient count prejudiced the defendant upon the other;[26] and where the elements involved in the different counts are not identical,[27] there will then be a reversal. In the former case a new trial will be ordered.[28] In the latter the case will be sent back for a new sentence.[29] Ordinarily there will be no interference with the discretion of the trial judge acting within the jurisdiction;[30] but a grossly excessive fine or imprisonment might in an extraordinary case justify a reversal.[31]

A conviction for the violation of a provision in a statute which is unconstitutional cannot be sustained, because there was proof upon the trial of a violation by him of another provision of the same statute.[32]

When the indictment does not set forth facts which constitute a crime, the judgment will be reversed, although there was no demurrer,[33] or exception below;[34] but, where there was no demurrer, a superfluous allegation,[35] or technical defect[36] which

25 Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 440, 55 L. ed. 797, 805, 34 L. R. A. (N. S.) 874.

26 Dwyer v. U. S., C. C. A., 170 Fed. 160; Stokes v. U. S., C. C. A., 264 Fed. 18.

27 Johnson v. U. S., C. C. A., 215 Fed. 679.

28 Dwyer v. U. S., C. C. A., 170 Fed. 160; Stokes v. U. S., C. C. A., 264 Fed. 18.

29 Ballew v. U. S., 160 U. S. 187, 203; Wroclawsky v. U. S., C. C. A., 183 Fed. 312; Johnson v. U. S., C. C. A., 215 Fed. 679, 687; Orth v. U. S., C. C. A., 252 Fed. 566.

30 Wallace v. U. S., C. C. A., 243 Fed. 300, 310; Freeman v. U. S., C. C. A., 243 Fed. 353, 357; Peterson v. U. S., C. C. A., 246 Fed. 118.

31 Weems v. U. S., 217 U. S. 349, 54 L. ed. 793. See *supra*, § 534.

32 Stewart v. Michigan, 232 U. S. 665.

33 Oesting v. U. S., C. C. A., 234 Fed. 304.

34 Buessel v. U. S., C. C. A., 258 Fed. 811; *supra*, § 479.

35 Tucker v. U. S., C. C. A., 224 Fed. 833.

36 Hamilton v. U. S., C. C. A., 255 Fed. 511.

could not have injured the defendant, will usually be disregarded. Objections to irregularities in the summons, the panel, or the organization of a grand jury, cannot be raised for the first time by writ of error.[37]

By the Act of February 26, 1919, on the hearing of any writ of error, "In any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the party."[38] It has been held, that this authorizes an affirmance, notwithstanding errors in the admission or rejection of evidence, when the guilt of the defendant is otherwise conclusively proved.[39] It has been further held, that it is incumbent upon the plaintiff in error to show that such an error is of a nature that it is reasonable to believe it was prejudicial.[40] It has been said that conviction should be reversed because of prejudicial remarks by the attorney for the United States although there was no exception nor any request for an instruction in relation thereto.[41] When evidence erroneously admitted has subsequently been stricken out, or the jury directed to disregard it, the error is usually cured unless it was of such apparent weight as to be clearly prejudicial.[42]

The court of error may refuse to consider the correctness of an instruction to which no exceptions may be duly taken;[43] and when there was a general exception to the whole charge[44] or to

37 Burchett v. U. S., C. C. A., 194 Fed. 821.

38 Act of February 26, 1919, ch. —, § —, St. at L. —; Myers v. U. S., C. C. A., 223 Fed. 919.

39 Fye v. U. S., C. C. A., 262 Fed. 6; Sheierson v. U. S., C. C. A., 264 Fed. 275.

40 Dimmitt v. Breakey, C. C. A., 267 Fed. 792, 794. See Latham v. U. S., C. C. A., 210 Fed. 159; Fraina v. U. S., C. C. A., 255 Fed. 28. See *infra*, § 711. *Contra*, Keliher v. U. S., C. C. A., 193 Fed. 8, 20; Ayer v. Territory of New Mexico, C. C. A., 201 Fed. 497; Todd v. U. S., C. C. A., 221 Fed. 205.

41 August v. U. S., C. C. A., 257 Fed. 388, 392.

42 Looker v. U. S., C. C. A., 240 Fed. 732.

43 Savage v. U. S., C. C. A., 213 Fed. 31.

44 Anthony v. Louisville & N. R. Co., 132 U. S. 172, 33 L. ed. 301; MacDonald v. U. S., C. C. A., 63 Fed. 426; Ulmer v. U. S., 219 Fed. 641; Heard v. U. S., C. C. A., 228 Fed. 503; Hunnicutt v. U. S., C. C. A., 253 Fed. 556. *Supra*, § 473j.

several instructions, one of which is good.[45] Exceptions have been considered when noted in a general statement to each and every other instruction given by the court and to the refusal of the court to give each and every of the instructions requested by the defendant.[46] It has been said that when there was but one proposition of law laid down by the court a general exception to the charge was sufficient.[47]

A general exception to a refusal to direct a verdict is insufficient to entitle the accused to claim in the court of review that there was a variance.[48]

The court of error will usually refuse to consider errors not specifically set forth as required by the rules in an assignment of error duly filed [49] and in the brief of the plaintiff in error.[50]

In an extraordinary case, where personal liberty is involved, the court of review may consider an error not contained in the assignment, although no sufficient exception thereto was taken.[51] This is more usual when the evidence was insufficient to prove a crime.[52] It is not essential to an affirmance that the court of

45 U. S. v. Hammond, 226 Fed. 849; McClendon v. U. S., C. C. A., 229 Fed. 523; *supra*, § 473j.

46 Sam Yick v. U. S., C. C. A., 240 Fed. 60.

47 Fisher v. U. S., C. C. A., 266 Fed. 667, 670.

48 Richardson v. U. S., C. C. A., 181 Fed. 1.

49 Freeman v. U. S., C. C. A., 243 Fed. 353.

50 Harris v. U. S., C. C. A., 249 Fed. 41; Clark v. U. S., C. C. A., 265 Fed. 104.

51 Humes v. U. S., C. C. A., 182 Fed. 485; Savage v. U. S., C. C. A., 213 Fed. 31; Oppenheim v. U. S., C. C. A., 241 Fed. 625; Skuy v. U. S., C. C. A., 261 Fed. 317; McNutt v. U. S., C. C. A., 267 Fed. 670. But see Gruher v. U. S., C. C. A., 255 Fed. 475; Lockhart v. U. S., C. C. A., 264 Fed. 14, 16, "Lacking any objection or exception, an appellate court would, at most, look into this subject only far enough to ascertain whether it was reasonably clear that there had been a miscarriage of justice; if so convinced, it might feel a duty to interfere."

But see White v. U. S., C. C. A., 263 Fed. 17; Mark Yick Hee v. U. S., C. C. A., 223 Fed. 732; Moore v. U. S., C. C. A., 224 Fed. 95; Fielder v. U. S., C. C. A., 227 Fed. 832; Wright v. U. S., C. C. A., 227 Fed. 855.

52 Fisher v. U. S., C. C. A., 266 Fed. 667, 670; Taylor v. U. S., C. C. A., 244 Fed. 321; Doe v. U. S., C. C. A., 253 Fed. 903; Ray v. U. S., C. C. A., 265 Fed. 257; Fisher v. U. S., C. C. A., 266 Fed. 667, 670. But see Collins v. U. S., C. C. A., 219 Fed. 679; Glass v. U. S., C. C. A., 231 Fed. 65; Gillette v. U. S., C. C. A., 236 Fed. 215; Benson v. U. S., C. C. A., 240 Fed. 413; Hale v. U. S., C. C. A., 242 Fed. 891; Gregorat v. U. S., C. C. A.,

review should be satisfied of the defendant's guilt beyond a reasonable doubt, when there is substantial evidence thereof.[53] But it has been said that a judgment should be reversed when the evidence is as consistent with innocence as with guilt.[54] A reversal for error in imposing an excessive sentence does not entitle the defendant to a discharge, but the case will be remanded with directions to enter the appropriate judgment.[55] It has been held that, upon an affirmance, the Circuit Court of Appeals may, with the consent of the District Attorney, authorize the trial judge to modify the sentence imposed.[56]

When the defendant is a fugitive from justice who has not been recaptured the court will refuse to hear argument upon his writ of error[57] and may even refuse to allow his assignments of error.[58] A Circuit Court of Appeals has reviewed a conviction although the execution of the sentence had been suspended.[59]

Where the plaintiff in error is out upon bail the court of review may postpone action upon the writ of error until the termination of proceedings below which may result in giving him a right to discharge by the District Court.[60]

A writ of error returnable to the Supreme Court must issue within three months after the entry of the judgment.[61] One returnable to the Circuit Court of Appeals within six months thereafter.[62] The time cannot be extended by an order granting a writ of error *nunc pro tunc*.[63]

249 Fed. 470; McColl v. U. S., C. C. A., 263 Fed. 65.

53 Matthews v. U. S., C. C. A., 192 Fed. 490; Stout v. U. S., C. C. A., 227 Fed. 799; Looker v. U. S., C. C. A., 240 Fed. 932.

54 Tucker v. U. S., C. C. A., 224 Fed. 833.

55 Mitchell v. U. S., C. C. A., 196 Fed. 874. See § 532, *supra*.

56 Scott v. U. S., C. C. A., 165 Fed 172. In Rosenstein v. U. S., C. C. A., 193 Fed. 1022, the counsel for the plaintiff in error having called the attention of the court of review that the punishment should have been less, in view of extenuating circumstances which his client excusably failed to bring before the District Court, the judgment was vacated and the case remanded for a resentence.

57 Smith v. U. S., 94 U. S. 97, 24 L. ed. 32; *infra*, § 707.

58 U. S. v. Billingsley, 242 Fed. 330.

59 Cook v. U. S., C. C. A., 232 Fed. 82.

60 *Ex parte* Fox, C. C. A., 236 Fed. 861.

61 30 St. at L. 727, § 6, Comp. St., § 1228; *infra*, § 698.

62 26 St. at L. 829, § 11. See *infra*, § 698.

63 Old Nick Williams Co. v. U. S., C. C. A., 152 Fed. 925, 929, aff'd

The review should be by writ of error, not by appeal;[64] but by a recent statute an appeal can not be dismissed because a writ of error should have been sued out.[65]

The writ of error must be sued out by the party against whom the judgment was entered.[66] A judgment punishing for contempt disobedience to a subpoena *duces tecum* cannot be reviewed by such a writ issued upon the application of a person not punished by the judgment who claims to be the owner of the books and papers described in the subpoena.[67] The writ should not issue upon the application of the friends of the party sentenced when the latter does not make the application.[68] A bond for cost[69] is required unless the plaintiff in error is permitted to obtain the writ in *forma pauperis*.[70]

The practice in obtaining and prosecuting writs of error is described in the last chapter of this work.[71] Stays of proceedings and bail pending writs of error are previously discussed.[72] Upon an application for a stay, the court will take judicial notice of its own records[73] as to newly discovered evidence. Affidavits presented for the first time in the court of review cannot be considered.[74] "Where a judgment against accused was reversed on writ of error for invalidity of the sentence imposed, and a mandate issued directing the court to impose a proper sentence, but pending this the Department of Justice, believing that the conviction was based on perjured testimony, instructed the district attorney not to oppose efforts to obtain a new trial, which was thereupon granted, the Government thereby waived its right to a sentence pursuant to the mandate."[75]

30 Sup. Ct. 221, 34 L. ed. 318, 215 U. S. 541. See *supra*, § 255; *infra*, § 698.

64 Bucklin v. U. S., 159 U. S. 682, 40 L. ed. 305; DeLemos v. U. S., C. C. A., 107 Fed. 121; Sena v. U. S., C. C. A., 147 Fed. 485; Price v. U. S., C. C. A., 169 Fed. 791.

65 Act of Sept. 6, 1916, ch. 448, § 4, 39 St. at L. 727; see U. S. v. Reaves, C. C. A., 126 Fed. 127.

66 Grant v. U. S., 227 U. S. 74, 57 L. ed. 423.

67 Ibid.

68 *Ex parte* Dorr, 3 How. 103, 11 L. ed. 514.

69 Amer. Surety Co. v. U. S., 239 Fed. 68.

70 *Supra*, § 413.

71 *Infra*, Chapter XXXV.

72 *Supra*, § 493.

73 U. S. v. Wright, 224 Fed. 285. See *supra*, § 329a.

74 Kulp v. U. S., C. C. A., 210 Fed. 249.

75 *Re* Cain, C. C. A., 209 Fed. 40.

CHAPTER XXXII.

REMOVAL OF CAUSES.

§ 537. History of legislation upon removals from State and Federal courts. The right of removal from the State to the Federal courts was first granted by the Judiciary Act of September 24th, 1789.[1] It was continuously extended: by the act of March 2nd, 1833, passed during the attempt at nullification by South Carolina;[2] and by the acts of March 3rd, 1863,[3] April 9th, 1866,[4] May 11th, 1866,[5] July 13th, 1866,[6] July 27th, 1866,[7] February 5th, 1867,[8] March 2nd, 1867,[9] July 27th, 1868,[10] May 31st, 1870,[11] February 28th, 1871,[12] and March 30th, 1872.[13] All of these were incorporated in the Revised Statutes of 1873.[14] The right was further extended by the first act of March 3rd, 1875, an appropriation bill which included a clause upon the subject;[15] and by the second act, known as the Judiciary Act, of March 3rd, 1875, which was intended to extend the same to the full extent authorized by the Constitution of the United States.[16] The right of removal was restricted by the act of March 3rd, 1887.[17]

The enrollment of this last act contained a few clerical errors, which were corrected by a statute re-enacting the same, ap-

§ 537. 1 Ch. 20, § 12, 1 St. at L. 79.

2 Ch. 57, § 3, 4 St. at L. 633.

3 Ch. 81, § 5, 12 St. at L. 756.

4 Ch. 31, § 3, 14 St. at L. 27.

5 Ch. 80, §§ 3, 5, 14 St. at L. 46.

6 Ch. 184, § 67, 14 St. at L. 171.

7 Ch. 288, 14 St. at L. 306.

8 Ch. 27, 14 St. at L. 385.

9 Ch. 196, 14 St. at L. 558.

10 Ch. 255, § 2, 15 St. at L. 227.

11 Ch. 114, §§ 16, 18, 16 St. at L. 144.

12 Ch. 99, § 16, 16 St. at L. 438.

13 Ch. 72, 17 St. at L. 44.

14 §§ 639, 640, 641, 642, 643, 644, 645, 646 and 647.

15 Ch. 130, § 8, 18 St. at L. 371.

16 Ch. 137, 18 St. at L. 471.

Senator George F. Edmunds, who took part in the enactment of that law, told the writer that that was the intention.

17 Ch. 373, 24 St. at L. 552. For the report and debate in Congress see Foulk v. Gray, 120 Fed. 156, 160, 18 Cong. Rec. 2724.

proved August 13th, 1888.[18] The act of February 8th, 1894,[19] repealed so much of the former statutes as gave a right of removal to an officer of the United States, engaged in the enforcement of the act to regulate Congressional elections.[20]

The Act of April 5, 1910, provided that cases arising under the Employers' Liability Act should not be removed.[21]

The Judicial Code of March 3, 1911, repealed the former statutes except the Employers' Liability Act, directed that the removals be made to the District Courts, instead of as formerly to the Circuit Courts which it abolished, increased the value of matter in dispute from two thousand dollars to three thousand dollars, made certain changes in the practice and then reenacted the law substantially as it previously stood.[22]

An amendment to the Judicial Code passed January 20, 1914, forbids the removal of suits against common carriers for damages in transportation where the matter in controversy does not exceed, exclusive of interest and cost, the sum or value of $3,000.[23]

Since the statutes regulating removals expressly cover only a few of the cases arising in actual practice, it has been said that the courts must often disregard express words and find the proper rule from the intent and history of the legislation upon the subject.[24] While the sections of the Judiciary Act of March 3, 1887, as amended August 13, 1888, which relate to the jurisdiction of the Federal Courts venue and the removal of causes, have been to some extent changed in phraseology by the Judicial Code, which divided the former statute into numerous sections, the scope of the former law was not changed, and

18 Symonds v. St. Louis & S. E. Ry. Co., 192 Fed. 353; Strauser v. Chicago B. & Q. R. Co., 193 Fed. 293; Saiek v. Pennsylvania R. Co., 193 Fed. 303; Lee v. Toledo, St. L. & W. Ry. Co., 193 Fed. 685; Ullrich v. N. Y., N. H. & H. R. Co., 193 Fed. 768; Hulac v. Chicago & N. W. Ry. Co., 194 Fed. 747; McChesney v. Illinois Cent. R. Co., 197 Fed. 85. *Contra,* Van Brimmer v. Texas & P. Ry. Co. (E. D. Texas), 190 Fed. 394.

19 Strauser v. Chicago, B. & Q. R. Co., 193 Fed. 293.

20 Ullrich v. N. Y., N. H. & H. R. Co., 193 Fed. 768.

21 Ch. 866, 25 St. at L. 433.

22 Jud. Code, §§ 297, 28-29, 36 St. at L. 1087.

23 Ch. 11, 38 St. at L. 278, Comp. St., § 1010.

24 Eddy v. Chicago & N. W. Ry. Co., 226 Fed. 120.

decisions thereunder have a similar effect to those decided under the Judicial Code.[25]

§ 537a. Removal of causes from one Federal Court to another. "Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court or in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

"Sec. 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county or territory, prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created.

[25] Keating v. Pennsylvania Co., 245 Fed. 155.

or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

"Sec. 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted."[1]

§ 537a. [1] 36 St. at L. 1103, Comp. St., §§ 1040, 1041, 1042.

A suit brought in a Territorial court cannot be removed, when, after answer, it has passed into the jurisdiction of a State court upon the admission of the Territory as a State.[2]

§ 537b. Removal of suits arising under the Constitution or laws of the United States. "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district." [1]

It has been held that there can be no removal for this cause when neither party is a resident of the district.[2] No case arising under an Act entitled "an act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.[3]

The matter in dispute must exceed in value three thousand dollars, exclusive of interest and costs.[4]

Where the plaintiff's pleading does not show that his cause of action arises under the Constitution or laws of the United States, the defendant cannot remove the case because his de-

2 Ames v. Colorado Cent. R. Co., Fed. Cas. No. 325 (4 Dill. 260). For the removal of cases brought in Territorial courts when the Territory has subsequently been admitted as a State. See Anaconda Copper Mining Co. v. Butte-Balaklava C. Co., 200 Fed. 808; U. S. v. Alamogordo Lumber Co., New Mexico, C. C. A., 202 Fed. 700; Utah Const. Co. v. St. Louis Construction & Equipment Co., D. New Mexico, 254 Fed. 331.

§ 537b. 1 Ibid. § 28, re-enacting 24 St. at L. ch. 373, p. 552. See §§ 24-39, *supra*.

2 36 St. at L. 291, ch. 143, *infra*, § 537h.

3 Clark v. Southern Pac. Co. (W. D. Texas) 175 Fed. 122; Bottoms v. St. Louis & S. F. R. Co., 179 Fed. 318. See §§ 61, 62, *supra*.

4 See § 6, *supra*: It has been held that a case arising under the revenue laws cannot be removed unless the value of the matter in dispute exceeds the jurisdictional amount, although the Federal court might have had original jurisdiction over the same. Johnson v. Wells, Fargo & Co., 91 Fed. 1.

fense depends upon a provision of such laws or Constitution.[5] An omission in this respect in the plaintiff's pleading is not cured by the petition of removal,[6] or by an amendment filed subsequent to the removal.[7] Where a removal is sought because the suit arises under the Constitution or laws of the United States, all the defendants must join in the petition; although the sole ground is that one of them is a corporation chartered by Congress.[8] The fact that the plaintiff's pleading shows that his suit cannot be maintained, because it is inconsistent with the Constitution or laws of the United States,[9] or because the questions involved have been already decided by the Supreme Court of the United States,[10] does not justify removal. There can be no removal of a suit against a refrigerator car company for damage to fruit in transit over a railroad engaged in interstate commerce when the requisite difference in citizenship does not exist and the matter in dispute is less than the jurisdictional amount.[11]

A suit was removed when brought for injury to an interstate shipment against a collecting carrier who had received the goods from the initial carrier,[12] but not such a suit when brought against the initial carrier.[13]

It was held that a suit arising under the postal laws, the institution of which in a State court was authorized by the

5 Oregon S. L. & U. N. Ry. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048; Tennessee v. Union & P. Bank of Com., 152 U. S. 454, 38 L. ed. 511; Chappell v. Waterworth, 155 U. S. 102, 39 L. ed. 85; Postal Tel. C. Co. v. Alabama, 155 U. S. 482, 39 L. ed. 231; East L. L. Co. v. Brown, 155 U. S. 488, 39 L. ed. 233; 180 U. S. 535; Gableman v. Peoria, D. & E. R. Co., 179 U. S. 335, 45 L. ed. 220; Miller v. Le Mars Nat. Bank, 116 Fed. 551; § 24.

6 Rural Home Telephone Co. v. Powers, 176 Fed. 986; W. G. Coyle & Co. v. Stern, C. C. A., 193 Fed. 582. But see *infra*, §§ 551, 552.

7 Caples v. Texas & P. Ry. Co., 67 Fed. 9.

8 Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055; *infra*, § 542.

9 Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 46 L. ed. 144.

10 Alabama G. S. Ry. Co. v. Am. Cotton Oil Co., C. C. A., 229 Fed. 11.

11 Emery & Co. v. Am. Refrigerator Co., 246 U. S. 634.

12 Alabama Great Southern Ry. Co. v. Am. Cotton Oil Co., C. C. A., 229 Fed. 11.

13 Adams v. Chicago Great Western R. Co., 210 Fed. 362.

14 New Orleans Nat. Bank v. Merchant, 18 Fed. 841.

Revised Statutes, might be removed into a Federal court upon the ground that it arose under a law of the United States.[14]

The District Courts have jurisdiction "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by said title. And all national banking associations, established under the laws of the United States, shall, for the purposes of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." [15]

A federal reserve bank which does not serve the public generally and locally is not a national banking association within the meaning of the section of the Judicial Code.[16] It may remove a suit brought against it where the value of the matter in dispute is sufficient upon the ground that the suit arises under the laws of the United States.[17]

§ 537c. Removals of suits where the cause of action arose on ceded territory. Where the cause of action arose on territory ceded by a State to the United States, the suit arises under the Constitution and laws of the United States, and if the subject matter exceeds the jurisdictional amount it may be removed;[1] although the decision depends upon the construction of a State law there in force.[2] In such a case the fact that the plaintiff's statement of his cause of action need not show that it arises under the Constitution or laws of the United States does not prevent the removal.[3]

§ 537d. Removal of suits arising under the Employers' Liability Law. By the Act of April 5, 1910, "no case arising under an Act entitled 'an act relating to the liability of com-

15 § 24, subd. 16, 36 St. at L. 1087. See *supra*, § 28.

16 American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, Ga., C. C. A., 269 Fed. 4.

17 Ibid.

§ 537c. 1 Steele v. Halligan, 229 Fed. 1011. See *supra*, §§ 24, 66a.

2 Ibid.

3 Ibid.

mon-carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.''[1] For a case to come within the scope of this act, two things must concur: the common carrier must be engaged in interstate commerce, and the injury must be suffered by the employee while engaged in such commerce.[2] The complaint need not refer to the Act of Congress.[3] It has been said that it is sufficient when the plaintiff alleges that he was himself engaged in interstate commerce and was injured by an interstate railroad.[4]

Where the complaints were expressly based upon two grounds of recovery, one under the Federal Employers' Liability Act, and the other under the State statutes, removals were allowed.[5]

An action against a railway company and a sleeping car company for an injury to an employee of the latter is removable when the necessary diversity of citizenship exists and the matter in dispute is not less than the jurisdictional amount.[6]

It has been held that an objection to the jurisdiction based upon this statute cannot be waived.[7]

§ 537e. Removals of suits against common carriers for loss in transportation. By the Act of January 14, 1914, the Judicial Code is amended so as to provide "that no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of or injury to property received for transpor-

§ 537d. [1] 36 St. at L. 291, ch. 143.

[2] Southern Ry. Co. v. Loyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. ed. 402; Great Northern Railway Co. v. Alexander, 246 U. S. 276; Ullrich v. N. Y., N. H. & H. R. R., 193 Fed. 768; Givens v. Wight, 247 Fed. 233; Frazier v. Hines, 260 Fed. 874; Frazier v. Hines, 260 Fed. 874. See *supra*, § 454j.

[3] Ullrich v. N. Y., N. H. & H. R. R. Co., 193 Fed. 768.

[4] Ibid.

[5] Bedell v. Baltimore & O. R. Co., 245 Fed. 788; Givens v. Wight, 247 Fed. 233.

[6] Martin v. N. Y., N. H. & H. R. Co., 241 Fed. 696.

[7] Mitchell v. Southern Ry. Co., 247 Fed. 819; Deuel v. Chicago, B. & Q. R. Co., 253 Fed. 857. But see Illinois Cent. R. Co. v. Egan, C. C. A., 203 Fed. 937; *infra*, § 556a.

tation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of three thousand dollars.[1]

It is doubtful whether this applies to a suit against a refrigerator car company.[2]

§ 537f. Removal of suits to which aliens are parties. A non-resident alien defendant may remove a suit involving the jurisdictional amount, when all the parties on the opposite side of the controversy are citizens and residents of the same State of the United States, and when the plaintiffs reside in the same district where the suit is brought;[1] and it has been held when they reside elsewhere.[2] A resident alien cannot when no Federal question is involved.[3] It has been held, that when a non-resident alien is joined as a defendant with a non-resident citizen of a different State from that of a resident plaintiff, they may jointly remove the case if the jurisdictional amount is involved;[4] but this cannot be done when the plaintiff

§ 537e. [1] Ch. 11, 38 St. at L. 278, Comp. St., § 1010. See Southern Pacific Co. v. Stewart, 245 U. S. 359; *supra*, § 32a.

[2] See E. H. Emery & Co. v. Am. Refrigerator Co., 246 U. S. 634, 636.

§ 537f. [1] Cooley v. McArthur, 35 Fed. 372.

[2] Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., C. C. A., 196 Fed. 340; Attleboro Mfg. Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 202 Fed. 293.

[3] Johnson v. Monell, Fed. Cas. No. 7,399 (1 Woolw. 390); Sands v. Smith, Fed. Cas. No. 12,305 (1 Abb. U. S. 368, 1 Dill. 290); Cudahy v. McGeoch, 37 Fed. 1; Walker v. O'Neill, 38 Fed. 374; Eddy v. Casas, 118 Fed. 363; Miller v. New York Cent. & H. R. R. Co., 147 Fed. 771; Rooker v. Crinkley, 113 N. C. 73, 18 S. E. 56. *Contra*, Best v. Great Northern Ry. Co., 243 Fed. 789. See Bradshaw v. Bowden, 226 Fed. 323.

[4] Ballin v. Lehr, 24 Fed. 193; where the report does not show whether the alien was a resident or a nonresident; Roberts v. Pac. & A. Ry. & Nav. Co., C. C. A., 121 Fed. 785, 58 C. C. A. 61, affirming 104 Fed. 577; Ladew v. Tennessee Copper Co., 179 Fed. 245; H. G. Baker & Bro. v. Pinkham, 211 Fed. 728, 731. See, also, Rateau v. Bernard, 3 Blatchf. 244, Fed. Cas. No. 11,579.

is not a resident of the State where the suit is brought.[5] A suit by a State in its own court against an alien cannot be removed.[6] The authorities are in conflict as to whether a defendant, who is a citizen and resident of a different State from that where the suit is instituted, can remove an action brought by an alien in the State court. The preponderance of the more recent authorities holds that he cannot, whether the alien is a resident,[7] or nonresident[8] of the State where the suit is brought.

Where the suit is originally brought in the State court, the defendant by the removal consents to the jurisdiction of the court of the United States, and the plaintiff alone can make an objection founded upon the residence of either of the parties.[9]

There can be no removal, by reason of a diversity of citizenship, when the controversy is between two aliens;[10] nor when a citizen of the same State as that of the opposite parties is on

Contra, Tracy v. Morel (D. Nebraska), 88 Fed. 801; Best v. Great Northern Ry. Co., 243 Fed. 789 (where the alien lived in the state where the suit was brought).

5 Carp v. Queen Ins. Co. (W. D. Mo.) 168 Fed. 782. *Contra,* Ladew v. Tennessee Copper Co. (S. D. Tenn.), 179 Fed. 245, 256.

6 O'Conor v. Texas, 202 U. S. 501.

7 Kamenicky v. Catterall Printing Co. (S. D. N. Y.), 188 Fed. 400 (in which the author was counsel); Odhner v. Northern Pac. Ry. Co. (S. D. New York) 188 Fed. 507; Sagara v. Chicago, R. I. & P. Ry. Co. (D. Col.) 189 Fed. 220; Hall v. Great Northern Ry. Co., 197 Fed. 488; Jackson v. William Kenefick Co., S. D. N. Y., 233 Fed. 130. These cases follow the analogy of *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264. See, also, Petrocokino v. Stuart, Fed. Cas. No. 11,041; Matter of Tobin, 214 U. S. 506, 53 L. ed. 1061. *Contra,* Uhle v. Burnham (S. D. N. Y.), 42 Fed. 1 (residence not shown); Stalker v. Pullman's Palace Car Co. (S. D. Cal.), 81 Fed. 989 (residence not shown).

8 Harold v. Iron Silver Min. Co. (D. Col.), 33 Fed. 529; Mahopoulus v. Chicago, R. I. & Pac. Ry. Co. (W. D. Mo.), 167 Fed. 165; Bagenas v. Southern Pacific Co. (N. D. Cal.), 180 Fed. 887; Hall v. Great Northern Ry. Co. (D. Montana), 197 Fed. 448; Ivanoff v. Mechanical Rubber Co., 232 Fed. 173. *Contra,* Schnerb & Wegimont v. The Holt Mfg. Co., N. Y. L. J., May, 1920; Gy. Tr. Co. v. McCabe, 250 Fed. 699; Matarazzo v. Hustis, 256 Fed. 882.

9 H. J. Decker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224.

10 Mossman v. Higginson, 4 Dallas, 12, 1 L. ed. 720; Montalet v. Murray, 4 Cranch, 46, 2 L. ed. 545; King v. Cornell, 106 U. S. 395, 27 L. ed. 60; Walton v. McNeil, Fed. Cas. No. 17,134; Prentiss v. Brennan, Fed. Cas. No. 11,385 (2 Blatchf. 162); Rateau v. Bernard,

the same side of the controversy as an alien;[11] nor when a State and an alien are parties.[12]

"Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section."[13]

§ 537g. Removal of suits between citizens of different States. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States have original jurisdiction under the Judicial Code, namely, in which there is a controversy between citizens of different States or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $3,000, or in which there is a controversy between citizens of the same State claiming lands under grants of different States, can be removed into the District Court of the United States for the proper district by the defendant or defendants therein alone,[1] and not by these,

Fed. Cas. No. 11,579 (3 Blatchf. 244); Hinckley v. Byrne, Fed. Cas. No. 6,510 (1 Deady, 224); Petrocokino v. Stuart, Fed. Cas. No. 11,041; Pooley v. Luco, 72 Fed. 561; Oroseo v. Gagliardo, 22 Cal. 83; Barroweliffe v. La Caisse Generale (New York), 58 How. Prac. 131. *Contra*, Liverpool, B. & R. P. Nav. Co. v. Agar, 14 Fed. 615.

11 King v. Cornell, 106 U. S. 395, 27 L. ed. 60; Hervey v. Illinois Midland Ry. Co., Fed. Cas. No. 6,434 (7 Biss. 103); Watson v. Evers, 13 Fed. 194; People v. Hager, 20 Cal. 167; Davis v. Cook, 9 Nev. 134. But see Bell v. Ohio Life Ins. Co., Fed. Cas. No. 1,261.

12 O'Conor v. Texas, 202 U. S. 501, 50 L. ed. 1120; affirming State v. O'Connor, 73 S. S. 1041, 96 Tex. 484; New Jersey v. Babcock, Fed. Cas. No. 10,103 (4 Wash. 344).

13 Jud. Code, § 34, 36 St. at L. 1087.

§ 537g. 1 Jud. Code § 28, 36 St. at L. 1087, re-enacting 24 St. at L. 552; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Mills v. Newell, 41 Fed. 529; *supra*, §§ 40-49, 18-24; *infra*,

unless they are non-residents of that State;[2] nor when there is no separable controversy[3] nor proof of prejudice or local influence,[4] unless all on the side of the controversy opposite to that of the plaintiff unite in the application for a removal.[5]

The limitation in the bankruptcy law upon the jurisdiction of the Federal Courts over suits by the trustee does not affect the right of the defendant to remove such a suit because of a difference of citizenship.[6]

An assignment of a cause of action to a citizen of the same State as the defendant, although made for that purpose, will prevent the removal of a suit thereupon to the Federal Court, unless a Federal question is involved or the parties claim the same land under grants from different States;[7] but where the suit was brought against an alien by a citizen assignee of several causes of action, some of which were assigned by other aliens and the rest by citizens of the United States, the whole suit was removed.[8]

§ 542. But see Mutual Life Ins. Co. v. Champlin, 21 Fed. 85; Foster's Federal Judiciary Acts, 26-29.

2 Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602; Wichita Nat. Bank v. Smith, C. C. A., 72 Fed. 568. It has been held that a suit is not removable when pending within a district in which the plaintiff does not reside, although he is a citizen and resident of the State, and the defendant, a citizen and resident of another State, and he sued in such district for the purpose of preventing a removal. Shawnee Nat. Bank v. Missouri, K. & T. Ry., 175 Fed. 456.

3 *Infra*, § 541.

4 *Infra*, § 549.

5 Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Chicago, R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055; Huntington v. Pinney, 126 Fed. 237; Arkansas V. Sm. Co. v. Cowenhoven, 41 Fed. 450; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Yarnell v. Felton, 102 Fed. 369; *infra*, § 542.

6 Ewing v. S. L. Leszynsky & Co., 236 Fed. 811.

7 Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. ed. 261; Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. ed. 61; Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. ed. 816; Vimont v. Chicago & N. W. Ry. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9; Goodnow v. Litchfield, 67 Iowa 691, 25 N. W. 882; Goodnow v. Oakley, 68 Iowa 25, 25 N. W. 912; Vimont v. Chicago & N. W. Ry. Co., 69 Iowa 296, 22 N. W. 906, 28 N. W. 612; Hawley v. Chicago, B. & Q. Ry. Co., 71 Iowa 717, 29 N. W. 787; *Contra*, Goodnow v. Litchfield, 47 Fed. 753.

8 Patterson v. Bucknall S. S. Line, 203 Fed. 1021.

In determining between whom the controversy exists the court is not bound by the title of the cause nor by the form of the pleadings, but will examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the controversy according to the facts, no matter what their technical place as plaintiffs or defendants may be.[9] The citizenship of formal parties,[10] of improper parties,[11] or, perhaps, of unnecessary parties[12] is immaterial. It has been said that, where there is a difference of citizenship and a cause of action, it is immaterial whether a controversy exists.[13]

"Where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, that if it further appears that said suit can be fully and justly determined as to the other

9 Removal Cases, 100 U. S. 457, 468, 25 L. ed. 593, 597; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Carson v. Hyatt, 118 U. S. 279, 286, 30 L. ed. 167, 169; Judah v. Iowa B. W. Co., 32 Fed. 561; Wilson v. Oswego Tp., 151 U. S. 56, 38 L. ed. 70; Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69; Wolcott v. Sprague, 55 Fed. 545; Scoutt v. Keck, C. C. A., 73 Fed. 900; Stockton v. Baltimore & N. Y. R. Co., 32 Fed. 9, 14; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 186, 31 L. ed. 650, 652; Horn Silver Mining Co. v. New York State, 143 U. S. 305, 317, 36 L. ed. 164, 169; Carver v. Jarvis-Conklin Tr. Co., 73 Fed. 9; Missouri v. Alt, 37 Fed. 302; Hunter v. Conrad, 85 Fed. 803. See Garrard v. Silver Peak Mines, 76 Fed. 1. But see Seddon v. Virginia, T. & C. S. R. Co., 1 L. R. A. 108, 36 Fed. 6; Putnam v. Ingraham, 114 U. S. 57, 29 L. ed. 65; Sloane v. Anderson, 117 U. S. 275, 278, 29 L. ed. 899, 900; Missouri v. New Madrid County, 73 Fed. 304; §§ 40, 41.

10 *Supra*, § 42.

11 *Infra*, §§ 539, 540.

12 *Supra*, § 43.

13 Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96. See *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein." [14]

§ 537h. Effect upon removal of residence of parties. Where the jurisdiction of the Federal court is invoked because of a controversy between citizens of different States, it cannot be removed by a defendant who is a resident of the district where the suit is brought.[1] Nor, according to the preponderance of authority, can such a suit be removed when the plaintiff is not a resident of the district.[2] This is reasonable, for the object of the grant to the courts of the United States of jurisdiction over controversies between citizens of different States is to prevent local prejudice or influence against the defendant, which is not likely to exist when the plaintiff also is a non-resident. A New York case, based upon a close construction of the statute, holds that, when a suit is brought by an assignee in the district of his residence, but where his assignor, a citizen of the same State

[14] Jud. Code, § 28, 36 St. at L. 1087, re-enacting 24 St. at L., ch. 373, p. 552. For the practice in such a case see *infra*, § 541.

§ 537h. [1] Martin v. Synder, 148 U. S. 663, 37 L. ed. 602; Wichita Nat. Bank v. Smith, C. C. A., 72 Fed. 568.

[2] Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264; Yellow Aster Min. & Mill. Co. v. Crane Co., C. C. A., 150 Fed. 580; Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831; H. J. Decker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224; W. U. Tel. Co. v. Louisville & N. R. Co., 201 Fed. 932; Stewart v. Cybur Lumber Co., 211 Fed. 343; St. John v. U. S. Fidelity & Guaranty Co., 213 Fed. 685; Whitaker v. Coudon, 217 Fed. 139; Mutual Life Ins. Co. of N. Y. v. Painter, 220 Fed. 998; Eddy v. Chicago & N. W. Ry. Co., 226 Fed. 120; Doherty et al. v. Smith, 233 Fed. 132; Peninsula Lumber Co. v. Royal Indemnity Co., 237 Fed. 297; O'Neil Ins. Co. v. Birdseye, 244 Fed. 254; Guaranty & Tr. Co. v. McCabe, C. C. A., 250 Fed. 699, *certiorari* denied, 247 U. S. 505, 38 Sup. Ct. 427, 62 L. ed. 1240; Boise Commercial Club v. Oregon Short Line R. Co., C. C. A., 260 Fed. 769, and cases cited. Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co., 210 Fed. 393; Louisville & Nashville R. R. Co. v. Western Union Tel. Co., 218 Fed. 91; Hohenberg & Co. v. Mobile Liners, 245 Fed. 169; James v. Amarillo Light & Power Co., 251 Fed. 337; Sanders v. W. U. Tel. Co., 261 Fed. 697; Earles v. Germain Co., 265 Fed. 715.

as the plaintiff, does not reside, a defendant who is a non-resident citizen of a different State cannot have a removal.[3]

The same rule seems to apply to alien defendants.[4] By the preponderance of authority, an alien defendant cannot remove a suit when he is a resident of the district.[5]

When the jurisdiction is invoked because the suit arises under the Constitution or laws of the United States, a non-resident is interested quite as much as a resident defendant in having it decided by a court of the United States. The authorities are divided upon the question whether such a suit can be removed by a defendant who does not reside in the district.[6]

§ 537i. "The proper district" for a removal. The Judicial Code, which re-enacts the previous legislation in this respect, directs that the removal be made "into the District Court of the United States for the proper district."[1] According to the weight of reason and the preponderance of authority, this is the District Court of the judicial district within the boundaries of which the suit is brought in the State court.[2] In the North-

[3] Orr v. Cincinnati, Hamilton & Dayton R. R. N. Y., Sup. Ct., Sp. Tm. per Jaycox, J., N. Y. L. J., May 27, 1914.

[4] *Supra*, §§ 45, 537f.

[5] Kamenicky v. Catterall Printing Co. (S. D. N. Y.), 188 Fed. 400 (in which the author was counsel); Odhner v. Northern Pac. Ry. Co. (S. D. N. Y.), 188 Fed. 507; Sagara v. Chicago, R. I. & P. Ry. Co, (D. Col.), 189 Fed. 220; Hall v. Great Northern Ry. Co., 197 Fed. 488; Jackson v. William Kenefick Co. (S. D. N. Y.), 233 Fed. 130. These cases follow the analogy of *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264. See, also, Petrocokino v. Stuart, Fed. Cas. No. 11,041; Matter of Tobin, 214 U. S. 506, 53 L. ed. 1061. *Contra*, Uhle v. Burnham (S. D. N. Y.), 42 Fed. 1 (residence not shown); Stalker v. Pullman's Palace Car Co. (S. D. Cal.), 81 Fed. 989 (residence not shown). See *supra*, §§ 45, 537f.

[6] In the following cases it has been held that a non-resident may remove such a case: Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co., D. Mass., 210 Fed. 393, a suit for an injunction against the violation of a registered trade-mark. *Contra*, Western Union Tel. Co. v. Louisville & N. R. Co., E. D. Tenn., N. D., 201 Fed. 932; Orr v. Baltimore & O. R. Co, 2 S. D. N. Y., 242 Fed. 608; Boise Commerce Club v. Oregon Short Line R. Co., C. C. A., 260 Fed. 769. All arising under the Interstate Commerce Laws; see *supra*, § 61b.

§ 537i. [1] Jud. Code, § 28, 36 St. at L. 1094.

[2] Stewart v. Cybur Lumber Co., D. Ala., 11 Fed. 343; St. John v. U. S. Fidelity & Gy. Co., 213 Fed.

ern District of New York, it has been held that, where a suit is removed by a non-resident defendant because of a difference of citizenship, the "proper district" is the district where he resides and that the suit must be removed thereto.[3]

§ 537j. Effect of counter-claim upon removal. The pleading in a State court by the original defendant, of a counterclaim or demand in re-convention, which exceeds the jurisdictional amount, does not put the original plaintiff in the position of a defendant so that he can remove the cause,[1] nor debar the defendant of his right to remove.[2] But where, pending an appeal by a landowner from the award of a sheriff's jury in condemnation proceedings under the statute of Iowa, he filed a pleading which was tantamount to a cross-bill praying an injunction against the institution of the proceedings for want of power in the corporation, it was held that this made the corporation defendant, as regards the issues raised thereupon, and entitled it to remove the case when the other statutory prerequisites existed.[3]

The authorities are in conflict as to whether the amount of a counterclaim pleaded by the defendant should be added to that of the plaintiff's claim, in order to determine the juris-

685; St. John v. Taintor, S. D. N. Y., 220 Fed. 457; N. Y. Coal Co. v. Sunday Creek Co., 230 Fed. 295; Ostrom v. Edison, D. N. J., 244 Fed. 228; Lockport Glass Co. v. H. L. Dixon Co., D. Pa., 262 Fed. 976.

3 Mattison v. Boston & M. R. R., N. D. N. Y., 203 Fed. 821; Park Square Automobile Station v. Am. Locomotive Co., N. D. N. Y., 222 Fed. 979; mandamus refused, *Ex parte* Park Square Automobile Station, 244 U. S. 412, 37 Sup. Ct. 732, 61 L. ed. 1231.

§ 537j. 1 West v. Aurora City, 6 Wall. 139, 18 L. ed. 819; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Waco Hardware Co. v. Michigan Stove Co., C. C. A., 91 Fed. 289; McKown v. Kansas & T. Coal Co., 105 Fed. 657; City of Aurora v. West, 25 Ind. 148; aff'd 6 Wall. 139, 18 L. ed. 819; Chappell v. Chappell, 39 Atl. 984; Illinois Cent. R. Co. v. A. Waller & Co., 164 Fed. 358, 85 Md. 532; Smithers v. Smith (Tex. Civ. App.), 80 S. W. 646; rehearing granted (Sup.) 81 S. W. 283. *Contra*, Carson v. Rand Lumber Co. v. Holtzclaw, 39 Fed. 578 (for prejudice or local influence); Price v. Hart v. T. J. Ellis & Co., 129 Fed. 482. See *infra*, § 542; Glover Mach. Works v. Cooke Jellico Coal Co., 222 Fed. 531.

2 Meissner v. Buck, 28 Fed. 161; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645. *Contra*, Hansen v. Pac. Coast Asphalt Cement Co., 243 Fed. 283.

3 La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645.

dictional amount.[4] It has been held that this question is so doubtful that a motion to remand the clause should be granted in such a case.[5] Where the counterclaim belongs to a class which by the State practice is barred unless pleaded in the suit, it must be added to the sums demanded by the plaintiff when determining the jurisdictional amount.[6] Such an objection is waived if the plaintiff proceeds in the Federal court without making a motion to remand shortly after the removal.[7] Where the counterclaim is for damages in excess of the amount which the State court has jurisdiction to award, such excess must be disregarded.[8]

§ 537k. Nature of the right of removal. The purpose of the creation of the right to remove a case from a State to a Federal court was to enable a defendant to have claims against him under the Federal Constitution or Federal statutes, adjudicated in the first instance by a Federal tribunal; and to enable him to obtain freedom from local prejudice or influence, when sued in the courts of a State, of which he is not a citizen. It is analogous to a change of venue.[1] This right is unknown to the common law and is the creature of statute.[2] Statutes, which

4 Clarkson v. Manson, 4 Fed. 257 (18 Blatchf. 443); Carson & R. L. Co. v. Holtzclaw, 39 Fed. 578; Wolcott v. Watson, 46 Fed. 529; Wolcott v. Sprague, 55 Fed. 545; Lee v. Continental Ins. Co., 74 Fed. 424; Price & Hart v. T. J. Ellis & Co., 129 Fed. 482; Central Commercial Co. v. Jones-Dusenbury Co., 251 Fed. 13; Clarkson v. Manson (N. Y.), 60 How. Pr. 45; reversing 59 How. Pr. 480. See Champion v. Grand Rapids, etc., Ry. Co., 145 Mich. 676, 108 N. W. 1078. *Contra,* Falls W. Mfg Co. v. Broderick, 6 Fed 654; La Montague v. T. W. Harvey Lumber Co., 44 Fed. 645; Bennett v. Devine, 45 Fed. 705; McKown v. Kansas & T. Coal Co., 105 Fed. 657; Eltenstein v. Yankaus, S. D. N. Y.; Hough, J., quoted in Yankaus v. Feltenstein, 244 U. S. 127, 131, in which the author was counsel. See *supra,* § 21.

5 Crane Co. v. Guanica Centrale (S. D. N. Y.), 132 Fed. 713. *Contra,* Yankaus v. Feltenstein, 244 U. S 127, 131, in which the author was counsel.

6 Lee v. Continental I. & S. Co., 74 Fed. 424.

7 Mackay v. Uinta Dev. Co., 229 U. S. 173.

8 New York I. & P. Co. v. Milburn Gin & Machine Co., 35 Fed. 225. *Cf.* Bennett v. Forrest, 69 Fed. 421.

§ 537k. 1 Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786, 787, *infra,* § 555.

2 Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Hubbard v. Northern R. Co., Fed. Cas. No. 6,818 (3

provide for such removals, are authorized by the Constitution of the United States.[3] The right of removal is not a vested right of property, which may not be taken away after it has once accrued; and such a right, which has come into existence, but has not been exercised before the repeal of the statute under which it arose, is lost upon such repeal.[4]

The rights of a plaintiff to bring and of defendant to remove a suit over which the Federal and State courts have concurrent jurisdiction are not reciprocal; the fact that the plaintiff might have brought the suit in the Federal court of a particular district does not give the defendant the right to remove it thereto.[5]

§ 5371. Interference by the States with the right of removal. A State has no power to forbid the removal of a suit to a Federal court.[1] A State statute is invalid which deprives a foreign corporation of the benefit of a statute of limitations unless the latter stipulates not to remove to the Federal court suits brought

Blatchf. 84; 25 Vt. 715); Manley v. Olney, 32 Fed. 708.

3 Chicago & N. W. R. Co. v. Whitton, 13 Wall. (80 U. S.) 270, 20 L. ed. 571; Home Life Ins. Co. v. Dunn, 19 Wall. (86 U. S.) 214, 22 L. ed. 68; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827 (6 Blatchf. 362); Johnson v. Monell, Fed. Cas. No. 7,399 (Woolw. 390); Murray v. Patric, Fed. Cas. No. 9,967; San Mateo County v. Southern Pac. R. Co., 13 Fed. 145; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L. R. A. 65; McCormick v. Humphrey, 27 Ind. 144; Burson v. National Park Bank, 40 Ind. 173, 13 Am. Rep. 285; Meadow Val. Min. Co. v. Dodds, 7 Nev. 143, 8 Am. Rep. 709; State v. Fairfield County Court of Common Pleas, 15 Ohio St. 377; Hodgson v. Millward (Pennsylvania), 3 Grant Cas. 412; Kulp v. Ricketts (Pennsylvania), 3 Grant Cas. 420; Goodman v. City of Oshkosh, 45 Wis. 355.

4 Manley v. Olney, 32 Fed. 708; Birdseye v. Schaeffer, 37 Fed. 821; Kaufman v. McNutt (Super. Ct. Cin., Ohio), 1 Wkly. Law Bul. 94.

5 Ostrom v. Edison, 244 Fed. 228.

§ 5371. 1 Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Hulbert v. Prusso, 64 Fed. 8 (holding that a statutory stay for nonpayment of motion costs did not prevent a removal); Ashe v. Union Cent. Life Ins. Co., 115 Fed. 234; Jones v. Amazon Ins. Co. (Pennsylvania), 8 Leg. Gaz. 59; Brown v. Crippin (Virginia), 4 Hen. & M. 173. A State court cannot enjoin the removal of a case. Blydenstein v. N. Y. S. & Tr. Co., 59 Fed. 12. A State statute creating a cause of action, and providing that the same shall only be enforced in the State courts, or in a specified State court, will not prevent the removal of such a suit to a court of the United

against it.[2] A State has no power to revoke the authority to transact business therein of a Federal corporation,[3] or of a corporation engaged in interstate commerce,[4] because of the removal by such a corporation of a suit brought against it. A State may revoke the authority of a foreign corporation, such as an insurance company, not engaged in interstate commerce, to transact business within its jurisdiction, because of the removal by such corporation of a suit which has been brought against it.[5]

A State statute cannot deprive a party of the right of removal by designating him as plaintiff in a particular class of suits where he is essentially defendant;[6] nor by directing that nonresidents, who qualify there, as the personal representatives of those who die and leave assets in the State shall be treated as citizens thereof for the purpose of suing and being sued, deprive them of the right of removal.[7]

§ 537m. Stipulations against removals. An agreement by a corporation not to remove, into a court of the United States, any suit brought against it within a State, is void.[1] A stipulation not to remove a specified suit is valid.[2] The right to remove

States. Railway Co. v. Whitton, 13 Wall. (80 U. S.) 270, 20 L. ed. 571; Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. ed. 927; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. ed. 88; affirming 31 Fed. 670; Warren v. Wisconsin Valley R. Co., Fed. Cas. No. 17,204 (6 Biss. 425); Kirby v. Chicago & N. W. R. Co., 106 Fed. 551.

[2] Quinette v. Pullman Co., C. C. A., 233 Fed. 980.

[3] Mercantile Trust Co. v. Texas & P. Ry., 216 Fed. 225.

[4] Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S. 318; Wisconsin v. Phila. & R. Coal Co., 241 U. S. 329; Western Union Tel. Co. v. Frear, 216 Fed. 199; Copper Queen Consol. Mining Co. v. Jones, 237 Fed. 131.

[5] Doyle v. Continental Ins. Co., 94 U. S. 535; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246.

[6] Chicago, M. & St. P. Ry. Co., Drainage Dist. No. 8, 253 Fed. 491.

[7] Memphis Street Ry. Co. v. Moore, 243 U. S. 299.

§ 537m. [1] Barron v. Burnside, 121 U. S. 186; Insurance Co. v. Morse, 20 Wall. 445; Rowland v. Empire State Life Ins. Co., Fed. Cas. No. 12,097; Ashe v. Union Cent. L. I. Co., 115 Fed. 234; Commonwealth v. East Tennessee Coal Co., 97 Ky. 238, 30 S. W. 608; Railway Passenger Assur. Co. v. Pierce, 27 Ohio St. 155; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208; Erie Ry. Co. v. Stringer, 32 Ohio St. 468; Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572. *Contra*, see New York Life Ins. Co. v. Best, 23 Ohio St. 105.

[2] Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035, 13 Blatchf.

a particular case may also be waived by the conduct of the defendant.[3]

§ 537n. Waiver of right to removal. The right to remove a specified suit may be waived either by stipulation [1] or by the conduct of the defendant.[2] The following acts have been held to constitute a waiver of the right of removal: The argument by the defendant of a plea or motion which he has made.[3] The transmission by him, or his procurement of the transmission, of a record from an inferior to a higher court of the State.[4] His appeal to a State court of review from an order granting an injunction,[5] or appointing a receiver.[6] His application to a State court of reviews for a writ of prohibition to compel the Inferior court to proceed in a certain manner.[7] A consent to the submission of the cause to a State court.[8] A consent to a reference.[9]

224. A defendant may waive his right to insist upon a removal to a Federal court by his stipulation to try it in the State court in consideration of being permitted to file an answer after default, there being no question of jurisdiction. Smithson v. Chicago G. W. Ry. Co. (Minnesota), 73 N. W. 853.

3 Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399; Hanover Nat. Bank, Fed. Cas. No. 6,035 (13 Blatchf. 224); Gaffney v. Gillette, Fed. Cas. No. 5,168 (4 Dill. 264); Hudson River R. R. & Term. Co. v. Day, 54 Fed. 545; State of West Virginia v. King, 112 Fed. 369; Schneider v. Eldredge, 125 Fed. 638; Amy v. Manning, 144 Mass. 153, 10 N. E. 737; Dart v. Arnis (New York), 19 How. Pr. 429; Pollack v. Cohen, 32 Ohio St. 514; Wadleigh v. Standard Life & Acc. Ins. Co., 76 Wis. 439, 45 N. W. 109.

§ 537n. 1 Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035.

2 Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399; Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035 (13 Blatchf. 224); Gaffney v. Gillette, Fed. Cas. No. 5,168 (4 Dill. 264); Hudson River R. R. & Term. Co. v. Day, 54 Fed. 545; State of West Virginia v. King, 112 Fed. 369; Schneider v. Eldredge, 125 Fed. 638; Amy v. Manning, 144 Mass. 153, 10 N. E. 737; Dart v. Arnis (New York), 19 How. Pr. 429; Pollock v. Cohen, 32 Ohio St. 514; Wadleigh v. Standard Life & Acc. Ins. Co., 76 Wis. 439, 45 N. W. 109.

3 Amy v. Manning, 144 Mass. 153, 10 N. E. 737.

4 Hudson River R. & Term. Co. v. Day, 54 Fed. 545.

5 Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co., 29 Fed. 337.

6 Freeman v. Butler, 39 Fed. 1; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Franklin v. Wolf, 78 Ga. 446, 3 S. E. 696.

7 State of West Virginia v. King, 112 Fed. 369; Baltimore & O. R. Co. v. Ford, 35 Fed. 170.

8 Gaffney v. Gillette, Fed. Cas. No. 5,168, 4 Dill. 264.

9 Hanover Nat. Bank v. Smith,

The entry into trial in the State court without a protest.[10] The right is not waived by a previous objection to the jurisdiction of the State court and proceedings founded upon such objection,[11] such as the trial of a plea in abatement,[12] nor by an appeal from an order denying a motion to set aside the service of the summons and a motion to stay proceedings pending such appeal,[13] nor by opposition to an application for any interlocutory remedy, or a proceeding to dissolve such a remedy,[14] as an attachment,[15] nor by the filing and procurement of the approval of a bond to dissolve an attachment,[16] nor by a voluntary appearance in the State court,[17] nor by the filing of a demurrer,[18] or an answer,[19] or a plea in abatement,[20] nor by argument in opposition to a motion to strike out his pleading, at least when the same does not affect the merits of the controversy,[21] nor, it has been held, by his consent to the appointment of an auditor,[22] nor by entry into an arbitration resulting in an award which is not binding except by mutual consent,[23] nor by appealing from such award,[24] nor, it has been

Fed. Cas. No. 6,035 (13 Blatchf. 224).

10 Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399.

11 Remington v. Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274; Baumgardner v. Bono Fertilizer Co., 58 Fed. 1; Donahue v. Calumet Fire Clay Co., 94 Fed. 23.

12 Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274.

13 Remington v. Central Pac. Ry. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959.

14 Cella, Adler & Tilles v. Brown, 136 Fed. 439, 440; but see Dart v. Arnis (New York), 19 How. Prac. 429.

15 Cella, Adler & Tilles v. Brown, 136 Fed. 439; Calderhead v. Downing, 103 Fed. 27.

16 Purdy v. Wallace Muller & Co., 81 Fed. 513; Whiteley Malleable Castings Co. v. Sterlingworth.

17 Healy v. Prevost, Fed. Cas. No. 6,297; Stevens v. Richardson, 9 Fed. 191 (20 Blatchf. 53); Connor v. Skagit Cumberland Coal Co., 45 Fed. 802; Groton Bridge & Manufacturing Co. v. American Bridge Co., 137 Fed. 284.

18 Tennessee Coal, Lumber & Tanbark Co. v. Waller, 37 Fed. 545; Connor v. Skagit Cumberland Coal Co., 45 Fed. 802; Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co., 83 Fed. 853.

19 Gavin v. Vance, 33 Fed. 84; Donahue v. Calumet Fire Clay Co., 94 Fed. 23.

20 Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274.

21 Richards v. Incorporated Town of Rock Rapids, 31 Fed. 505.

22 Stone v. Sargent, 129 Mass. 503.

23 Thorne v. Towanda Tanning Co., 15 Fed. 289.

24 Ibid.

held, a stipulation to plead and try the case at the next term,[25] nor by defending upon a trial,[26] nor by argument in opposition to an appeal from the order of removal,[27] nor by appealing to a higher State court from an order refusing the removal.[28] Where, in an action against a nonresident in a State court, its attorney was directed to appear solely for the purpose of removing the cause on the last day for answer, he filed a petition for removal with a bond; applied to the judge for an order of removal, and when, over objection, the court postponed the hearing on the application for a removal to the following week; the attorney believing it necessary to sustain his right to removal, and, for that purpose only, orally asked for and obtained an extension of time to plead; held that such application for time should be construed an an application for an extension of time to appear for the purpose of pleading to the jurisdiction or otherwise, and therefore did not constitute an appearance sufficient to confer jurisdiction.[29] After the transcript has been filed, the case cannot be remanded by consent.[30] It has been held by a State court that a removal may be withdrawn and the right waived by a notice to that effect, after the petition and bond have been filed, but before the transcript has been sent to the court of the United States.[31]

§ 538. Cases which are the subject of removal. The Judicial Code authorizes the removal of those cases of which the District Courts of the United States are given original jurisdiction thereby.[1]

A judicial proceeding, which is of such a character, owing to its procedure, that it could not be commenced in the Federal courts, can be removed when the controversy presents every ele-

25 Waite v. Phœnix Ins. Co., 62 Fed. 769.

26 Insurance Co. v. Dunn, 19 Wall. 214; Removal Cases, 100 U. S. 457; Richards v. Incorporated Town of Rock Rapids, 31 Fed. 505, 506; State v. Sullivan, 50 Fed. 593; McMullen v. Northern Pac. R. Co., 57 Fed. 16.

27 Mecke v. Valley T. M. Co., 89 Fed. 209, 211.

28 Richards v. Incorporated Town of Rock Rapids, 31 Fed. 505, 506.

29 Waters v. Central Trust Co., 126 Fed. 469.

30 Lawton v. Blitch, 30 Fed. 641.

31 Wadleigh v. Standard Life & Acc. Ins. Co., 76 Wis. 439.

§ 538. 1 § 2, quoted *supra*, § 537.

ment mentioned in the first section of the statute, namely: that it is a civil nature, at common law or in equity, which involves three thousand dollars, exclusive of interest and costs, and arises only between citizens of different States, or between citizens of the same State claiming land under grants of different States.[2] When the requisite difference of citizenship exists and the matter in controversy exceeds the jurisdictional amount, an action commenced by attachment in the State court can be removed although the writ could not have originally issued from the Federal court.[3] So may an action pending before a Nebraska justice of the peace.[4] It is no objection to the removal that the case involves claims and defenses in both law and equity, which cannot be united in a suit in the Federal court.[5]

A proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, is considered as purely administrative in its character, and not in any just sense a suit; but an appeal from the decision in such a proceeding may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and if there are parties litigant to contest the case on the one side and the other.[6] The decision of a State court of last resort, that a special statutory proceeding is not a civil suit, does not control the Federal court on the question whether this may be removed.[7]

It has been held: that a suit against an assignee for the benefit of creditors, brought under the Ohio statute for an adjudication upon a claim against the estate, may be removed.[8] That

2 *Re* Stutsman County, 88 Fed. 337, 342. See Wilson v. Smith, 66 Fed. 81. But see Anderson v. Sharp, 189 Fed. 247.

3 Crocker Nat. Bank v. Pengenstecher, 44 Fed. 705; Vermilya v. Brown, 65 Fed. 149; Long v. Long, 73 Fed. 369. *Cf.* Bentlif v. London & C. F. Corp. Ld., 44 Fed. 667; *supra*, § 470.

4 Katz v. Herschel Mfg. Co., 150 Fed. 684.

5 Ketchum v. Black River Lumber Co., 4 Fed. 139; Tarver v. Ficklin, 60 Ga. 373.

6 Delaware C. Com'rs v. Diebold S. & L. Co., 133 U. S. 473, 33 L. ed. 674; Upshur County v. Rich, 135 U. S. 474, 477, 34 L. ed. 199, 200; per Bradley, J.

7 *Re* Jarnecke Ditch, 69 Fed. 161.

8 Claflin v. Robbins, Fed. Cas. No. 2,776 (1 Flip. 603).

a creditor's bill, brought under a State statute by one who is not a judgment creditor, to set aside a conveyance as fraudulent, or to reach and apply, in payment of a debt, property of a debtor, which cannot be attached or taken under execution in an action at law,[9] and a suit against a partnership by the firm name, under a State statute which authorizes, in such case, judgment to be entered against the firm, enforceable against the partnership property and also that of such members as have appeared or have been served with notice, cannot be removed.[10]

It has been said that, before a suit is pending in a State court, for the purposes of the removal act, it must be a suit within the meaning of the State law, and the mere filing of a petition of intervention, without the issue or service of notice or process of any kind,[11] does not constitute a suit within the meaning of the law of Iowa.[12] A suit or proceeding in which the value of the matter in dispute cannot be estimated in money is not removable.[13]

§ 538a. Removal of criminal proceedings. Except in cases arising under the civil rights acts, or where there is a defense under the revenue laws, or the defendant is an officer of a House of Congress, no criminal proceeding,[1] nor proceeding in its nature criminal,[2] can be removed. An action by a State or by a

9 First Nat. Bank v. Prager, C. C. A., 91 Fed. 689. See *supra*, §§ 82, 83.

10 Mathews Slate Co. v. Mathews, 148 Fed. 490. See *supra*, §§ 82, 83.

11 Ralya Market Co. v. Armour & Co., 102 Fed. 530.

12 *Re* Iowa & M. Const. Co., 6 Fed. 799.

13 Whitney v. Am. Shipbuilding Co., 197 Fed. 777, a suit to compel a corporation to exhibit its books to its stockholders. See *supra*, § 6.

§ 538a. 1 New Hampshire v. The Grand Trunk Railway, 3 Fed. 887.

2 Chicago, M. & St. P. Ry. Co. v. Iowa, 145 U. S. 632, 12 Sup. Ct. 978, 36 L. ed. 857; Iowa v. Chicago, B. & Q. R. Co., 3 L. R. A. 554, 37 Fed. 497; appeal dismissed; Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161; Texas v. Day, L. & C. Co., 41 Fed. 228; Dey et al., R. R. Com'rs v. Chicago, M. & St. P. R. Co., 45 Fed. 82; Indiana v. Alleghany Oil Co., 85 Fed. 870; Southern Ry. Co. v. State (Indiana), 72 N. E. 174. An early case holds that an action on a recognizance for good behavior is criminal in its nature and cannot be removed. Respublica v. Cobbett, 3 Dall. 467, 1 L. ed. 683; Chicago, M. & St. P. Ry. Co. v. Iowa, 145 U. S. 632, 12 Sup. Ct. 978, 36 L. ed. 857; Iowa v. Chicago, B. & Q. R. Co., 3 L. R. A. 554, 37 Fed. 497; Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161; Texas v.

public officer, to recover a penalty, is criminal, not civil, in its nature; and consequently cannot be removed; even, it has been held, where the State statute declares it to be a civil action, or where a count for the penalty is joined with another count for damages,[3] or for an injunction;[4] nor when any part of the penalty belongs to the State, although the suit is brought in the name of an informer, who receives the balance of the same;[5] but where the penalty is imposed merely as punitive damages for the benefit of the individual plaintiff, the suit is removable.[6] It has been held that an information in equity by a State Attorney-General to enjoin the violation of an anti-trust law,[7] and a suit by a city to enjoin the transaction of business therein by a corporation which has failed to comply with a municipal ordinance imposing a license tax when the bill also prays for a decree for the amount of the tax together with a penalty,[8] are not removable.

A suit by State Commissioners, to enjoin a railroad company from violating a State statute and their order concerning rates, was removed.[9]

The following cases have been held to be removable: a proceeding to punish a revenue collector for contempt of court;[10] an action by the State to enjoin a Federal receiver from destroying a railroad;[11] a statutory summary proceeding by a landlord to eject a tenant;[12] an executory process in Louisiana to seize and sell a vessel under a mortgage;[13] a proceeding for

Day, L. & C. Co., 41 Fed. 228; Dey et al., R. R. Com'rs v. Chicago, M. & St. P. R. Co, 45 Fed 82.

3 Indiana v. Alleghany Oil Co., 85 Fed. 870.

4 City of Montgomery, Ala., v. Postal Tel.-Cable Co., 218 Fed. 471.

5 Texas v. D., L. & C. Co., 49 Fed. 593.

6 Gruetter v. Cumberland Tel. & T. Co., 181 Fed. 248; Younts v. Southwestern Tel. & T. Co., 192 Fed. 200.

7 Moloney v. Am. Tobacco Co., 72 Fed. 801.

8 City of Montgomery, Ala., v. Postal Tel.-Cable Co., 218 Fed. 475.

9 Missouri, K. & T. Ry. Co. of Kansas v. Hickman, 183 U. S. 53, 22 S. Ct. 18, 46 L. ed. 78; reversing judgment, Hickman v. Missouri, K. & T. Ry. Co. of Kansas, 52 S. W. 351, 151 Mo. 644; Hickman v. Missouri, K. & T. Ry. Co., 97 Fed. 113.

10 McCullough v. Large, 20 Fed. 309.

11 State v. Frost, 89 N. W. 915, 113 Wis. 623.

12 Gallatin v. Sherman, 77 Fed. 337.

13 W. G. Coyle & Co. v. Stern, C. C. A., 193 Fed. 582.

the collection of delinquent taxes under a statute of North Dakota;[14] and an action by the personal representative of a decedent to recover damages for causing his death,[15] although the act also provides for a fine, payable to the personal representative, after conviction upon an indictment.[16]

§ 538b. Removal of applications for the writ of mandamus. An application for the writ of mandamus is not removable, except, perhaps, when it is ancillary to proceedings previously pending in the Federal court.[1] An affidavit and petition for a writ of mandate filed by a city alleged a street car company's failure and neglect to operate cars, that under its franchise the city was entitled to a percentage of the gross earnings, that the loss sustained by the city was at the rate of $75,000 a year, and that the cessation of operation would cause irreparable damage to the industries and business of the public within the city. It prayed for an alternative writ of mandate, and that upon a refusal or failure of the company to operate cars the court, in addition to punishment for contempt, appoint a receiver. It was held that, while the affidavit and petition contained matters which were unnecessary and constituted surplusage, the proceeding was not an equitable proceeding for the appointment of a receiver, or an application for a mandatory injunction or a receivership, but a mandamus proceeding, in which the pleader sought a receivership as punishment for noncompliance with the writ, and hence the proceeding was not removable.[2]

§ 538c. Removal of habeas corpus proceedings. Before the Judiciary Act of 1887 a proceeding upon an application for the writ of *habeas corpus* could not be removed.[1]

14 *Re* Stutsman County, 88 Fed. 337. It has been held that a proceeding in a court in Kentucky to cause the assessment of omitted property, for taxation, cannot be removed. Chicago, St. L. & No. Ry. Co. v. Commonwealth, 72 S. W. 1119, 24 Ky. Law Rep. 2124.

15 Brisenden v. Chamberlain, 53 Fed. 307; Martin v. N. Y., N. H. & H. R. Co, 241 Fed. 696.

16 Boston & Maine R. Co. v. Hurd, C. C. A., 56 L. R. A. 193, 108 Fed. 116; Malloy v. American Hide & Leather Co., 148 Fed. 482. The latter case was decided after the Supreme Court of Massachusetts had said that the statute in question was penal.

§ 538b. 1 State City of Seattle v. Puget Sound Traction, Light & Power Co., 243 Fed. 748.

2 Ibid. See *supra*, § 51.

§ 538c. 1 Kurtz v. Moffitt, 115 U.

§ 538d. Removal of quo warranto proceedings. An action in the nature of a *quo warranto,* even if it is begun by information, may be removed, when it arises under the Constitution or laws of the United States.[1]

It was held that a proceeding in the nature of *quo warranto* to try respondent's title to the office of lieutenant governor, on the ground that he had not been a resident of the State for the time required by the Constitution, was not removable under the "civil rights bill" and the *habeas corpus* acts of March 3, 1863, and May 11, 1866.[2]

It has been held: that an action to annul the franchise of a corporation cannot be removed.[3] That a writ of *quo warranto* brought to enforce the provisions of the Pennsylvania Constitution,[4] and a statute [5] prohibiting competing telegraph companies from consolidating, and providing that upon such consolidation the property shall be forfeited to the Commonwealth, is a criminal proceeding, and therefore cannot be removed from the State court to the United States Circuit Court.[6] That such an action, to determine the defendant's title to office in a corporation organized under the laws of the State in which the suit is brought, is not removable because of difference of citizenship, when the relator is a citizen of that State and the defendant a citizen of another State.[7]

§ 538e. Removal of proceedings in State courts of probate and of those affecting the administration of decedents' estates. A District Court of the United States has no power to admit a will to probate.[1] Consequently an application for the probate of a will is not reviewable either originally,[2] or upon

S. 487, 29 L. ed. 458; *Re* Burrus, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514, *supra.*

§ 538d. [1] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 482; State of Illinois v. Illinois Cent. R. Co., 33 Fed. 721; *supra,* § 468.

[2] State v. Gleason, 12 Fla. 190.

[3] People v. Bleeker St. & Fulton Ferry R. R. Co., 178 Fed. 156.

[4] Art. 16, sec. 12.

[5] Act June 5, 1883, secs. 1, 2.

[6] Commonwealth v. Western Union Tel. Co. (Pennsylvania Common Pleas, 1889), 1 Daugh. Co. 141.

[7] Place v. Illinois ex rel. Wilkinson, C. C. A., 69 Fed. 481, 16 C. C. A. 300.

§ 538e. [1] Copeland v. Bruning, 72 Fed. 5.

[2] Copeland v. Bruning, 72 Fed. 5 (under Indiana statute); Hargroves v. Redd, 43 Ga. 142. In McDonnell v. Jordan, 178 U. S. 229, 44 L. ed. 1048, which arose under the Alabama statute, the Supreme Court, without passing upon the

appeal.[3] It has been held that a suit in equity to establish a lost will may be removed.[4] A bill in equity brought to annul a will as a muniment of title, and to limit the operation of the decree admitting the same to probate, was held to be removable.[5] It has been held that a statutory proceeding to set aside the probate of a will, in the same court, cannot be removed;[6] but that an appeal from such proceedings may be removed.[7]

A District Court of the United States has no jurisdiction to undertake the general administration of a decedent's estate.[8] A proceeding for the general administration of a decedent's estate cannot be removed.[9] Neither, it has been held, can a suit to remove an administrator.[10]

question whether a contest upon the admission of a will in a probate court could be removed, intimated that in such a case the proponent of the will was the plaintiff and could not obtain the removal. Meadow v. Nash, 250 Fed. 911.

3 *Re* Frazer, Fed. Cas. No. 5,068 (C. C. under Michigan statute); *Re* Cilley, 58 Fed. 977 (under New Hampshire statute); *Re* Aspinwall's Estate, 83 Fed. 851 (under Pennsylvania statute); appeal dismissed in C. C. A., 90 Fed. 675; Wahl v. Franz, C. C. A., 49 L. R. A. 62, 100 Fed. 680 (under Arkansas statute); reversing 81 Fed. 9.

4 Southworth v. Adams, 4 Fed. 1, 9 Biss. 521.

5 Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524. See Southworth v. Adams, 11 Rep. 46.

6 Reed v. Reed, 31 Fed. 49 (under Ohio statute). A Circuit Court of the United States has taken original jurisdiction of a proceeding under the Oregon statutes to contest a will. Richardson v. Green, C. C. A., 61 Fed. 423. See *supra*, § 54.

7 Brodhead v. Shoemaker, 11 L. R. A. 567, 44 Fed. 518 (under Georgia statute). See *supra*, § 54.

8 Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867; McCauley v. McCauley, 202 Fed. 280; *Re* Mississippi River Power Co., 241 Fed. 194; Smith v. Douglas County, C. C. A., 254 Fed. 244. But see Comstock v. Herron, C. C. A., 55 Fed. 803; Herron v. Comstock, C. C. A., 139 Fed. 370; Iowa Loan & Tr. Co. v. Fairweather, 252 Fed. 605; *supra*, § 54.

9 Foley v. Hartley, 72 Fed. 570; *Re* Foley, 76 Fed. 390; *Re* Foley, 80 Fed. 949; Clark v. Guy, 114 Fed. 783. It has been held that a proceeding in a Connecticut probate court for the settlement of the accounts of an executor cannot be removed. Clark v. Guy, 114 Fed. 783. It has been held, in Georgia, that a proceeding in the court of ordinary of Georgia, for the final settlement of a guardian's account, may be removed. Stafford v. Hightower, 68 Ga. 394. It was previously said that proceedings in the State court, upon a petition of an administratrix for a final accounting, might be removed. Craigie v. McArthur, Fed. Cas. No. 3,341 (4 Dill. 474).

10 White v. Keown, 261 Fed. 814.

It has been held that the following cases, affecting the estate of a decedent, are removable: a proceeding in a court of probate, against the administrator, to compel payment of a debt owed by the decedent during his life;[11] an action to recover a legacy;[12] an application by an illegitimate child to be permitted to share in a decedent's estate, because of the alleged acknowledgment of the petitioner's paternity in accordance with the State statute;[13] a special proceeding by an administrator for leave to sell the land of his decedent for the payment of debts;[14] and a suit by one executor against another, who was also the surviving partner of the decedent, to compel an account of his administration of the partnership assets.[15]

§ 538f. Removal of condemnation proceedings. Proceedings for the condemnation of land, when instituted by a State for its exclusive benefit, are not removable, if no Federal question is involved.[1] When instituted by or for the benefit of a corporation, public[2] or private,[3] between whom and the respondent the requisite difference of citizenship exists, or when the proceed-

11 Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927; Schneider v. Eldredge, 125 Fed. 638. It was held that a claim against the insolvent estate of a deceased person, pending in the superior court on appeal from the decision of the probate commissioners, cannot be removed to the Circuit Court of the United States under Acts 1867, c. 196. Du Vivier v. Hopkins, 116 Mass. 125, 17 Am. Rep. 141.

12 Wilson v. Smith, 66 Fed. 81.

13 *Re* Foley, 76 Fed. 390.

14 Elliott v. Schuler, 50 Fed. 454.

15 Filer v. Levy, 17 Fed. 609 (although the liquidating partner gave a bond in the State probate court and is an officer thereof). A proceeding by a widow in a District Court of Nevada for a partial distribution of the estate of a decedent, and for a determination that part of the same was separate property and the rest community property, *Re* Foley, 80 Fed. 949. It has been said, an application by a widow for an heir's support under the statute of Georgia, McElmurray v. Loomis, 31 Fed. 395; and a proceeding in Louisiana for the removal of an executor and the appointment of his successor, Succession of Burnside, 34 La. Ann. 728, cannot be removed.

§ 538f. 1 Madisonville Traction Co. v. St. Bernard Min. Co., 130 Fed. 789, 790.

2 Metropolitan Water Co. v. Kansas City, 164 Fed. 738; s. c., 164 Fed. 728; Fishblatt v. Atlantic City, 174 Fed. 196.

3 Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Searl v. School District, 124 U. S. 197, 199, 31 L. ed. 415, 416; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462; affirming 130 Fed. 789. It has been held, in West Virginia, that a for-

ing arises under the Constitution or laws of the United States,[4] although instituted by a town or other subdivision of the State,[5] they may be removed. Proceedings upon a petition filed with the State railroad commissioners, praying their consent to the taking of certain lands by condemnation proceedings to be subsequently instituted, cannot be removed.[6]

The initial proceeding for the appraisal by commissioners, at least when the application for their appointment is made *ex parte*, is usually considered to be purely administrative in its nature and not to be a suit which can be removed.[7] In some cases, when such application is upon notice and may be opposed, it has been held that the proceedings are then removable.[8]

After their appraisal, when process is issued by the court which appointed them, directing the owners to show cause why their report should not be confirmed, a removal may be had,

eign corporation cannot institute proceedings in the United States Courts to condemn the land of a citizen if the State for the use of the corporation, and proceedings of that nature instituted in the State courts cannot be removed to the Federal courts. Baltimore & O. R. Co. v. Pittsburgh, W. & K. R. Co., 17 W. Va. 812.

4 Pacific Railroad Removal Cases, 115 U. S. 1, 18, 29 L. ed. 319, 325; Helena Power Transmission Co. v. Spratt, 46 Fed. 319 (under Montana statute).

5 Metropolitan Water Co. v. Kansas City, 164 Fed. 738; s. c., 164 Fed. 728.

6 New York, N. H. & H. R. Co. v. Cockcroft, 46 Fed. 881; New York v. Sage, 239 U. S. 57.

7 Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. ed. 206, 207; Pacific Railroad Removal Cases, 115 U. S. 1, 10, 18, 29 L. ed. 319, 322, 325; Searl v. School District, 124 U. S. 197, 199, 31 L. ed. 415, 416; Des Moines Water Co. v. City of Des Moines, C. C. A., 206 Fed. 537.

8 Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339 (under Oregon statute); Mineral Range R. Co. v. Detroit & Lake Superior Cotton Co., 25 Fed. 515 (under Michigan statute); Colorado Midland Ry. Co. v. Jones, 29 Fed. 193 (under Colorado statute); Banigan v. Worcester, 30 Fed. 392 (under Massachusetts statute); Kansas City & Tr. R. Co. v. Interstate Lumber Co., 37 Fed. 3; Sugar Creek, P. B. & P. C. R. Co. v. McKell, 75 Fed. 34 (under West Virginia statute); Postal Tel. Cable Co. v. Southern Ry. Co., 88 Fed. 803 (under North Carolina statute); Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209 (under Missouri statute). But see Searl v. School District, 124 U. S. 197, 31 L. ed. 415 (under similar statute). But it has been held, that under a Connecticut statute, which requires the appointment of commissioners to be made upon notice, there can be no removal of the proceedings. Hartford & C. W. R. Co. v. Montague, 94 Fed. 337.

even though there is a subsequent appeal, upon which all the matters decided can be retried.[9] When, after the appraisal by commissioners, a trial by jury can be had upon demand, the proceedings can be removed at or before the time when such demand is made.[10] When there is no such proceeding in the court of first instance, a removal may take place after an appeal to another court, where the question as to the amount of damages to be awarded can be retried.[11]

The existence of a controversy as to the right to condemn the lands, which is distinct from that of the amount of damages to be awarded, does not prevent a removal.[12]

§ 538g. Removal of proceedings to settle water rights. Proceedings before the Oregon Water Board of Control by the users of water in a stream to determine the rights of the appropriators thereof are not removable so long as they are pending before the board; but they might be after the evidence and the orders of the board have been filed in the State Circuit Court.[1]

§ 538h. Removal of proceedings to assess betterments. It has been held that proceedings under the Indiana,[1] Missouri,[2]

9 Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462 (under Kentucky statute); affirming 130 Fed. 789.

10 Minneapolis, St. P. & S. S. Ry. Co. v. Nestor, 50 Fed. 1 (under North Dakota statute).

11 Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Pacific Railroad Removal Cases, 115 U. S. 1, 10, 18, 29 L. ed. 319, 322, 325; Searl v. School District, 124 U. S. 197, 199, 31 L. ed. 415, 416; Warren v. Wisconsin V. Ry. Co., Fed. Cas. No. 17,204, 6 Biss. 425 (under Illinois statute); Hudson River R. & T. Co. v. Day, 54 Fed. 545 (under New Jersey statute); Terre Haute v. Evansville & T. H. R. Co., 106 Fed. 545 (under Indiana statute); Kirby v. Chicago & N. W. R. Co., 106 Fed. 551 (under Iowa statute); Myers v. Chicago, N. W. Ry. Co., 118 Iowa 312, 91 N. W. 1076.

12 Searle v. School District, 124 U. S. 197, 31 L. ed. 415; Madison Tr. Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462 (decided by a divided court of five to four); Sugar Creek, P. B. & P. C. R. Co. v. McKell, 75 Fed. 34; Helena Power Transmission Co. v. Spratt, 146 Fed. 310 (under Montana statute).

§ 538g. 1 Pacific Live Stock Co. v. Oregon Water Bd., 241 U. S. 440; *Re* Silvies River, 199 Fed. 495. See Pacific Livestock Co. v. Cochran, 63 Oregon 1417, 1429; *Re* Willow Creek, 74 Oregon 592.

§ 538h. 1 *Re* Jarnecke Ditch, 69 Fed. 161.

2 Drainage Dist. No. 19, Caldwell County, Mo. v. Chicago, M. & St. P. Ry. Co., 198 Fed. 253.

Iowa,[3] and Arkansas [4] statutes for the establishment of drainage districts and the assessment of the betterments therefrom arising may be removed, after the report of the commissioners has been filed in the State court. The report of the commissioners is considered as a complaint; the petitioners for the drain as complainants and the remonstrants or opponents of the proceedings as defendants.[5] Where the propriety of the construction of the drain is disputed, there can be no separate controversy therein;[6] but a separate controversy arises when the sole matter in dispute is as to the amount of the assessments against different landowners.[7] It has been held that a proceeding under the Illinois statute in a court with full judicial power to assess real estate for the cost of a sewer in proportion to the benefits therefrom derived are not removable.[8]

§ 538i. Removal of proceedings to collect claims against counties. Proceedings upon a claim presented to a board of county officers cannot be removed while they are pending before such board.[1] It has been held, however, that an appeal to a court of record from the decision of a county board upon such a claim may be removed.[2] In such a case, the claimant was considered to be the plaintiff, although the appeal had been taken by a taxpayer from a decision allowing the claim.[3]

§ 538j. Removal of creditors' bills. A creditor's bill, founded upon a judgment of a State or Federal court, may be removed, when the requisite difference of citizenship exists.[1] It has been held: that a creditor's bill, when the plaintiff has not reduced

[3] Chicago, M. & St. P. Ry. Co. v. Drainage Dist. No. 8 of Shelby County, Iowa, et al., 253 Fed. 481.

[4] St. Louis Southwestern Ry. Co. v. Commissioners of Road Improvement Dist. No. 2, 265 Fed. 524.

[5] *Re* Jarnecke Ditch, 69 Fed. 161, 167, 168.

[6] Ibid., St. Louis Southwestern Ry. Co. v. Commissioners of Road Improvement Dist. No. 2.

[7] Drainage Dist. No. 19 v. Chicago, M. & St. P. Ry. Co., 198 Fed. 253.

[8] *Re* City of Chicago, 64 Fed. 897; criticised in *Re* Stutsman County, 88 Fed. 341.

§ 538i. [1] Gurnee v. Brunswick, Fed. Cas. No. 5,872 (1 Hughes 270); Fuller v. Colfax County, 14 Fed. 177 (4 McCrary 535).

[2] Delaware County Com'rs v. Diebold, S. & L. Co., 133 U. S. 473, 33 L. ed. 674 (under Indiana statute); Fuller v. Colfax, 14 Fed. 177 (under Nebraska statute).

[3] Tullock v. Webster County, 40 Fed. 706.

§ 538j. [1] Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823.

his claim to judgment, cannot be removed, although the State practice authorizes such a suit;[2] that a bill in equity to enforce the lien of an attachment by the plaintiff, having a simple contract debt or claim for unliquidated damages, can be removed;[3] and that a garnishee proceeding, after judgment, is to be considered as a new suit, which may be removed by the garnishee, when his citizenship is different from that of the original plaintiff and defendant.[4]

§ 538k. Removal of ancillary and supplemental suits. A suit, which is ancillary and supplemental to one previously brought in a State court, and which is so connected with the original suit as to form an incident thereto, and to be substantially a continuation thereof, cannot be removed into District Court of the United States, unless the original suit has been previously, or may be, simultaneously, removed.[1]

It has been said, that "there is no language in any removal act, which justifies the removal of a cause from a State court to a Federal court, on the ground that it is ancillary to a suit in a Federal court."[2]

It has been held that the following cases are *not* removable: proceedings to determine the disposition of a fund which has been deposited in the registry of a State court to await its further order.[3] Proceedings by an intervenor in sequestration proceedings.[4] Proceedings supplementary to execu-

2 Cates v. Allen, 149 U. S. 451, 37 L. ed. 804; First Nat. Bank v. Pragler, C. C. A., 91 Fed. 689; *supra*, §§ 82, 83.

3 Craddock v. Fulton, 140 Fed. 426.

4 Baker v. Duwamish Mill Co., 149 Fed. 612.

§ 538k. 1 Barrow v. Hunton, 99 U. S. 80, 82, 25 L. ed. 407, 408; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870; Webber v. Humphreys, Fed. Cas. No. 17,326 (5 Dill. 223); Chapman v. Barger, Fed. Cas. No. 2,603 (4 Dill. 557); Buford v. Strother, 10 Fed. 406 (3 McCrary, 253); Poole v. Thatcherdeft, 19 Fed. 49; Flash v. Dillon, 22 Fed. 1; Richmond & D. R. Co. v. Findley, 32 Fed. 641; Wolcott v. Aspen M. & S. Co., 34 Fed. 821; Kalamazoo W. Co. v. Snavely, 34 Fed. 823. See *supra*, § 51.

2 Taft, J, in Gillmore v. Herrick, 93 Fed. 525 (when granting a motion to remand a suit brought in a State court against a Federal receiver to recover less than $2,000).

3 Daugherty v. Sharp, 171 Fed. 466.

4 Hospes v. Northwestern Mfg. & Car. Co., 22 Fed. 565. Under S. S. Minnesota it was said that, where a receiver appointed by a State court in the interest of the creditors of a construction company, proceeds with

tion,[5] although instituted by a supplemental bill.[6] An application for the appointment of a receiver in such supplementary proceedings.[7] Applications by claimants of property, which has been seized under execution.[8] Suits for injunctions against the sale under execution of land.[9] Proceedings by or against strangers to the original suit, in connection with garnishee process,[10] but not *contra,* when property in the hands of a Federal collector of customs had been attached.[11] It is doubtful whether a removal can be had of an action of replevin against the sheriff to recover property, on which he has levied by writ of attachment.[12] No removal was allowed of: suits in equity by a tenant to set up a defense to an action of ejectment, which, by the State practice, he might have pleaded in that action.[13] A proceeding by the plaintiff, after a decree establishing his rights to the products of a mine, to enforce his rights under such decree

the work of construction by entering into contracts, etc., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a Federal court, especially after the State court has proceeded, without objection, to adjudicate upon the rights of the parties. Buell v. Cincinnati, E. & Q. Const. Co., 9 Fed. 351, 10 Biss. 555.

5 Webber v. Humphreys, 5 Dill. 223; Poole v. Thatcherdeft, 19 Fed. 49; Buford v. Strother, 3 McCrary 253; s. c., 10 Fed. 406; Flash v. Dillon, 22 Fed. 1.

6 Smith v. St. Louis Mut. Life Ins. Co., 3 Tenn. Ch. 350.

7 Cœur d'Alene Ry. & N. Co. v. Spalding, C. C. A., 93 Fed. 28.

8 First Nat. Bank v. Turnbell, 16 Wall. 190, 21 L. ed. 296; Flash v. Dillon, 22 Fed. 1; Hochstadter v. Harrison, 71 Ga. 21.

9 Lawrence v. Morgan's Louisiana & T. R. & S. S. Co., 121 U. S. 634, 7 Sup. Ct. 1013, 30 L. ed. 1018; Besser v. Munford, 63 Ga. 446; Goodrich v. Hunton, 29 La. Ann. 372; Watson v. Bondurant, 30 La. Ann. 1; Calhoun v. Levy, 33 La. Ann. 1296; Ralston v. British & American Mortg. Co., 37 La. Ann. 193; Edwards Mfg. Co. v. Sprague, 76 Maine 53; Rogers v. Rogers (New York), 1 Paige 183; or chattels, Kelly, Maus & Co. v. Sioux Nat. Bank, 81 Fed. 3.

10 Pratt v. Albright, 9 Fed. 634, 10 Biss. 511; Buford v. Strother, 10 Fed. 406, 3 McCrary 253; Poole v. Thatcherdeft, 19 Fed. 49; or attachments, King v. Shepherd, 20 Fed. 337.

11 Fischer v. Daudistal, 9 Fed. 145.

12 Burnham v. First Nat. Bank, C. C. A., 53 Fed. 163.

13 Chapman v. Barger, Fed. Cas. No. 2,603, 4 Dill. 557; Richmond & D. R. Co. v. Findley, 32 Fed. 621. See Cable v. Ellis, 110 U. S. 389, 28 L. ed. 186; Johnson v. Christian, 125 U. S. 642, 31 L. ed. 820.

against the defendant to the original suit and a third person, who claims a superior title by purchase.[14] A proceeding under a State statute to charge with liability, to the extent of corporate assets in their hands, the directors of a railway company, which has passed out of existence pending a suit against it.[15] A bill in equity setting up a prior judgment for damages for a nuisance, and an action pending at law for the same purpose, which prays consolidation. A perpetual injunction and damages subsequent to the beginning of the pending action at law.[16] A bill of review for errors apparent upon the face of the record,[17] or for fraud,[18] without showing that the facts constituting the fraud were not within the knowledge of the complainants before the rendition of the decree, or could not have been discovered in time to bring them in some appropriate mode to the attention of the State court, while the decree was within its control.

It has been held that the following cases are *removable,* when the requisite difference of citizenship exists and the matter in controversy is of the jurisdictional amount: a bill in equity, such as one to reform an insurance policy, which is filed in aid of a suit of law and seeks to prevent a party from availing himself of an inequitable claim or defense in a pending suit at common law,[19] or to enjoin a condemnation proceeding when the relief prayed could not have been obtained in the pending action.[20] A bill to set aside a judgment or decree of a State court for mistake[21] or fraud,[22] which mistake or fraud could

14 Wolcott v. Aspen, M. & S. Co., 34 Fed. 821.

15 Houston & Texas Cent. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455. See also Hospes v. N. W. Mfg. & C. Co., 22 Fed. 565.

16 Ladd v. West, 55 Fed. 353.

17 Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; Goodrich v. Hunton, 29 La. Ann. 372; Ranlett v. Collier White Lead Co., 30 La. Ann. 56; Jackson v. Gould, 74 Maine 564.

18 Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026; Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 177, 30 L. ed. 196, 204; Marshall v. Holmes, 141 U. S. 589, 600, 35 L. ed. 870, 874; Caswell v. Caswell, 24 Ill. App. 548; affirmed 120 Ill. 377, 11 N. E. 342.

19 Charter Oak Fire Ins. Co. v. Star Ins. Co., Fed. Cas. No. 2,623 (6 Blatchf. 208).

20 Georgia R. & Banking Co. v. Atlantic P. Tel. Cable Co., 152 Fed. 991.

21 Pelzer Mfg. Co. v. Hamburg B. F. Ins. Co., 62 Fed. 1.

22 Johnson v. Waters, 111 U. S. 640, 667, 28 L. ed. 547, 556; Arrowsmith v. Gleason, 129 U. S. 86, 101, 32 L. ed. 630, 635; Marshall

not, with the exercise of reasonable diligence, have been discovered before the decree passed beyond the control of the State court. A creditor's bill founded on a State judgment.[23] Where a petition for intervention charged fraud or want of jurisdiction, without an attack on any final judgment, but only interlocutory orders, it was held that the intervenors might remove the cause.[24]

A suit begun by a petition asking for an injunction against the enforcement of previous judgments against the plaintiff and alleging extinguishment by compensation, error of fact and law, and the nullity of the judgments sought to be enforced was removed.[25] Where a distress warrant issued by a justice of the peace was levied on land, and the defendant therein filed a "plea," which was subsequently dismissed; it was held that such dismissal terminated the proceedings in the court; and that a subsequent equitable action to restrain the progress of the warrant was a new, distinct, and original action, and not a mere ancillary proceeding to the justice court action, and was removable.[26] The following cases were also removed: a proceeding to enforce a judgment purporting to have been entered by confession.[27] A bill filed by a stranger to a previous suit and decree in order to prevent the execution of such decree by a levy upon property, of which the complainant was the owner before the former suit was brought.[28] An action of replevin against a sheriff who has levied a writ of execution on chattels claimed by a stranger to the writ.[29] A suit by a second mortgagee to redeem property from a foreclosure in a suit to which he was not a party.[30] A proceeding to enforce an attorney's lien.[31] A proceeding to enjoin a stranger from violating a

v. Holmes, 141 U. S. 589, 600, 35 L. ed. 870, 874; Carver v. Jarvis-Conklin Mtge. Tr. Co., 73 Fed. 9.

23 Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823.

24 *Re* Iowa & M. Const. Co., 10 Fed. 401 (3 McCrary 310).

25 Stackhouse v. Zunts, 15 Fed. 481, 4 Woods 171.

26 Withers v. John Hopkins Place Sav. Bank, 104 Georgia 89, 30 S. E. 766.

27 Lockhart v. Morey, 31 Fed. 497.

28 Bondurant v. Watson, 103 U. S. 281, 26 L. ed. 447; Watson v. Bondurant, Fed. Cas. No. 17,278 (2 Woods 166).

29 Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354.

30 Title Guarantee & Trust Co. v. Studebaker, 100 Fed. 358.

31 Pettus v. Georgia R. & Banking Co., Fed. Cas. No. 11,048, 3 Woods 620.

decree previously entered.[32] It was held that a suit by a judgment creditor to subject land in the name of the debtor's brother on the ground that the purchase price was paid by the debtor, and the deed taken in the brother's name to defraud creditors, is not supplementary to the original suit, but an independent proceeding, and removable.[33] That an hypothecary action against a third possessor of mortgaged lands, who was not a party to the previous suit and judgment of the plaintiff against the former owner of the property, is a new suit, and not the mere continuation of the previous suit, so that for a diversity of citizenship the action may be removed to the Federal court, though the previous suit could not have been removed.[34] A proceeding under a statute of Arkansas, which directs that, where lands are sold by a sheriff or other public officer, the purchaser is authorized to institute proceedings in a court calling on all persons to come in and show cause why the sale should not be confirmed, was removed.[35] Where the necessary diversity of citizenship exists the following cases may also be removed: a suit in which a State court appointed a receiver.[36] A suit for the appointment of a receiver ancillary to one previously appointed by a court in another suit.[37] A suit by bondholders to foreclose a lien paramount to the rights of the stockholders, who had procured an order of a State court placing trustees in possession of the property.[38] A feigned issue in Pennsylvania to try the validity of a judgment obtained by a creditor, which is attacked as fraudulent,[39] and a motion under the Missouri statutes.[40] An application for an execution against a stockholder after judgment and return of execution against his corporation.[41] It

32 Hatch v. Preston, Fed. Cas. No. 6,208 (1 Biss. 19); Ward v. Congress Const. Co., C. C. A., 99 Fed. 598.

33 Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823.

34 Garrett v. Bonner, 30 La. Ann. 1305.

35 Parker v. Overman, 18 How. 137, 15 L. ed. 318.

36 *Re* Iowa & M. Const. Co., 10 Fed. 401.

37 Shinney v. N. A. Sav., L. & B'g Co., 97 Fed. 9.

38 Scott v. Clinton & S. R. Co., Fed. Cas. No. 12,527, 6 Biss. 529.

39 Fuller v. Wright, 23 Fed. 833.

40 Mo. R. S., § 2517.

41 Lackawanna, C. & I. Co. v. Bates, 56 Fed. 737; overruling Webber v. Humphreys, Fed. Cas. No. 17,326 (5 Dill. 223).

was held: that a suit originally instituted in a State court by an executor, legatee, who also sued as the agent of other legatees, nonresidents, claiming a sum of money from a liquidating partner as due to the succession of his deceased partner, was not an action merely incidental to the settlement of his succession of the deceased partner, nor an action supplemental to or auxiliary of any pending proceeding in such succession, nor in any sense an ancillary suit; but a separate, distinct, and independent suit, removable on the application of either party litigant.[42]

§ 538 l. Removal of proceedings to assess and collect taxes. A statutory appeal from an assessment of taxes to "a county court," which, in respect to such proceeding, acts not as a judicial body but as a board of commissioners without judicial power, and which is only authorized to determine questions of quantity, proportion and value, is not a suit which can be removed to a Federal court.[1] It has been held that proceedings before the Oregon board of control by the users of water in a stream to determine the rights of the appropriators thereof,[2] and, under the laws of North Dakota, to collect delinquent taxes,[3] may be removed.

§ 538m. Removal of divorce suits. A suit for divorce cannot be removed, although the plaintiff demands alimony and counsel fees.[1] A suit to collect a decree for alimony might be removed.[2]

§ 539. Removals when there are improper parties plaintiff. Where it appears on the face of the bill, that a person has been improperly joined with others as a plaintiff; his citizenship should be disregarded when determining the rights of the defendants to a removal.[1] Thus, where it appeared, on the face of the bill, that one of a number of plaintiffs was not entitled to relief, and that the others were the real parties litigant; his joinder did

42 Filer v. Levy, 17 Fed. 609.

§ 538l. 1 Upsher County v. Rich, 135 U. S. 467, 34 L. ed. 196 (under West Virginia statute).

2 *Re* Silvies River, 199 Fed. 495.

3 *Re* Stutsman County, 88 Fed. 337.

§ 538m. 1 Johnson v. Johnson, 13 Fed. 193; Bowman v. Bowman, 30 Fed. 849; Chappell v. Chappell, 86 Md. 532.

2 Barber v. Barber, 21 How. 582, 16 L. ed. 226.

§ 539. 1 McHenry v. New York, P. & O. R. Co., 25 Fed. 65; Over v. Lake Erie & W. R. Co., 63 Fed. 34; Jarvis v. Crozier, 98 Fed. 753.

not prevent a removal.[2] Where, in a suit for a partition, plaintiff sued in his own right, and also as the next friend of two infants, to whom he was in nowise related, those infants being citizens of the same State as the defendants, and of a different State from that of the plaintiff; it was held, that the infants were improperly joined as plaintiffs; should be considered as defendants; and that such misjoinder could not prevent a removal.[3] Where the legal owner of a cause of action, and the equitable assignees of different parts of the same, joined in an action at law; it was held, that the citizenship of the plaintiff having the legal cause of action alone could affect the right of removal.[4] Where one of several plaintiffs is properly joined; but his presence is not indispensable to the maintenance of a bill; it has been held, that his citizenship must be considered when the right of removal is determined.[5] Thus, the voluntary joinder of a number of complainants in enforcing a common liability of the defendants, upon which they might have sued separately, has the same effect on the right of removal because of difference of citizenship, as if they had been compelled to unite.[6] Where it is alleged in the petition for removal, and proved to the satisfaction of the Federal court, that one of the plaintiffs has no interest in the controversy; the removal will be allowed.[7]

§ 540. Removals when there are improper parties defendant. Where persons are made defendants, against whom no relief is prayed, and their presence is not essential to a complete disposition of the controversy;[1] or where the plaintiff's pleading states no cause of action against defendants, against whom relief is

2 McHenry v. New York, P. & O. R. Co., 25 Fed. 65.

3 Jarvis v. Crozier, 98 Fed. 753.

4 Over v. Lake Erie & W. R. Co., 63 Fed. 34; Webb v. Southern Ry. Co., 235 Fed. 578.

5 Merchants Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 38 L. ed. 195; Florida Cent. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486; James v. Thurston, 6 R. I. 428.

6 Peninsular Iron Co. v. Stone, 121 U. S. 631, 30 L. ed. 1020; Merchants Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 38 L. ed. 195; Florida Cent. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486.

7 McHenry v. New York, P. & O. R. Co., 25 Fed. 65.

§ 540. 1 Arapahoe County v. Kansas Pac. Ry. Co., Fed. Cas. No. 502 (4 Dill. 277); Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed. 456.

prayed, and it manifestly appears that they were joined in the suit for the purpose of preventing a removal;[2] or it has been said, where the complaint charges negligence generally against several defendants and does not allege with reasonable definiteness the facts which show that the cause of action is joint, that may be an indication of the fraudulent joinder;[3] or, where it is alleged in the petition of removal and is proved to the satisfaction of the District Court upon a motion to remand, that parties, against whom relief is prayed, and the complaint or declaration states a cause of action, in fact have no connection therewith, the allegations in the plaintiff's pleading to that effect being intentionally false; the action may be removed if the requisite difference of citizenship exists between the plaintiff and the remaining defendants.[4]

[2] Nelson v. Hennessey, 33 Fed. 113; Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed. 456; Rivers v. Bradley, 53 Fed. 305; Hukill v. Maysville & B. S. R. Co., 72 Fed. 745; Prince v. Illinois Cent. R. Co., 98 Fed. 1; Mahon v. Somers, 112 Fed. 174; Loop v. Winters' Estate, 115 Fed. 362; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286; Carothers v. McKinley Mining & Smelting Co., 122 Fed. 305; Bryce v. Southern Ry. Co., 122 Fed. 709; Henry v. Illinois Cent. R. Co., 132 Fed. 715; Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650, aff'd as Fritzlen v. Boatmen's Bank, 212 U. S. 364; Axline v. Toledo, W. Va. & O. R. Co., 138 Fed. 169; Curtis v. Cleveland, C., C. & St. L. Ry. Co., 140 Fed. 777; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Cella v. Brown, C. C. A., 144 Fed. 742; Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908; Floyt v. Shenango Furnace Co., 186 Fed. 539; McAllister v. Chesapeake & O. Ry. Co., 198 Fed. 660; Price v. Southern Power Co., 206 Fed. 496; Richardson v. Southern Idaho Water Power Co., 209 Fed. 949; English v. Supreme Conclave, I. O. of H., 235 Fed. 630; Slaughter v. Nashville, C. & St. L. R. Co. (Kentucky), 91 S. W. 744, 28 Ky. Law Rep. 1195; Eastin & Knox v. Texas & P. Ry. Co. (Texas), 92 S. W. 838; judgment reversed Texas & P. Ry. Co. v. Eastin & Knox (Civ. App.), 89 S. W. 440.

[3] Reinartson v. Chicago Great Western Ry. Co., 174 Fed. 707.

[4] Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 51 L. ed. 430; Collins v. Wellington, 31 Fed. 244; Dow v. Bradstreet Co., 46 Fed. 824; Shepherd v. Bradstreet Co., 65 Fed. 142; Hukill v. Maysville & B. S. R. Co., 72 Fed. 745; McCormack v. Illinois Cent. Ry. Co., 100 Fed. 250; Diday v. N. Y., P. & O. R. Co., 107 Fed. 565; Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209; Ross v. Erie R. Co., 120 Fed. 703; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286;

It has been said that where the complaint sets forth a joint cause of action, fraud must consist in a wilful or negligent misstatement of the facts concerning the same.[5]

In determining the removability of a cause, indispensable parties only are to be considered.[6] The fact that the complaint is as to one of the defendants demurrable,[7] or that the State court could give no judgment against a defendant alleged to have been joined to prevent removal, except in violation of the Fourteenth Amendment,[8] is in itself insufficient to justify a removal. The dismissal of the case by the Federal court against both defendants does not show that the joinder of the resident was fraudulent.[9] The refusal by the State court upon the trial to dismiss the complaint against the resident defendant and a verdict against all shows that the contention that he was fraudulently joined is frivolous.[10]

The fact, that a defendant, whose presence prevents a removal, is not pecuniarily responsible, does not make him either a nominal or a sham party.[11] An amendment after the petition to remove has been denied will not justify another attempted removal where it merely makes the original cause of action more

Carothers v. McKinley Min. & Sm. Co., 122 Fed. 305; Free v. W. U. Tel. Co., 122 Fed. 309; Bryce v. Southern Ry. Co., 122 Fed. 709; Boatner v. American Exp. Co., 122 Fed. 714; Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. 85; Crawford v. Illinois Cent. R. Co., 130 Fed. 395; Dishon v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 133 Fed. 471; Roundtree v. Mt. Hood R. Co., 228 Fed. 1010; Hough v. Societe Electrique Westinghouse de Russie, 231 Fed. 342; Nelson v. Black Diamond Mining Co. et al., 237 Fed. 264; Southern Ry. Co. v. Edwards, 115 Georgia 1022, 42 S. E. 375; Cincinnati, N. O. & T. P. Ry. Co. v. Robertson, 115 Kentucky 858, 74 S. W. 1061, 25 Ky. Law Rep. 265; Davis' Adm'r v. Chesapeake & O. Ry. Co., 116 Kentucky 144, 75 S. W. 275, 25 Ky. Law Rep. 342.

5 McGarvey v. Butte Miner Co., 199 Fed. 671.

6 Webb v. Southern Ry. Co., 235 Fed. 278. See *supra*, § 120.

7 Evans v. Felton, 96 Fed. 176; Riser v. Southern Ry. Co., 116 Fed. 215.

8 Hough v. Societe Electrique Westinghouse de Russie, 231 Fed. 341.

9 Stevenson v. Illinois Cent. R. Co., 192 Fed. 956.

10 Deming v. Carlisle Packing Co., 226 U. S. 102, 56 L. ed. —.

11 Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co., 85 Fed. 876; Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760.

precise.[12] An action cannot be removed when one of the defendants is a citizen of the same State as that of the plaintiff, and either the complaint shows a cause of action against all the defendants, which is both joint and several, whether upon tort or contract, and the plaintiff has elected to make the same joint;[13] or where, according to the law of the State in the courts of which the suit was brought, the liability charged was joint, although the law as enforced in the Federal courts might be to the contrary;[14] or where there is reasonable ground for doubt as to the question of the joint liability which the plaintiff alleges, and it does not appear that the parties were fraudulently joined for the purpose of preventing a removal.[15]

12 Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —.

13 Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63; St. Louis & S. F. R. Co. v. Wilson, 114 U. S. 60, 29 L. ed 66; Pirie v. Tvedt, 115 U. S. 41, 29 L. ed. 331; Starin v. New York, 115 U. S. 248, 29 L. ed. 388; Plymouth Min. Co. v. Amador C. Co., 118 U. S. 264, 30 L. ed. 232; Little v. Giles, 118 U. S. 596, 30 L. ed. 269; Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Chicago, Rock Island & Pacific Ry. Co. v. Dowell, 292 U. S. 102; Chicago & Alton R. R. Co. v. McWhirt, 243 U. S. 472; Rountree v. Mt. Hood R. Co., 228 Fed. 1010; Boyd v. Gill, 19 Fed. 145; Wilson v. Union Saving Ass'n, 30 Fed. 521; Shaver v. Hardin, 30 Fed. 801; Anderson v. Appleton, 32 Fed. 855; Weller v. J. B. Pace T. Co., 32 Fed. 860; Thomas v. Great No. Ry. Co., C. C. A., 147 Fed. 83; Knuth v. Butte Electric Ry. Co., 148 Fed. 73.

14 Cincinnati, N. O. & Texas Pac. Ry. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448; Illinois Cent. R. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208; Southern Ry. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732; Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521; Chicago, Rock Island and Pacific Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Chicago, Rock Island & Pacific Ry. Co. v. Dowell, 229 U. S. 102; Chicago, Rock Island & Pacific Ry. Co. v. Whiteaker, 239 U. S. 421; Chicago & Alton R. R. Co. v. McWhirt, 243 U. S. 422; Thomas v. Great No. Ry. Co., C. C. A., 147 Fed. 83; Morris v. Louisville & N. R. Co., 175 Fed. 491; Atlantic Coast Line R. Co. v. Fewter, 260 Fed. 881.

15 Alabama Great So. Ry. Co. v. Thompson, 200 U. S. 206, 217, 50 L. ed. 441, 447; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004; McGarvey v. Butte Miner Co., 199 Fed. 671; Doremus v. Root, 94 Fed. 760; Evans v. Felton, 96 Fed. 176; Knuth v. Butte Electric Ry. Co., 148 Fed. 73; Hunter v. Illinois Cent. R. Co., C. C. A., 188 Fed. 645; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654; McGarvey v. Butte Miner Co., 199 Fed. 671; Price v. Southern Power Co., 206 Fed. 496;

"If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the nonresident defendants except for the purpose of avoiding the jurisdiction of the Federal court. Where he has reasonable ground for a *bona fide* belief in the facts, upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them in order to evade the jurisdiction of the Federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal."[16]

Where the petition for removal is filed before any pleading by the plaintiff, it has been held that the question depends upon the plaintiff's sworn plea to the petition for removal.[17] A statement, in a petition for the removal of a cause to the Federal court, that certain resident defendants were fraudulently joined for the purpose of preventing a removal is of no importance, the plaintiff's motive being immaterial if he had a right to bring the joint action.[18]

§ 540a. Improper parties defendant to negligence cases. A suit to recover damages for negligence may be removed by a defendant who is a citizen of a different State from the plaintiff when brought in the plaintiff's State to recover the jurisdictional amount although another defendant, a citizen of plaintiff's State, is joined and charged with joint negligence with the other, where the complaint charges negligence generally against both but does not allege with reasonable definiteness facts which

[16] Taft, J., in Hukill v. Maysville & B. S. R. Co., 72 Fed. 745, 750; to the same effect is Charman v. Lake Erie & W. R. Co., 105 Fed. 449.

[17] Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760.

[18] Illinois Cent. R. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Evansberg v. Insurance Stove, Range & Foundry Co., 168 Fed. 1001; Craddock-Terry Co. v. Kaufman, 175 Fed. 303; Bagenas v. Southern Pac. Co., 180 Fed. 887; Foster v. Coos Bay Gas & El. Co., 185 Fed. 979; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004; Southern Ry. Co. v. Sittasen (Indiana), 74 N. E. 808.

show that the cause of action is joint;[1] or where it is clearly proved by the former defendant that the other had absolutely no connection with the injury for which the plaintiff sued.[2] Where the plaintiff joined as defendants the corporation which caused the injury and another which had assumed such corporation's obligation, the latter was allowed to remove the case.[3]

A suit which is brought to recover damages for the alleged joint negligence, whether by act or omission, of a railway company and its engineer and conductor, or other employee, when the sole ground of the liability of the corporation, which is alleged, is the responsibility as a principal for the conduct of its servant, although not personally present, nor directing, and not charged with any other non-concurrent act of negligence cannot be removed,[4] unless there is a Federal question in the case.[5]

§ 540a. [1] Reinartson v. Chicago Great Western Ry. Co., 174 Fed. 707; *supra*, § 540.

[2] Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 51 L. ed. 430, quoted *supra*, § 540.

[3] Trana v. Chicago, M. & P. S. Ry. Co., 228 Fed. 824. But see *infra*, §§ 541, 541k.

[4] Powers v. Ches. & Ohio Ry. Co., 169 U. S. 92, 42 L. ed. 673; Alabama Great So. Ry. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 401; Cincinnati, N. O. & Texas Pac. Ry. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102; Chicago, R. I. & Pac. Ry. Co. v. Whiteaker, 239 U. S. 421; Chicago & Alton R. R. Co. v. McWhirt, 243 U. S. 422; Painter v. Chicago, B. & Q. R. Co., 177 Fed. 517; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956; Baker v. Jacksonville Traction Co., 247 Fed. 718. See also Ches. & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121. These cases overruled a number of decisions to the contrary in the lower courts. Fogarty v. Southern Pac. Co., 123 Fed. 973; American Bridge Co. v. Hunt, C. C. A., 130 Fed. 302; Roberts v. Shelby Steel Tube Co., C. C. A., 131 Fed. 729; Davenport v. Southern Ry. Co., C. C. A., 135 Fed. 960; Heffelfinger v. Choctaw, O. & G. R. Co., 140 Fed. 75; Thomas v. Great No. Ry. Co., C. C. A., 147 Fed. 83; Knuth v. Butte Electric Ry. Co., 148 Fed. 73; Southern Ry. Co. v. Grizzle, 53 S. E. 244, 124 Ga. 735; Illinois Cent. R. Co. v. Coley, 121 Kentucky 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234; Lanning v. Chicago Great Western Ry. Co., 94 S. W. 491, 196 Mo. 647; Able v. Southern Ry., 73 South Carolina 173, 52 S. E. 962; Louisville & N. R. Co. v. Vincent, 95 S. W. 179, 116 Tenn. 317; under the Tennessee statute for death caused by the negligence of a fellow servant; Atlantic Coast Line R. Co. v. Bailey, 151 Fed.

This rule applies to the joinder of the employer and the vice-principal,[6] and includes a case where both are charged for negligence in the use of improper machinery,[7] or in failing to furnish the plaintiff a safe place within which to work;[8] but not where the complaint fails to state a cause of action against the latter.[9]

Where the suit was brought in South Carolina it was held that the fact that the liability of the employer would be governed by a State statute while the responsibility of the other defendant would be measured by the common law did not justify a removal.[10]

When a lessor and lessee,[11] or a corporation and its re-

891; where the plaintiff was a fellow servant and relied upon a statute making his employer liable; Henry v. Illinois Cent. R. Co., 132 Fed. 715; under the Iowa statute giving the right of action for negligence resulting in death, which had never been construed by the courts of the State, to create a joint liability in such cases; Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908; under a similar Georgia statute. See Lathrop-Shea & Henwood Co. v. Pittsburgh, S. & N. R. Co., 135 Fed. 619; where the suit was for services procured against a railroad and a party who had made a contract with the plaintiff, and which the plaintiff charged he made acting as agent for the railroad company; held, that there the controversy was not separable.

5 See *supra*, § 537.

6 Evansberg v. Insurance Stove, Range & Foundry Co., 168 Fed. 1001 (superintendent of iron works); Morris v. Louisville & N. R. Co., 175 Fed. 491 (a car inspector); Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004 (a station agent); Foster v. Coos Bay Gas & El. Co., 185 Fed. 979; Galeotti v. Diamond Match Co., 178 Fed. 127, charging that the employer and his resident superintendent put plaintiff to work in an unsafe place; Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760; Veariel v. United Eng. & Foundry Co., 197 Fed. 877; Rountree v. Mt. Hood R. Co., 228 Fed. 1010; Deutsch v. Alaska Gastineau Mining Co., 237 Fed. 215; Plunkett v. Gulf Refining Co., 259 Fed. 974.

7 Evans v. Sioux City Service Co., 206 Fed. 841, where the conductor of a street car was sued with the company for joint negligence for operating a car without a fender, although equipment was no part of the former's duty.

8 Galeotti v. Diamond Match Co., 178 Fed. 127; *contra* Macutis v. Cudahy Packing Co., 203 Fed. 291.

9 Macutis v. Cudahy Packing Co., 203 Fed. 291; Martin v. Matson Nav. Co., 239 Fed. 188; Plunkett v. Gulf Refining Co., 259 Fed. 968.

10 Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881.

11 Illinois Cent. R. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208; Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 55 L. ed.

ceiver,[12] are sued jointly for an injury caused by negligence, the case cannot be removed because of difference of citizenship when either of the defendants is a citizen of the same State as that of the plaintiff, unless it clearly appears that one of them was fraudulently made a party for the sake of preventing the removal.[13]

§ 541. Separable controversies. The Judicial Code provides that if, in any suit, which would otherwise be removable, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district.[1] This refers to a case in which there are two controversies, one of which is separable from the other.[2] It does not authorize a

521; Central Ohio R. Co. v. Mahoney, C. C. A., 114 Fed. 732; Person v. Illinois Cent. R. Co., 118 Fed. 342; Keller v. Kansas City, St. L. & C. R. Co., 135 Fed. 202; Case v. Atlanta & Charlotte Air Line Ry. Co., 225 Fed. 862; *Cf.* Curtis v. Cleveland, C. C. & St. L. Ry. Co., 140 Fed. 777. *Contra,* Spangler v. Atchison, T. & S. F. R. Co., 42 Fed. 305; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286; Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796; Yeates v. Illinois Cent. R. Co., 137 Fed. 943.

12 Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303; Moore v. Los Angeles I. & S. Co., 89 Fed. 73; Rupp v. Wheeling & L. E. R. Co., C. C. A., 121 Fed. 825. *Contra,* Chamberlain v. New York, L. E. & W. R. Co., 71 Fed. 636.

13 Hukill v. Maysville & B. S. R. Co., 72 Fed. 745; Diday v. New York, P. & O. R. Co., 107 Fed. 565; Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796; Keller v. Kansas City, St. L. & C. Ry. Co., 135 Fed. 202; Yeates v. Illinois Cent. R. Co., 137 Fed. 943; Axline v. Toledo, W. V. & O. R. Co., 138 Fed. 169; Curtis v. Cleveland, C. C. & St. L. Ry. Co., 140 Fed. 777; McAllister v. Chesapeake & O. Ry. Co., 198 Fed. 660; Reinartson v. Chicago Great Western Ry. Co., 174 Fed. 707; all of which are cases of lessor and lessee.

§ 541. 1 Jud. Code, § 28. 36 St. at L., 1087. See 25 St. at L. 433.

2 Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Chicago, R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055; Western U. Tel. Co. v. Brown, 32 Fed. 337; Sexton v. Seelye, 39 Fed. 705; Arkansas V. Sm. Co. v. Cowenhoven, 41 Fed. 450; Rogers v. Van Nortwick, 45 Fed. 513; Thompson v. Chicago, S. P. & K. C. R. Co., 60 Fed. 773; Watson v. Asbury Park & B. Street R. Co., 73 Fed. 1; Mutual Reserve Fund Life Asso. v. Farmer, C. C. A., 77 Fed. 929, 23 C. C. A. 574, 36 U. S. App. 771; Yarnell v. Felton, 102 Fed. 369; Huntington v. Pinney, 126 Fed. 227; Blackburn v. Black-

removal of a separate controversy between the same plaintiffs and the same defendants;[3] nor enlarge the statutory provisions which specify the suits that may be removed.[4]

The removal takes the whole case, not merely the separable controversy, into the Federal court.[5]

It has been said that there is a clear distinction between separable controversies, as contemplated by the statute, and separate and wholly distinct controversies only joined in one proceeding by express statutory permission; and that, in the latter class of cases, nothing will be removed, except the controversy between the removing party and the plaintiff.[6] It has been held that a proceeding for the collection of delinquent taxes, under the statute of North Dakota, is not a single suit, but as many suits as there are parcels of land, and that if the same person owns several parcels, such suit is consolidated by his joining all the parcels in a single answer.[7] Where a suit is brought for the use of several having different claims against the same defendant to recover a separate amount for each, a removal of the controversy between one of these and the defendant does not

burn, 142 Fed. 901; Moloney v. Cressler, C. C. A., 210 Fed. 104. These cases overruled a number of decisions of the Circuit Courts. *Contra:* Arapahoe County v. Kansas City P. R. Co., 4 Dill. 277, Fed. Cas. No. 502; Mutual L. Ins. Co. v. Champlin, 22 Blatchf. 334, 21 Fed. 85; Grindrod v. Crine, 22 Fed. 257; Stanbrough v. Cook, 38 Fed. 369; Garner v. Second Nat. Bank, 66 Fed. 369; Hunter v. Conrad, 85 Fed. 803. See a note on subject of this section in 5 L. R. A. and Ann. S. 49, 57.

3 Tullar & Tullar v. Illinois Cent. R. Co., 213 Fed. 282.

4 Ibid.

5 Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; s. c., 3 Ky. Law Rep. 144 (Kentucky); Hervey v. Illinois Midland Ry. Co., Fed. Cas. No. 6,434 (7 Biss. 103); Carraher v. Brennan, Fed. Cas. No. 2,441 (7 Biss. 497); Girardey v. Moore, Fed. Cas. No. 5,462 (3 Woods 397); Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co., Fed. Cas. No. 4,665 (9 Biss. 133); Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 789 (9 Biss. 307); Corbin v. Boies, 18 Fed. 3; Atlantic & V. Fertilizing Co. v. Carter, 88 Fed. 707; Swan v. Mansfield, C. & L. M. R. Co., 7 Ohio Dec. 669, 4 Wkly. Law Bul. 898. But see Thomas, J., in Manufacturers Commercial Co. v. Brown Alaska Co., 148 Fed. 308, 313.

6 Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co., 152 Fed. 824.

7 *Re* Stutsman County, 88 Fed. 337.

remove the rest of the case.[8] By proceeding without objection to a trial in the State court of the remaining issues the right to have them tried in the Federal court is waived.[9]

It has been held that a separable controversy to which an alien is a party cannot be thus removed whether the alien is a plaintiff,[10] or a defendant.[11] Nor can a separable controversy to which a State is a party be removed.[12]

A plaintiff cannot remove a separable controversy in any case.[13] It has been held that a defendant, who is a resident of the State where the suit is brought, cannot remove a separable controversy therein.[14] Any one or more of the nonresident defendants interested in a separable controversy may remove it.[15] A defendant who is a resident of the district cannot.[16] Where there were several plaintiffs only one of whom was a citizen and resident of the State and the defendant was a citizen of a different State it was said that there might be a removal if there was a separable controversy between the two.[17] A defendant not interested therein cannot.[18] It has been held that an inter-

8 State of Idaho v. Am. Surety Co., 218 Fed. 678.

9 St. Louis, W. & W. R. Co. v. Ransom, 29 Kan. 298.

10 Deakin v. Lea, Fed. Cas. No. 3,695 (11 Biss. 27); Creagh v. Equitable Life Assur. Soc., 88 Fed. 1. *Contra,* Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446.

11 King v. Cornell, 106 U. S. 395, 27 L. ed. 60; Merchants' C. P. & S. Co. v. Insurance Co. of North America, 151 U. S. 368, 386, 38 L. ed. 195, 204; Woodrum v. Clay, 33 Fed. 897; Insurance Co. of North America v. Delaware Mutual Insurance Co., 50 Fed. 243; Tracy v. Morel, 88 Fed. 801. *Contra,* Bradshaw v. Bowden, 226 Fed. 323.

12 Rand v. Walker, 117 U. S. 340, 29 L. ed. 907; Texas v. Day Land & Cattle Co., 49 Fed. 593.

13 Western Union Tel. Co. v. Brown, 32 Fed. 337.

14 Thurber v. Miller, 67 Fed. 371, 14 C. C. A. 432, 32 U. S. App. 209. *Contra,* Stanbrough v. Cook, 38 Fed. 369, 3 L.R.A. 490; Nat. Bank of Battle Creek v. Howard, Special Term, N. Y. Sup. Ct. March 20, 1907, N. Y. L. U. March 21, 1907.

15 Rand v. Walker, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907; Field v. Lownsdale, Fed. Cas. No. 4,769 (Deady, 288); Fields v. Lamb, Fed. Cas. No. 4,775 (Deady, 430); Lewis v. White, Fed. Cas. No. 8,335; McGinnity v. White, Fed. Cas. No. 8,802 (3 Dill. 350); Green v. Klinger, 10 Fed. 689; Grindrod v. Crine, 22 Fed. 257.

16 Whitaker v. Coudon, 217 Fed. 139.

17 Webb v. Southern Ry. Co., C. C. A., 248 Fed. 618.

18 Rand v. Walker, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907.

venor,[19] or a party brought in on the motion of the plaintiff,[20] or of the defendant,[21] may remove a separable controversy, when the necessary difference of citizenship exists between him and the party on the opposite side thereof; provided that he presents some new and independent interest or question; otherwise not;[22]

19 Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337 (a party who, by an order of the court, had been appointed assignee of the property of a corporation pending a suit against it); Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442 (a landlord intervening in an ejectment suit against a tenant); distinguished in Chicago, R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245, 249, 250, 44 L. ed. 1055, 1056, 1057; Burdick v. Peterson, 6 Fed. 840, 2 McCrary 135; Snow v. Texas Trunk R. R., 16 Fed. 1, 4 Woods 394; Pennsylvania R. Co. v. Alleghany Val. R. Co., 25 Fed. 115; Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356 (a mortgage bondholder intervening in a creditor's suit and praying a foreclosure); American Nat. Bank v. Nat. Benefit & Casualty Co., 70 Fed. 420 (a receiver of a dissolved corporation, appointed prior to a suit against a trustee holding assets of the same). Previous cases hold: that a landlord cannot intervene in and remove an ejectment suit; *Ex parte* Girard, Fed. Cas. No. 5,457 (3 Wall. Jr. 263); *Ex parte* Tunner, Fed. Cas. No. 14,245 (3 Wall. Jr. 258); Allin v. Robinson, Fed. Cas. No. 249 (1 Dill. 119); and that a person becoming interested in the land in controversy cannot intervene in and remove an action of trespass to try title; Farmers' & Merchants' Nat. Bank v. Schuster, C. C. A., 86 Fed. 161, 29 C. C. A. 649. Indemnitors cannot remove a suit for trespass against a sheriff. Thorn Wire-Hedge Co. v. Fuller, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. ed. 1235; Ohlquist v. Farwell, 13 Fed. 305, 4 McCrary 401; Burnham v. First Nat. Bank, C. C. A., 53 Fed. 163, 3 C. C. A. 486, 10 U. S. App. 485; Olds Wagon Works v. Benedict, C. C A., 67 Fed. 1, 14 C. C. A. 285.

20 Jackson & Sharp Co. v. Pearson, 60 Fed. 113 (a purchaser of the subject-matter in controversy previous to the commencement of the suit).

21 Greene v. Klinger, 10 Fed. 689 (a warrantor of the original defendant's title).

22 Ellerman v. New Orleans, etc., R. Co., Fed. Cas. No. 4,382 (2 Woods 120); Weller v. J. B. Pace Tobacco Co., 32 Fed. 860; Bronson v. St. Croix Lumber Co., 35 Fed. 634; Hakes v. Burns, 40 Fed. 33; Olds Wagon Works v. Benedict, C. C. A., 67 Fed. 1; Watson v. Asbury Park & B. St. R. Co., 73 Fed. 1; Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4; Kidder v. Northwestern Mut. Life Ins. Co., 117 Fed. 997; Herbert v. Lefevre (Louisiana), 31 La. Ann. 363; Davis v. Montgomery (Louisiana), 36 La. Ann. 874; Baltimore & O. Tel. Co. v. Morgan's Louisiana & T. R. & S. S. Co. (Louisiana), 37 La. Ann. 883; Gudger v. Western N. C. R. Co. (North Carolina), 87 N. C. 325; Sifford v. Beaty (Ohio), 12 Ohio St. 189. *Contra*,

but that one who intervenes for the purpose of asserting a lien, prior to that of the original plaintiff, occupies the attitude of an intervening plaintiff, and cannot remove the case on the ground that there is a separate controversy between him and the original plaintiff;[23] and that a person who has been denied permission to intervene cannot obtain such a removal.[24] In one case a nonresident defendant who had not been served was denied the right of renewal.[25]

The case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different States, which can be fully determined without the presence of the other parties.[26] There can be no removal when an indispensable party to the controversy is a citizen of the same State as any party on the side opposite to him.[27] The citizenship

Beecher v. Gillett, Fed. Cas. No. 1,225 (1 Dill. 308). But see Connell v. Smiley, 156 U. S. 335, 39 L. ed. 443.

23 *Re* San Antonio & A. P. Ry. Co., 44 Fed. 145. *Contra,* Snow v. Texas Trunk R. Co., 16 Fed. 1, 4 Woods 394.

24 Bertha Zinc & Mineral Co. v. Carico, 61 Fed. 132.

25 Sullivan v. Lloyd, 213 Fed. 275.

26 Gardner v. Brown, 21 Wall. 36, 22 L. ed. 527; Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355; Fraser v. Jennison, 106 U. S. 191; 1 Sup. Ct. 171, 27 L. ed. 131; Winchester v. Loud, 108 U. S. 130, 2 Sup. Ct. 311, 27 L. ed. 677; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; Bixby v. Couse, Fed. Cas. No. 1,451 (8 Blatchf. 73); Maine v. Gilman, 11 Fed. 214; Connell v. Utica, U. & E. R. Co., 13 Fed. 241; New Jersey Zinc & Iron Co. v. Trotter, 18 Fed. 337; Gudger v. Western N. C. R. Co., 21 Fed. 81; Capital City Bank v. Hodgin, 22 Fed. 209; McNulty v. Connecticut Mut. Life Ins. Co., 46 Fed. 305; Scoutt v. Keck, C. C. A., 73 Fed. 900; Snow v. Smith, 88 Fed. 657; Carter v. Scott (Georgia), 82 Ga. 297, 8 S. E. 421; Burch v. Davenport & St. P. R. Co., 46 Iowa 449, 26 Am. Rep. 150; Succession of Townsend v. Sykes (Louisiana), 38 La. Ann. 410; National Docks & New Jersey Junction Connecting Ry. Co. v. Pennsylvania R. Co. (New Jersey), 52 N. J. Eq. (7 Dick.) 58, 28 Atl. 71.

27 Ayres v. Wiswall, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. ed. 693; St. Louis & S. F. R. Co. v. Wilson, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. ed. 66; affirming order Wilson v. St. Louis & S. F. R. Co., 22 Fed. 3; Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195. *Contra,* Burke v. Flood, 1 Fed. 541, 6 Sawy. 220; Lyddy v. Gano, 26 Fed. 177; Perrin v. Lepper, 26 Fed. 545; Vinal v. Continental Const. & Imp. Co., 35 Fed. 673; Rogers v. Van Nortwick, 45 Fed. 513; Insurance Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. 243; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646.

of a defendant, who, may be a proper, but who is not an indispensable, party to the controversy, will not prevent such a removal.[28]

The fact that one of the defendants has made a default in appearing or pleading,[29] or has appeared and disclaimed,[30] or has answered and not renewed the case [31] or that judgment has been entered against one of them before another was served with process,[32] does not make a separable controversy, as regards the other, which will justify a removal. The fact that no process has been served upon one or two or more defendants does not create a separable controversy.[33] The separable controversy must be real and substantial, and not one merely fanciful which has no support in the allegations of the bill.[34] The separability of the controversy must be determined on the plaintiff's pleading alone,[35] as it stands when the cause is removed,[36] at least

28 Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. ed. 1122; Chester v. Wellford, Fed. Cas. No. 2,662 (2 Flip 347); Stevens v. Richardson, 9 Fed. 191, 193 (20 Blatchf. 53); County Court v. Baltimore & O. R. Co., 35 Fed. 161; Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650 (a prior mortgagee or lienholder in a suit for the foreclosure of a junior incumbrance); Fritzlen v. Boatmen's Bank, aff'd 212 U. S. 364; Stewart v. Mordecai (Georgia), 40 Ga. 1, 2 Am. Rep. 555; Barney v. Latham (Kentucky), 3 Ky. Law Rep. 144.

29 Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. ed. 65; Fletcher v. Hamlet, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. ed. 679; affirming order Hamlet v. Fletcher, 24 Fed. 305; Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Hax v. Caspar, 31 Fed. 499; Fairchild v. Durand (New York), 8 Abb. Prac. 305. But see Robert v. Pineland Club, 139 Fed. 1001.

30 City of Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; New Jersey Zinc Co. v. Trotter, Fed. Cas. No. 10,167; Hax v. Caspar, 31 Fed. 499; Dow v. Bradstreet Co., 46 Fed. 824; Goodnow v. Litchfield, 47 Fed. 753.

31 *Re* City of Seattle, 237 Fed. 100.

32 Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608.

33 Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987; Patchin v. Hunter, 38 Fed. 51. *Contra*, Wormser v. Dahlman, Fed. Cas. No. 18,048 (16 Blatchf. 319); Tremper v. Schwabacher, 84 Fed. 413.

34 MacGinnis v. Boston & M. Consol. Copper & Silver Min. Co., C. C. A., 119 Fed. 96, 101. See Snow v. Smith, 88 Fed. 657.

35 Ames v. Chicago, S. F. & C. Ry. Co., 39 Fed. 881; Riser v. Southern Ry. Co., 116 Fed. 215; MacGinnis v. Boston & M. Consol. Copper & Silver Min. Co., 119 Fed. 96, 55 C. C. A. 648; Union Terminal Ry.

when no cross-bill or counterclaim has been interposed.[37] The legal effect of the allegations is determined by the court and not solely by the prayer of relief.[38] Usually the law of the State governs in this respect.[39]

The pleading of the defendant, either by cross-bill counterclaim, or otherwise, of a separate claim, which is purely a matter of defense, or is directly connected with the plaintiff's original pleading, or the answer, does not present a separable controversy.[40] The interposition of separate defenses by answers will not make a case removable;[41] even though one of them, in which all of the defendants are not interested, arises under the Constitution or laws of the United States.[42]

Co. v. Chicago, B. & Q. R. Co., 119 Fed. 209; Dougherty v. Yazoo & M. V. R. Co., 122 Fed. 205, 58 C. C. A., 651; Fogarty v. Southern Pac. Co., 123 Fed. 973; Harley v. Home Ins. Co., 125 Fed. 792; Southern Ry. Co. v. Sittasen (Indiana), 74 N. E. 898; Illinois Cent. R. Co. v. Harris (Mississippi), 38 So. 225, 85 Miss. 15; National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co. (New Jersey), 52 N. J. Eq. 58, 28 Atl. 71.

36 Puckett v. Columbus Power Co., 248 Fed. 353.

37 Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356.

38 Hough v. Société Electrique Westinghouse, 232 Fed. 635.

39 Bloede v. Van Dyke, 222 Fed. 347; Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881.

40 Wilson v. Oswego Tp., 151 U. S. 56, 14 Sup. Ct. 259, 38 L. ed. 70; Donohoe v. Mariposa Land & Mining Co., Fed. Cas. No. 3,989 (5 Sawy. 163); Brande v. Gilchrist, 18 Fed. 465 (where a counter-claim had been interposed in an equitable action in the State court and no repleader was had nor cross-bill filed after the removal); Rumsey v. Call, 28 Fed. 769; Shaver v. Hardin, 30 Fed. 801; Maish v. Bird, 48 Fed. 607.

41 Louisville & N. R. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. ed. 63; Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. ed. 65; Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331, Starin v. City of New York, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. ed. 388; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; reversing decree Giles v. Little, 13 Fed. 100, 2 McCrary, 370; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. ed. 473; Patchin v. Hunter, 38 Fed. 51; O'Harrow v. Henderson, 52 Fed. 769; Arrowsmith v. Nashville & D. R. Co., 57 Fed. 165; Thurber v. Miller, 67 Fed. 371, 14 C. C. A., 432, 32 U. S. App. 209; Robbins v. Ellenbogen, 71 Fed. 4, 18 C. C. A. 83, 36 U. S. App. 242; American Bridge Co. v. Hunt, C. C. A., 130 Fed. 302.

42 Chicago, Rock Island & Pac.

The allegations in the petition for removal are immaterial.[43] Where there are separate remedies against the several parties upon the same cause of action, there is no separable controversy.[44] In a suit to establish a lien upon property bought under a reorganization agreement, the purchaser has no controversy with the plaintiff which is separable from that between the latter and the other defendants who are interested in such agreement.[45]

It has been said that matters, which are mere incidents to the principal subject-matter of the suit, do not present a separable controversy;[46] and that collateral issues, connected with the case, do not destroy the right of removal.[47] Where the defendants are interested in separate parts of the same subject-matter, no separable controversy is presented.[48]

Ry. Co. v. Martin, 178 U. S. 245, 248, 44 L. ed. 1055.

43 Hazard v. Robinson, 21 Fed. 193; Fogarty v. Southern Pac. Co., 123 Fed. 973.

44 Winchester v. Loud, 108 U. S. 130, 27 L. ed. 677; Ayers v. Wiswall, 112 U. S. 187, 28 L. ed. 693; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A., 151 U. S. 368, 38 L. ed. 195; Gudger v. Western N. C. R. Co., 21 Fed. 81.

45 Genesee Valley Trust Co. v. Kansas City, M. & O. Ry. Co., 240 Fed. 524.

46 Shainwald v. Lewis, 108 U. S. 158, 2 Sup. Ct. 385, 27 L. ed. 691; affirming order 5 Fed. 510, 6 Sawy. 585; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676; MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., 119 Fed. 96, 55 C. C. A. 648; Republic Fire Ins. Co. v. Keogh (New York), 23 Hun 644. *Contra,* Langdon v. Fogg, 18 Fed. 5 (21 Blatchf. 392). But see Campbell v. Milliken, 119 Fed. 981.

47 Osgood v. Chicago D. & V. R. Co., Fed. Cas. No. 10,604 (6 Biss. 330).

48 Temple v. Smith, 4 Fed. 392, 2 McCrary, 226; Merchants' Nat. Bank v. Thompson, 4 Fed. 876; Friedler v. Chotard, 19 Fed. 227; Independent District v. Bank of Rock Rapids, 48 Fed. 2; *Re* City of Chicago, 64 Fed. 897; O'Neil v. Birdseye, 244 Fed. 254. A defendant who is a holder of stock in a corporation co-defendant has not such an interest in the controversy, to which the latter is a party, to prevent his removal of a separate controversy in which he alone is interested. Buck v. Felder, 106 Fed. 419.

Where the bill charged one of several defendants with failure to perform his contract to transfer a patent to the complainant, and that the others, with knowledge of his default, had bought machines from him, for the use of which they should account, Nesmith v. Calvert, Fed. Cas. No. 10,123, 1 Woodb. & M. 34. A suit to recover the possession of town bonds, when the party in possession disclaimed all interest in them except a lien for storage and counsel fees, while one of the depositors of the bonds and the township disputed the right of

Where a several liability is sought to be enforced against different defendants, a separable controversy exists between each of them and the plaintiff.[49] Where the parties are sued jointly

the plaintiff to possession and claimed that the bonds were void. Wilson v. Union Sav. Ass'n, 30 Fed. 521. A suit by the beneficiary under a will against the executors, the testamentary trustees, and a lessee of part of the trust estate, where the complaint prayed, that the executors may complete the trust fund for plaintiff's benefit by conveying real estate to the trustee; that the trustees pay to her whatever may be due for interest on said trust fund, and also pay to her, for her benefit, out of the estate, other moneys which she claims; that the trustees be enjoined from charging against her certain moneys which the estate has paid, and from paying to trustees of certain residuary trusts any moneys which might be in, or might hereafter come into, their hands; and that the rent of the part of the trust held by them, which may become due under the lease to the remaining defendant, be paid to the plaintiff, Stevens v. Richardson, 9 Fed. 191 (20 Blatchf. 53). Where remaindermen sued to set aside a settlement by the life tenant with an insurance company for a less amount than the face value of the policy, charging that the life tenant held the insurance impressed with a trust for the plaintiffs' benefit, and praying judgment against both defendants for the face value of the policy with interest, and that they be required to pay the same into court, to be invested for the benefit of the plaintiffs and the life tenant, interest only to be paid the latter during her life; it was held that there was a separable controversy between the insurance company and the plaintiffs. Harley v. Home Ins. Co., 125 Fed. 792.

[49] Chicago & A. R. Co. v. New York, L. E. & W. R. Co., 24 Fed. 516; Youtsey v. Hoffman, 108 Fed. 693; Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308 (an action by the holder of a note against the maker and the indorsers, in which it was held that the liability of each indorser presented a separable controversy from that with the others and with the maker), Feibleman v. Edmonds (Texas), 69 Tex. 334, 6 S. W. 417. A suit to establish an indebtedness against an insolvent corporation and for judgment against a second defendant, which had assumed the indebtedness of the former. Mecke v. Valleytown M. Co., 93 Fed. 697, 35 C. C. A., 151; affirming 89 Fed. 209; Trana v. Chicago, M. & T. S. Ry. Co., 228 Fed. 824. But see Lewis v. Weidenfeld, 76 Fed. 145; Mecke v. Valleytown Mineral Co., 122 N. C. 790, 29 S. E. 781.

Where a suit was brought against an employee of the plaintiff, who was charged with embezzlement, and the surety upon the bond guaranteeing plaintiff against loss by any of the acts of such employee; it was held that a *separable* controversy existed between the plaintiff and the surety. Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446. Where exemplary damages upon special facts were claimed against one of two de-

and severally, it seems that a separable controversy exists.[50] When the plaintiffs sue to enforce a common right, which they might have asserted in separate actions, there is *no* separable controversy, even though their rights depend upon different circumstances.[51] There is no separable controversy between defendants, against whom the plaintiff seeks to establish a joint liability alone, either in contract,[52] or in tort,[53] although the

fendants sued upon a joint obligation; it was held that there was a separable controversy, which might be removed. Feibelman v. Edmunds (Texas), 69 Texas 334, 6 S. W. 417.

50 Langdon v. Fogg, 18 Fed. 5, 7, 9; Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543.

51 Reineman v. Ball, 33 Fed. 692; Wilder v. Virginia, T. & C. S. & I. Co., 46 Fed. 676; per Fuller, C. J. (where the plaintiffs were different stockholders, some holding full paid stock, and others stock that was assessable, and also creditors holding separate claims to enforce a cause of action by the corporation). See also *Re* McClean's Estate, 26 Fed. 49.

52 Stone v. State, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; Folsom v. Continental Nat. Bank, 14 Fed. 497, 4 Woods 521; Western Union Tel. Co. v. Brown, 32 Fed. 337; Woodburn v. Clay, 33 Fed. 897; Mutual Reserve Fund Life Ass'n v. Farmer, 77 Fed. 929, 23 C. C. A. 574; Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., C. C. A., 80 Fed. 766; Lathrop-Shea & Henwood Co. v. Pittsburg, S. & N. R. Co., 135 Fed. 619; Boykin, Sol. Gen., ex rel. Johnson v. Morris Fertilizer Co., 257 Fed. 827; Fusz v. Trager (Louisiana), 38 La. Ann. 173; O'Kelly v. Richmond & D. R. (North Carolina), 89 N. C. 58.

53 Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; Tuedt v. Carson, 13 Fed. 353 (4 McCrary, 426); Southworth v. Reid, 36 Fed. 451; Kaitel v. Wylie, 38 Fed. 865; Dow v. Bradstreet Co., 46 Fed. 824; O'Harrow v. Henderson, 52 Fed. 769; Brown v. Coxe Bros. & Co., 75 Fed. 689; Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co., 85 Fed. 876; Moore v. Los Angeles Iron & Steel Co., 89 Fed. 73; Evans v. Felton, 96 Fed. 176; Marrs v. Felton, 102 Fed. 775; Ward v. Franklin, 110 Fed. 794; Riser v. Southern Ry. Co., 116 Fed. 215; Person v. Illinois Cent. R. Co., 118 Fed. 342; Hoye v. Great Northern Ry. Co., 120 Fed. 712; Dougherty v. Yazoo & M. V. R. Co., C. C. A., 122 Fed. 205, 58 C. C. A. 651; Fogarty v. Southern Pac. Co., 123 Fed. 973; American Bridge Co. v. Hunt, C. C. A., 130 Fed. 302; Davenport v. Southern Ry. Co., 135 Fed. 960, 68 C. C. A. 444; reversing judgment 124 Fed. 983. *Contra*, Clark v. Chicago, M. & St. P. Ry. Co., 11 Fed. 355 (3 McCrary, 591); Kerling v. Cotzhausen, 16 Fed. 705 (11 Biss. 582).

liability of the defendants is joint and several;[54] even when a State statute permits judgment to be entered for or against one or more of the plaintiffs, and for or against one or more of the defendants,[55] nor when the plaintiff sues less than all of those who are jointly and severally liable,[56] provided that the allegations in the bill do not clearly show that the liability is several.

Nor in a suit or proceeding to compel the joint performance of a duty by mandamus, or otherwise,[57] or to enjoin them all from the performance of the same act,[58] or of acts directly connected with each other.[59]

Where plaintiff sued upon two similar claims, one of which had been assigned to him; it was held that there was a separable controversy as regards the claim, to which he had an original right.[60]

It has been said that, "where an action is brought by one

54 Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Tuedt v. Carson, 13 Fed. 353 (4 McCrary, 426); Kaitel v. Wylie, 38 Fed. 865; Brown v. Coxe Bros. & Co., 75 Fed. 689; Moore v. Los Angeles Iron & Steel Co., 89 Fed. 73. *Contra*, Clark v. Chicago, M. & St. P. Ry. Co., 11 Fed. 355 (3 McCrary, 591); Kerling v. Cotzhausen, 16 Fed. 705 (11 Biss. 582).

55 Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63.

56 Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; Core v. Vinal, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. ed. 912; Tuedt v. Carson, 13 Fed. 353 (4 McCrary, 426); Kaitel v. Wylie, 38 Fed. 865; Fox v. Mackay, 60 Fed. 4. *Contra*, Clark v. Chicago, M. & St. P. Ry. Co., 11 Fed. 355 (3 McCrary, 591); Kerling v. Cotzhausen, 16 Fed. 705 (11 Biss. 582).

57 Ohio v. Columbus & X. R. Co., 48 Fed. 626.

58 Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. 28; affirming 21 Fed. 592; New York v. New Jersey S. B. Transp. Co., 24 Fed. 817; Yearian v. Horner, 36 Fed. 130; McMillan v. Noyes, 146 Fed. 926; National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co. (New Jersey), 52 N. J. Eq. 58, 28 Atl. 71.

59 Anderson v. Bowers, 40 Fed. 708; Davis v. County Court of Randolph County, 88 Fed. 705; Vulcan Detinning Co. v. American Can Co., 130 Fed. 635; Anderson v. Orient Fire Ins. Co. (Iowa), 88 Iowa 579, 55 N. W. 348.

60 Sharkey v. Port Blakely Mill Co., 92 Fed. 425.

61 Bates v. Carpenter, 98 Fed. 452, 454.

plaintiff against several defendants, not because they claim any joint interest or are subject to any joint liability in respect to the subject-matter of the action, but merely for convenience, it will generally be capable of resolution into separable controversies between the plaintiff and the individual defendants."[61]

§ 541a. Separable controversies in suits for accountings. A suit for an accounting presents separate controversies, which if the other jurisdictional facts exist will justify a removal: where an accounting is prayed against one or more, but not all, of the defendants, and there is an actual controversy between the remainder and the plaintiff,[1] or where the complaint prays separate accountings by different defendants[2] who are not jointly liable nor interested in the accounts of the other, in which last case the controversy between them and the plaintiff is not separable;[3] and, it has been held, when it prays a joint

§ 541a. [1] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. ed. 1122, a suit to set aside a contract between two corporations, to enjoin its directors from any further disposition of its property, for a reconveyance of the same, and an accounting by the grantee for the damages caused by the transfer, with which was joined a prayer that the defendants, who were directors of the grantor, should account for their actions in the premises and be required to make good all allowance and damage caused by their wrongful conduct. In a suit against a corporation and some of its officers for an injunction against all the parties from holding a meeting called by the latter for the purpose of conveying the corporate property to another company, and also for an accounting by such officers for the corporate funds, which, it was alleged, that they had appropriated to their own use, accompanied by a prayer for a receiver of the corporation, brought by a stockholder who alleged that the corporation was under the control of these officers; held, that there was no such separable controversy between the complainants and the corporation as entitled the latter to remove the cause. Campbell v. Millken, 119 Fed. 981.

[2] Langdon v. Fogg, 18 Fed. 5 (21 Blatchf. 392); Vinal v. Continental Const. & Imp. Co., 34 Fed. 228. See Golden v. Bruning, 72 Fed. 2. A suit for a conveyance of an undivided interest in lands held by a corporation, together with an accounting by such corporation of a similar proportion of the proceeds of lands by it sold, and also for an accounting by individual defendants for the proceeds of the sale of lands, acquired under the same title and sold by them before title was acquired by the defendant corporation, was held to present a separable controversy. Barney v. Latham, 103 U. S. 205, 26 L. ed. 514.

[3] Burke v. Flood, 1 Fed. 541 (6 Sawyer, 220); Sexton v. Seelye, 39

and several accounting by trustees for the fraudulent misappropriation of trust funds.[4] Where a joint accounting was prayed, but the allegations in the complaint showed that the liability was several, it was held that the case could be removed.[5] A prayer in the complaint that "defendants may account for all the wrongs alleged, and on such accounting repay all sums realized by said defendants, or any of them," is not a prayer for a several account, and the controversy is not separable on that ground.[6]

§ 541b. Separable controversies in suits affecting the title to land. A suit to quiet title contains separate controversies when the defendants do not claim under a common right or through a common source;[1] even, it has been held, where the bill alleged that all of the defendants made some claim under a certain deed; but did not limit the controversy to the validity of such deed;[2] but not when the defendants are charged with being joined in a conspiracy to cloud the complainants' title and to defraud them of their property;[3] nor when one of two defendants holds the

Fed. 705; German Savings & Loan Soc. v. Dormitzer, C. C. A., 116 Fed. 471; Regis v. United Drug Co., 180 Fed. 201; Coram v. Davis, 182 Fed. 939; Cornue v. Coram, 182 Fed. 941. In a stockholder's suit for an accounting by the officers of a corporation and for the appointment of a receiver of the company, the latter is an indispensable party to the accounting. Campbell v. Milliken, 119 Fed. 981. Held, that a prayer in the complaint that "defendants may account for all the wrongs alleged, and on such accounting repay all sums realized by said defendants, or any of them" is not a prayer for a several account, and the controversy is not separable on that ground. Fox v. Mackay, 60 Fed. 4. Where a joint accounting was prayed, but the allegations in the complaint showed that the liability was several, it was held that the case could be removed. Chicago & A. R. Co. v. N. Y., L. E. & W. R. Co., 24 Fed. 516.

4 Langdon v. Fogg, 18 Fed. 5, 7, 9; Boyd v. Gill, 19 Fed. 145 (21 Blatchf. 543).

5 Chicago & A. R. Co. v. N. Y., L. E. & W. R. Co., 24 Fed. 516.

6 Fox v. Mackay, 60 Fed. 4.

§ 541b. 1 Field v. Lownsdale, Fed. Cas. No. 4,769 (Deady, 288); Goodenough v. Warren, Fed. Cas. No. 5,534 (5 Sawy. 494); Steinkuhl v. York, Fed. Cas. No. 13,356 (2 Flipf. 376); Illinois v. Illinois Cent. R. Co., 16 Fed. 881; Chapman v. Chapman, 28 Fed. 1; Bates v. Carpenter, 98 Fed. 452; Carothers v. McKinley Mining & Smelting Co., 116 Fed. 947; McMullen v. Hallack Cattle Co., 193 Fed. 283 (water rights). But see Smedley v. Smedley, 110 Fed. 255; Lomax v. Foster Lumber Co., C. C. A., 174 Fed. 959.

2 Bacon v. Felt, 38 Fed. 870.

3 Little v. Giles, 118 U. S. 596,

legal title as trustee for the other;[4] nor in any case in which the defendants claim a joint or common right, or through a common source, with no difference between their titles, which affects the controversy in suit.[5]

A proceeding to recover the possession of land may be removed under similar circumstances;[6] it was held, in a suit to enforce a right to enter a park, that the owner and the lessees thereof had separate controversies with the plaintiff,[7] but not, it has been held, a suit for a partition, where one of the defendants claimed to own the plaintiff's undivided share of the land.[8] It has been held that, in a suit for specific performance against the vendor and his grantee of the land, there is a separable controversy between the plaintiff and such grantee;[9] but not between the vendee and the vendor to the exclusion of the holders of incumbrances upon the land.[10] In an action to set aside a conveyance, to which the grantor and the grantee are defendants there is no separable controversy between the plaintiff and the grantee,[11] nor between the plaintiff and the trustee in bankruptcy of the fraudulent grantor.[12]

§ 541c. Separable controversies in condemnation proceedings. A separate controversy exists between the petitioner and each of the lot owners, in a proceeding to condemn different lots of land for a public use, when the only question in dispute

7 Sup. Ct. 32, 30 L. ed. 269; reversing decree Giles v. Little, 13 Fed. 100, 2 McCrary 370.

4 Rand v. Walker, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907.

5 *Re* Foley, 80 Fed. 949; Davey v. Yolo Water & Power Co., 211 Fed. 345.

6 Laidly v. Huntington, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. ed. 883 (a suit for an assignment of dower); Collins v. Wellington, 31 Fed. 244; Anderson v. Appleton, 32 Fed. 855 (an action to establish a sale); Stanbrough v. Cook, 38 Fed. 369, 3 L. R. A. 400; Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404, 69 C. C. A. 248; rehearing denied, 139 Fed. 1007; Forsyth Mfg. Co. v. Putnam, Hooker & Co., 139 Fed. 1007; Cleveland v. Cleveland, C., C. & St. L. Ry. Co., C. C. A., 147 Fed. 171 (lessor and lessee).

7 Sharp v. Whiteside, 19 Fed. 150.

8 Torrenee v. Shedd, 144 U. S. 527, 36 L. ed. 528.

9 Elkins v. Howell, 140 Fed. 157.

10 Bryan v. Barriger, 251 Fed. 328.

11 Moore v. North River Const. Co., 19 Fed. 803; Winnemans v. Edgington, 27 Fed. 324; Reineman v. Ball, 33 Fed. 692; German Savings & Loan Soc. v. Dormitzer, C. C. A., 116 Fed. 471.

12 Casey v. Baker, 212 Fed. 247.

is the amount of damages, and the respondents have no joint interest in any of the parcels to be condemned, nor in the damages to be awarded,[1] except when the State statute directs that the proceedings against all of the respondents shall be tried together, and that a single finding be made including all the awards and all the assessments for benefits; in which case, it has been held that no separable controversy can exist.[2] And one of two or more respondents to a condemnation proceeding, who hold different interests in the same lot, cannot remove the case, since there is no separable controversy as regards them.[3] A mortgagee or a trustee, for the benefit of the holders of mortgage bonds, cannot claim to be interested in a separate controversy from that to which the mortgagor is a party.[4] But, where only a part of the land was leased, it was held that there was a separate controversy, as regards that not leased, between the lessor and the lessee.[5] It was held that a party who has leased the property to another for the term of ninety-nine years is indispensable to the controversy between his lessee and the person who institutes the condemnation proceedings,[6] even, although such lessor

§ 541c. [1] Pacific R. R. Removal Cases, 115 U. S. 2, 23, 29 L. ed. 319, 327; affirming 19 Fed. 150; City of Chicago v. Hutchinson, 15 Fed. 129 (11 Biss. 484); Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339 (9 Sawy. 348); New York, N. H. & H. R. Co. v. Cockcroft, 46 Fed. 881; South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co., C. C. A., 141 Fed. 578; Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co., 152 Fed. 824 (where the State statute authorized a proceeding against the landowners, either jointly or separately; and it was held that any one of them could remove so much as affected his land leaving the controversies between the others and the railway company in the State court); Drainage Dist. No. 19 v. Chicago, M. & St. P. Ry. Co., 198 Fed. 253.

[2] Kansas City v. Hennegan, 152 Fed. 249.

[3] Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 36 L. ed. 910; Seattle & M. Ry. Co. v. State, 52 Fed. 594; Washington v. Columbus & C. M. R. Co., 53 Fed. 673; Helena Power Transmission Co. v. Spratt, 146 Fed. 310. But see Oroville & N. R. Co. v. Leggett, 162 Fed. 571; West Side R. Co. v. California Pac. R. Co., 202 Fed. 331.

[4] Colorado Fuel & Iron Co. v. Four Mile Ry. Co., 66 Pac. 902, 29 Colo. 90.

[5] Sugar Creek, P. B. & P. C. Ry. Co. v. McKell, 75 Fed. 34.

[6] City of Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; City of Le Mars v. Iowa Falls & S. C. R. Co., 48 Fed. 661; City of Washington v. Columbus & C. M. R. Co., 53 Fed. 673.

files a disclaimer.[7] It has been held that, where there is a dispute concerning the right of the petitioner to condemn all the property there is but a single controversy between him and all of those who dispute the right.[8] Where the right to condemn only a part of the land is disputed, there is a separable controversy between the owners of that part and the petitioner, to which the powers of the other parts sought to be condemned are not parties.[9]

§ 541d. Separable controversies in foreclosure suits. In a suit to foreclose a mortgage or other lien, a defendant, who is alleged to be personally liable for a deficiency, has *no* separable controversy from that between the plaintiff and the owner of the equity of redemption;[1] and defendants charged to be junior incumbrancers cannot remove a suit because their controversy with the mortgagee is separate from that of the mortgagor,[2] although they contest the validity or privity of the mortgage, and the mortgagor does not.[3]

7 City of Washington v. Columbus & C. M. R. Co., 53 Fed. 673.

8 *Re* Jarnecke Ditch, 69 Fed. 161; Perkins v. Lake Superior & S. E. Ry. Co., 140 Fed. 904.

9 South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co, 141 Fed. 578, 73 C. C. A. 176; *Re* Silvies River, 199 Fed. 495.

§ 541d. 1 Ames v. Chicago, S. F. & C. Ry. Co., 39 Fed. 881; Lewis v. Weidenfeld, 76 Fed. 881; Lewis v. Weidenfeld, 76 Fed. 145; Union Iron & Foundry Co. v. Sonnefield & Emmins, 113 Louisiana 436, 37 So. 20; U. S. Mortg. Co. v. McClure (Oregon), 70 P. 542, 42 Or. 190.

2 First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co., Fed. Cas. No. 4,803; Donohoe v. Mariposa Land & Mining Co., Fed. Cas. No. 3,989 (5 Sawy. 163); Sweeney v. Grand Island & W. C. R. Co., 61 Fed. 3; Robbins v. Ellenbogen, 71 Fed. 4, 18 C. C. A. 83, 36 U. S. App. 242; Maher v. Tower Hotel Co., 94 Fed. 225; Flynn v. Des Moines & St. L. Ry. Co. (Iowa), 63 Iowa 490, 19 N. W. 312; Springer v. Sheets (North Carolina), 115 N. C. 370, 20 S. E. 469; Northwestern & Pacific Hypotheek Bank v. Suksdorf (Washington), 46 Pac. 1027, 15 Wash. 475. *Contra,* Osgood v. Chicago, D. & V. R. Co., Fed. Cas. No. 10,604 (6 Biss. 330). See also Bybee v. Hawkett, 5 Fed. 1 (6 Sawy. 593).

3 Bissell v. Canada & St. L. R. Co., 39 Fed. 225; Marsh v. Atlanta & F. R. Co., 53 Fed. 168; Thurber v. Miller, 67 Fed. 371, 14 C. C. A. 432, 32 U. S. App. 209. *Contra,* Foster v. Chesapeake & N. Ry. Co., 47 Fed. 369; distinguishing Fidelity Ins., Trust & Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. ed. 898; California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co., 56 Fed. 257. But see Capital

It has been held that a prayer for the reformation of the mortgage is incidental to a foreclosure suit and does not create a separate controversy.[4] It has been held that, where there is a dispute as to the amount of land covered by the mortgage, there is a *separable* controversy between the plaintiff, a mortgagee, and those of the defendants who are interested in the disputed portion of the property.[5] Where a complaint in a foreclosure suit alleged that a defendant, who remanded the case, claimed an interest in the mortgaged property, without stating the nature of the same, and it subsequently appeared that the latter's claim was to a title paramount to that of the mortgagor and mortgagee, which would make the controversies in the suit multifarious, the cause was remanded.[6] It has been held that, since a prior mortgagor or other incumbrancer is not a necessary party to a suit to foreclose a junior lien when he is joined, the controversy between the plaintiff and owner of the equity of redemption is removable.[7] It has been held: that a suit to foreclose a mortgage, in which subsequent incumbrancers are defendants, may be removed by the mortgagor, upon the ground that a separable controversy exists between it and the plaintiff.[8] That, in a suit to cancel a mortgage, there is no separable controversy between plaintiff and the defendants, mortgagor and mortgagee.[9] That the same rule prevails in a suit by a mortgagor against the different lienholders upon his property, for the adjustment of their rights, although separate suits might have been brought for the same purpose against the different mortgagees.[10] That there is no separable controversy in a suit to enjoin a fore-

City Bank v. Hodgin, 22 Fed. 209; Rich v. Gross (Nebraska), 29 Neb. 337, 45 N. W. 468.

4 Winchell v. Coney, 27 Fed. 482; see Gates Iron Works v. James E. Pepper & Co., 98 Fed. 449.

5 New England Water-Works Co. v. Farmers' Loan & Trust Co., 136 Fed. 521, 69 C. C. A. 297.

6 California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co., 56 Fed. 257. A similar ruling was made in Thompson v. Dixon, 28 Fed. 5.

7 Snow v. Texas Trunk R. Co., 16 Fed. 1 (4 Woods, 394); Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650; reversing Weldon v. Fritzlen, 128 Fed. 608. *Contra,* Foster v. Chesapeake & N. R. Co., 47 Fed. 539. See Marsh v. Atlantic & F. R. Co., 53 Fed. 168.

8 Wabash, St. L. & Pac. Ry. Co. v. Central Trust Co., 23 Fed. 513.

9 Oakes v. Yonah Land & Mining Co., 89 Fed. 243.

10 Springer v. Sheets (North Carolina), 115 N. C. 370, 20 S. E. 469.

closure sale and to redeem a mortgage, when the right of the complainant in the equity of redemption is disputed by the person in whose name the title stands, and who is joined as defendant with the mortgagee,[11] and that, in a suit to establish an interest in land in the possession of a mortgagor, the mortgagor and mortgagee are interested in the same controversy with the plaintiff.[12]

§ 541e. Separable controversies in stockholders' suits. Where a suit was brought against two corporations and the directors of one of them, to set aside a conveyance made by this to the other, for an injunction against the directors as managing the affairs of the corporation and for the appointment of a receiver thereof; it was held that the controversy between the complainant and the directors was *separable* from that between him and the two corporations, and that the latter might remove the suit.[1] In a suit to restrain two companies from voting on stock in complainant's corporation in their common interest, it was held that there was a separate controversy between the plaintiff and each of them.[2]

It has been held that there is no separable controversy between the corporation and the complainant in a stockholders' suit in which are joined as defendants the officers,[3] although an accounting is asked against the latter;[4] nor when other defendants are the officers, directors, trustee under a mortgage, and bondholders, and it is sought to set aside an exchange of stock for bonds, and there is a joinder of another corporation holding capital stock of the former company, a cancellation of which is prayed, together with an injunction against the latter exercising any control over the former and against the former permitting any transfer of such shares upon its books or any vote thereupon by the latter and against the directors of the former from acting as such;[5] nor in a stockholder's suit for an account-

11 Faison v. Hardy (North Carolina), 114 N. C. 429, 19 S. E. 701.

12 Chester v. Chester, 7 Fed. 1.

§ 541e. 1 Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122.

2 Kirby v. Louismann-Capen Co., 221 Fed. 271. But see Baillie v. Backus, 230 Fed. 711.

3 Campbell v. Milliken, 119 Fed. 981.

4 Ibid.

5 MacGinniss v. Boston & M. Consol. Copper and Silver Min. Co., C.

ing by an individual and corporations controlled by the latter to recover funds of the plaintiff's company which had been misappropriated at different times by different defendants acting in pursuance of a common scheme or fraud.[6] The fact that plaintiffs, in such a suit, hold stock of different classes, or that creditors, in a suit for an accounting by directors, hold claims of different kinds, does not make the controversy separable, although they might have prosecuted several suits which they properly brought jointly.[7] In a suit to prevent one corporation from obtaining and exercising control over another, there is no separable controversy between the plaintiff and the former.[8] In a stockholder's suit to set aside a contract by his corporation, the controversy between him and the contractor is not separable from that to which the corporation is a party.[9]

§ 541f. Separable controversies in suits to enforce the liability of stockholders.

When no accounting of the assets or liabilities of a corporation is required, suits by receivers to enforce the liability of stockholders either upon unpaid subscriptions [1] or their liability to creditors by statute,[2] usually presents separate controversies between the plaintiff and each stockholder who is a defendant. But, it was held, that a creditors' bill, brought by several on behalf of the rest, to enforce a statutory liability of stockholders under a Colorado statute, by requiring each of them to pay the full amount of the same to a master, to be applied upon the debts *pro rata,* together with such sums as might be collected from other stockholders, the remainder to be returned,

C. A., 119 Fed. 96; overruling Lamm v. Parrot, S. & C. Co., 111 Fed. 241.

6 Baillie v. Backus, 230 Fed. 711.

7 Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676.

8 MacGinnis v. Boston & M. Consol. Copper and Silver Min. Co., C. C. A., 119 Fed. 96; overruling Lamm v. Parrot, S. & C. Co., 111 Fed. 241.

9 Cape Girardeau & St. L. R. R. v. Winston, Fed. Cas. No. 2,390; Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676; Hanover Nat. Bank v. Credits Commutation Co., 118 Fed. 110; Douglas v. Richmond & D. R. Co. (North Carolina), 106 N. C. 65, 10 S. E. 1048. An analogous case is Shumway v. Chicago & I. R. Co., 4 Fed. 385.

§ 541f. 1 Wright v. Ankeny, 217 Fed. 985, under the Washington statute. See *supra,* § 82.

2 Calderhead v. Downing, 103 Fed. 27, under the Washington statute.

did not present a separate controversy between the plaintiff and any one of the defendants.[3]

§ 541g. Separate controversies in suits for the administration of the assets of a debtor.

Upon a creditor's bill for the collection and preservation of the debtor's assets and their distribution *pro rata* among the creditors, there is no separate controversy between the plaintiff and defendants, who claim a prior lien upon the assets;[1] nor between him and defendants, whom he contends should be excluded from participating in the distribution;[2] nor, it has been held, between him and a party, who is alleged in the bill to have assumed the obligations of the insolvent debtor.[3] The same principles apply to similar suits by an administrator,[4] or by an assignee for the benefit of creditors,[5] or by a partner for a dissolution and the distribution of the assets of the firm.[6]

§ 541h. Separable controversies in actions upon promissory notes. The contracts and liability of the maker and the indorsers of a promissory note are separate and distinct from each other. When they are joined as defendants, there is a separable controversy between the plaintiff and each of the indorsers.[1]

3 Miller v. Clifford, 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49.

§ 541g. 1 Fidelity Ins., Trust & Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. ed. 898; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; reversing decree Corbin v. Boies, 34 Fed. 692; Torrence v. Shedd, 144 U. S. 527, 531, 36 L. ed. 528, 531; Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399; Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4; Peters v. Peters (Georgia), 41 Ga. 242; State v. Adams (Ohio), 2 Ohio Dec. 119, 9 Ohio Cir. Ct. R. 21. *Contra,* Corbin v. Boies, 18 Fed. 3; Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356. The same principle has been applied to a bill by a judgment creditor for his own benefit. Palmer v. Inman (Georgia), 122 Ga. 226, 50 S. E. 86.

2 Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; reversing Corbin v. Boies, 34 Fed. 692; Colburn v. Hill, 101 Fed. 500, 41 C. C. A. 467; Burts v. Lloyd (Georgia), 45 Ga. 104, 12 Am. Rep. 574.

3 Meeke v. Valleytown Mineral Co., 122 North Carolina 790, 29 S. E. 781.

4 Peters v. Peters (Georgia), 41 Ga. 242; Burts v. Lloyd (Georgia), 45 Ga. 104, 12 Am. Rep. 574. See State v. Adams (Ohio), 2 Ohio Dec. 119, 9 Ohio C. C. R. 21.

5 Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. ed. 399.

6 Shainwald v. Lewis, 108 U. S. 158, 27 L. ed. 691.

§ 541h. 1 Sheldon v. Keokuk

§ 541i. Separable controversies in negligence cases. It has been held that separable controversies exist in an action to recover damages for negligence, when the negligence charged against the different defendants is different and not concurrent;[1] even when charges of concurrent negligence are joined with a distinct charge of negligence against one defendant.[2]

Thus removals were allowed upon the petition of a railroad company, in a suit by its employee charging the corporation with negligence in furnishing a defective engine, and the other defendants, who were fellow servants of the plaintiff, with negligence in not keeping a proper lookout;[3] where the plaintiff charged the railroad company with negligence in permitting a dangerous obstruction in the immediate vicinity of the track, and a contractor for building the obstruction;[4] where plaintiff sued to recover damages for a personal injury and based his cause of action against each of two defendants upon a separate contract;[5] and where he sued his employer for failing to give him a safe place in which to work and another for its negligence which caused the danger.[6]

It has been held: that there is no separable controversy in an action to recover damages for the alleged joint negligence, by act or omission, of a railroad company and its engineer, conductor or other employee, when the sole ground alleged for the liability of the corporation is its responsibility as principal for the

Northern Line Packet Co., 1 Fed. 789 (9 Biss. 307); Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308.

§ 541i. [1] Yeates v. Illinois Cent. R. Co., 137 Fed. 943.

[2] McIntyre v. Southern Ry. Co., 131 Fed. 985; Henry v. Illinois Cent. R. Co., 132 Fed. 715; Southern Ry. Co. v. Edwards, 115 Georgia 1022, 42 S. E. 375; Adderson v. Southern Ry. Co., 177 Fed. 571; Jackson v. Chicago, R. I. & P. Ry. Co., C. C. A., 178 Fed. 432, where the liability of the different defendants was fixed by different statutes fixing different grounds of liability and permitting different defenses. Bainbridge Grocery Co. v. Atlantic Coast Line R. Co., 182 Fed. 276; Nichols v. Chesapeake & O. Ry. Co., C. C. A., 195 Fed. 913.

[3] Ferguson v. Chicago, M. & St. P. Ry. Co., 63 Fed. 177.

[4] Hartshorn v. Atchison, T. & S. F. R. Co., 77 Fed. 9. A similar ruling was made in Coker v. Monaghan Mills, 110 Fed. 803. See Veariel v. United Eng. & Foundry Co., 197 Fed. 877; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654, *supra*, § 540, *infra*, § 543.

[5] Batey v. Nashville, C. & St. L. Ry., 95 Fed. 368.

[6] Puckett v. Columbus Power Co., 248 Fed. 353.

conduct of its servant, although not personally present nor directing and not charged with any specific concurrent act of negligence.[7] Nor where a passenger sued a railroad company and its conductor for the same injuries, alleging negligence on the part of the corporation in accepting and carrying a lunatic as a passenger without adequate protection, and charged the conductor with negligence in failing to restrain the lunatic so as to prevent him from assaulting the plaintiff.[8] Nor where a passenger in an automobile sued a railway company, its engineer and the operators of the automobile, for injury at a railroad crossing.[9] Nor where the owner of an engine and cars and the owner of the tracks upon which they ran,[10] or a lessor and lessee,[11] or a corporation and its receivers,[12] or two joint receivers,[13] or a city and a landowner[14] are sued jointly for an injury caused by their concurrent negligence.

7 Powers v. Ches. & Ohio Ry. Co., 169 U. S. 92, 42 L. ed. 673; Alabama Great So. Ry. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441; Cincinnati, N. O. & Texas Pac. Ry. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448; (These cases overruled a number of decisions to the contrary in the lower courts.) See also Ches. & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121; Fogarty v. Southern Pac. Co., 123 Fed. 973; American Bridge Co. v. Hunt, C. C. A., 130 Fed. 302; Roberts v. Shelby Steel Tube Co., C. C. A., 131 Fed. 729; Davenport v. Southern Ry. Co., C. C. A., 135 Fed. 960; Heffelfinger v. Choctaw, O. & G. R. Co., 140 Fed. 75; Thomas v. Great No. Ry. Co., C. C. A., 147 Fed. 83; Knuth v. Butte Electric Ry. Co., 148 Fed. 73; Bowles v. H. J. Heinz Co., 188 Fed. 937; Illinois Cent. R. Co. v. Coley (Kentucky), C. C. A., 89 S. W. 234; Able v. Southern Ry., 73 South Carolina, 173, 52 S. E. 962.

8 Dougherty v. Atchison, T. & S. F. R. Co., 126 Fed. 239.

9 Beckwith v. Chicago, M. & St. P. Ry. Co., 223 Fed. 858.

10 Haire v. Rome R. Co., 57 Fed. 321.

11 Central Ohio R. Co. v. Mahoney C. C. A., 114 Fed. 732; Person v. Illinois Cent. R. Co., 118 Fed. 342; Keller v. Kansas City, St. L. & C. R. Co., 135 Fed. 202; Curtis v. Cleveland, C. C. & St. L. Ry. Co., 140 Fed. 777. *Contra,* Spangler v. Atchison, T. & S. F. R. Co., 42 Fed. 305; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286; Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796; Yeates v. Illinois Cent. R. Co., 137 Fed. 943.

12 Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303; Moore v. Los Angeles, I. & S. Co., 89 Fed. 73; Dougherty v. Atchison, T. & S. F. R. Co., 126 Fed. 239. *Contra,* Chamberlain v. New York, L. E. & W. R. Co., 71 Fed. 636.

13 Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co., 180 Fed. 586.

14 Goede v. City of Colorado Springs, 200 Fed. 99.

§ 541j. Separable controversies in suits affecting subrogation to fire insurance. It has been held that plaintiffs or defendants [1] who have been joined because they have a right, by subrogation, to share in the recovery, have no interest in the controversy between the plaintiff and the principal defendant,[2] and that such controversy may be removed; but when such persons are joined as plaintiffs there is no separate controversy which will justify a removal.[3] In a suit to enforce a right of subrogation to several fire insurance policies upon the same property, and to collect losses upon them resulting from the same fire, there is no separable controversy between the plaintiff and the different insurance companies.[4] In a suit by an insurance company to enforce its right of subrogation, and to collect the claim of the insured against a person who caused the loss, the controversy between the insured company and such wrongdoer is not separable from that to which the insured is an indispensable party.[5]

§ 541k. Separable controversies in suits affecting wills. In proceedings upon an application for the admission of a will to probate,[1] or to contest the validity of the same,[2] or an action to establish a will,[3] or, it has been held, in a suit to determine the construction thereof,[4] there is no separable controversy.

§ 542. Parties who may remove cases. Where the necessary jurisdictional facts exist, an infant defendant may remove a case through his next friend or guardian *ad litem*, in the same manner and under the same circumstances as any other defendant;[1] but, it has been held, that this cannot be done until the

§ 541j. 1 Isaac Kubie v. Lehigh Valley R. Co., 265 Fed. 806.

2 Ireton v. Pennsylvania Co., C. C. A., 185 Fed. 84.

3 Webb v. Southern Ry. Co., C. C. A., 248 Fed. 618.

4 Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 38 L. ed. 195, affirming Insurance Co. of North America v. Delaware Mut. Safety Insurance Co., 91 Tenn. (7 Pickle) 537, 19 S. W. 755; overruling Insurance Co. of North America v. Delaware Mut. Insurance Co., 50 Fed. 243.

5 First Presbyterian Soc. of Green Bay v. Goodrich Transp. Co., 7 Fed. 257 (10 Biss. 312); Broadway Ins. Co. v. Chicago G. W. Ry. Co., 101 Fed. 507.

§ 541k. 1 Fraser v. Jennison, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. ed. 131.

2 Reed v. Reed, 31 Fed. 49.

3 Anderson v. Appleton, 32 Fed. 855.

4 Security Co. v. Pratt, 64 Fed. 405.

§ 542. 1 Woolridge v. McKenna, 8 Fed. 650. *Cf. Re* Moore, 209 U. S. 490, 52 L. ed. 904. But see Kings-

infant has been served with process, or otherwise subjected to the jurisdiction of the State court, in accordance with the law of the State.[2] In Georgia a husband may join the wife in an application for the removal of a suit affecting property, which belonged to her before the marriage, and has not yet been reduced to possession.[3] A New York corporation, over whose property receivers have been appointed by the Supreme Court of New York and the Chancellor of New Jersey, may, without the consent of those receivers, remove a suit begun by the levy of a writ of foreign attachment in a New Jersey court.[4] A receiver, authorized to sue and be sued in his own name, may, when the necessary jurisdictional facts exist, remove a suit to which he is the defendant.[5]

An intervenor, who presents some new and independent interest or question, may remove a case under circumstances that would warrant such a removal by the original defendant.[6] An intervenor, who is substituted in the place of another defendant, or who comes in because he has succeeded to such other's rights, cannot remove a cause, which the original defendant could not have removed.[7] Where the party whose place he takes

bury v. Kingsbury, Fed. Cas. No. 7,817 (3 Biss. 60); Glover Mach. Works v. Cooke Jellico Coal Co., 222 Fed. 531.

2 Woolridge v. McKenna, 8 Fed. 650.

3 Carswell v. Schley, 59 Ga. 17.

4 Second Nat. Bank v. New York Silk Mfg. Co., 11 Fed. 532. Under the New Jersey statute, which, for the purpose of the prosecution and defense of actions, continues the existence of a corporation that has been dissolved, such a company can remove a case notwithstanding its dissolution. Groom v. Mortimer Land Co., C. C. A., 192 Fed. 849.

5 American Nat. Bank v. National Benefit & Casualty Co., 70 Fed. 420.

6 Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356; Jackson & Sharp Co. v. Pearson, 60 Fed. 113; American Nat. Bank of Denver v. National Benefit & Casualty Co., 70 Fed. 420; Chase v. Beech Creek R. Co., 144 Fed. 571. As to the right of intervenors to remove a separate controversy, see *supra*, § 541.

7 Cable v. Ellis, 110 U. S. 389, 4 Sup. Ct. 85, 28 L. ed. 186; Houston & T. C. Ry. Co. v. Shirley, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; Jefferson v. Driver, 117 U. S. 272, 6 Sup. Ct. 729, 29 L. ed. 897; Ellis v. Sisson, 11 Fed. 353 (11 Biss. 187); Shirley v. Waco Tap. R. Co., 13 Fed. 705 (4 Woods,

might still remove the case if he had remained in the suit and the intervenor's citizenship is the same, the latter may have a removal.[8] It has been intimated that an intervenor, who asserts rights prior to that of the plaintiff, must be treated as a new plaintiff rather than as a defendant, and cannot remove the case.[9] It has been held that a party, who has been wrongfully denied the right of intervention, may remove a case;[10] but that one who has not applied for leave to intervene cannot.[11]

A suit between citizens of the same State, claiming lands under grants by different States, may be recovered by any one or more of the plaintiffs or defendants.[12] In every other case a defendant only may procure a removal;[13] except where parties have been joined as plaintiffs, who are on the same side of the controversy as the defendants, when, it might be held, that they could join with the other defendants in the petition.[14]

The pleading by the original defendant of a cross-bill, a counter-claim or a demand in reconvention, which exceeds the

411); Ohlquist v. Farwell, 13 Fed 305 (4 McCrary, 401); Goodnow v. Dolliver, 26 Fed. 469; Richmond & D. R. Co. v. Findley, 32 Fed. 641; *Re* San Antonio & A. P. Ry. Co., 44 Fed. 145; Burnham v. First Nat. Bank of Leith, 53 Fed. 163, 166, 3 C. C. A., 486, 10 U. S. App. 485; Grand Trunk Ry. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237; United Electric Securities Co. v. Louisiana Electric Light Co., 68 Fed. 673; Olds Wagon Works v. Benedict, 67 Fed. 1, 14 C. C. A. 285; Baltimore & O. Tel. Co. v. Morgan's Louisiana & T. R. & S. S. Co., 37 La. Ann. 883; Howard v. Stewart, 34 Neb. 765, 52 N. W. 714. But see Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; Greene v. Klingler, Fed. Cas. No. 5,767; American National Bank of Denver v. National Benefit & Casualty Co., 70 Fed. 420.

8 Howard v. Stewart, 34 Neb. 765, 52 N. W. 714.

9 *Re* San Antonio & A. P. Ry. Co, 44 Fed. 145; Nash v. McNamara, 145 Fed. 541.

10 Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356. *Contra*, Bertha Zinc & Mineral Co. v. Carico, 61 Fed. 132.

11 State v. Barnes, 5 N. D. 350, 65 N. W. 688.

12 25 St. at L., p. 433, § 3, *supra*, §§ 50, 537.

13 Western Union Tel. Co. v. Brown, 32 Fed. 337 (separable controversy); La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Campbell v. Collins, 62 Fed. 849 (for prejudice or local influence); Waco Hardware Co. v. Michigan Stove Co., C. C. A., 91 Fed. 289; McKown v. Kansas & T. Coal Co., 105 Fed. 657; Chappell v. Chappell, 86 Md. 532, 39 Atl. 984.

14 Removal Cases, 100 U. S. 457, 468, 25 L. ed. 593, 597; *supra*, §§ 40, 41, 537.

jurisdictional amount, does not put the original plaintiff in the position of a defendant, so that he can remove the cause;[15] nor debar the defendant of his right to remove.[16]

Upon the removal of a condemnation proceeding, pending an appeal from the decision of the commissioners, the land owner, who was the respondent below, is usually regarded as a defendant.[17] Upon an appeal from an application for the probate of a will, the party opposing the probate is considered as the defendant.[18] It has been held that, upon an appeal from a decision of a board of county commissioners upon a county claim, the claimant must be considered to be the plaintiff, and that he cannot remove the cause, although he is the respondent

15 West v. Aurora City, 6 Wall. 139, 18 L. ed. 819; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Waco Hardware Co. v. Michigan Stove Co., C. C. A., 91 Fed. 289; McKown v. Kansas & T. Coal Co., 105 Fed. 657; City of Aurora v. West, 25 Ind. 148; aff'd 6 Wall. 139, 18 L. ed. 819; Chappell v. Chappell, 39 Atl. 984; Illinois Cent. R. Co. v. A. Waller & Co., 164 Fed. 358, 85 Md. 532; Smithers v. Smith (Tex. Civ. App.), 80 S. W. 646; rehearing granted (Sup.) 81 S. W. 283. But where, pending an appeal by a landowner from the award of a sheriff's jury in condemnation proceedings under the statute of Iowa, he filed a pleading which was tantamount to a cross-bill praying an injunction against the institution of the proceedings for want of power in the corporation; it was held that this made the defendant the latter as regards the issues raised thereupon and entitled it to remove the case when the other statutory prerequisites existed. Hagerla v. Mississippi River Power Co., 202 Fed. 777. *Contra*, Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 578 (for prejudice or local influence); Price & Hart v. T. J. Ellis & Co., 129 Fed. 482.

16 Meissner v. Buck, 28 Fed. 161; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645.

17 Mason City & Fort Dodge R. R. Co. v. Boynton, 204 U. S. 570, 51 L. ed. 629 (under Iowa statute, which said that on an appeal "the land owner shall be plaintiff and the corporation defendant"); Mt. Washington Ry. Co. v. Coe, 50 Fed. 637 (under New Hampshire statute); Hudson River R. & T. Co. v. Day, 54 Fed. 545 (under New Jersey statute). *Supra*, § 538f. *Contra*, White v. City, 8 Phila. 241. But see Hagerla v. Mississippi River Power Co., 202 Fed. 771; *supra*, note 15. Before the case in 204 U. S. 570, 51 L. ed. 629 it was held that, under similar circumstances in proceedings under the same Iowa statute, the railroad company might remove the case. Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; Myers v. Chicago & Northwestern Ry. Co., 118 Iowa 312, 324, 91 N. W. 1076.

18 Brodhead v. Shoemaker, 44 Fed. 518.

upon such appeal.[19] In Colorado, it was held that a claimant against an assignee for the benefit of creditors, who had filed his claim, and subsequently a reply to the exception filed by the assignee, must be considered to be a plaintiff, and had no right to remove the cause.[20] It seems that civil suits or criminal prosecutions against revenue officers or persons having defenses under the revenue laws may be removed by such defendant alone, although other parties not having such a defense have been joined with him;[21] and that actions against any person for or on account of anything done by him while an officer of either House of Congress, in the discharge of his official duty, may be similarly removed.[22] It seems that civil suits or criminal prosecutions where any defendant is denied or cannot enforce his rights, secured by the civil rights laws, or where any defendant has a defense under the civil rights laws, may be removed by such defendant, although his co-defendants do not join in his petition.[23]

Suits between citizens of the same State claiming land under grants of different States may be removed by any one or more of the plaintiffs or defendants.[24]

Suits arising under the Constitution or laws or treaties of the United States, except those previously specified, cannot be removed unless all the defendants join in the petition, even though some of them are not interested in the controversy.[25] It seems that suits to which an alien is a party cannot be removed unless all the parties on the opposite side of the controversy to that of the plaintiff join in the application.[26] Where

19 Delaware County Commissioners v. Diebold S. & L. Co., 133 U. S. 473, 33 L. ed. 674; Tullock v. Webster County, 40 Fed. 706; *supra*, § 538i.

20 Hill v. Graham, 11 Colorado App. 536, 53 Pac. 1060.

21 U. S. R. S., § 643. See *infra*, § 551.

22 18 St. at L., p. 401, ch. 130, § 8. See *infra*, §§ 551, 552.

23 U. S. R. S., § 641.

24 25 St. at L., p. 433, ch. 866, § 3; *supra*, § 50.

25 Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U. S. 245, 248, 44 L. ed. 1055, 1056; Yarnell v. Felton, 102 Fed. 369; Yarnell v. Felton, 104 Fed. 161; Scott v. Choctaw, O. & G. R. Co., 112 Fed. 180; Heffelfinger v. Choctaw, O. & G. R. Co., 140 Fed. 75; Chicago, R. I. & P. Ry. Co. v. Martin, 59 Kansas 437, 53 Pac. 461; Texas & P. Ry. Co. v. Young (Texas Civ. App.), 27 S. W. 145. See *supra*, § 537b.

26 25 St. at L., p. 433, ch. 866,

the sole ground of the removal is that the only controversy in the suit is between citizens of different States, the preponderance of authorty supports the proposition that all the parties named in the plaintiff's pleading, who are on the opposite side of the controversy to him, must join in the application.[27] The fact that one of the defendants has not been served,[28] or has made default,[29] or that judgment was entered against one before service upon the other,[30] or that one had appeared and disclaimed,[31] will not obviate the necessity of his joinder in the application.

Defendants who are described in the plaintiff's pleadings as unknown need not join in the petition for the removal.[32] Formal parties need not join in the petition.[33] Improper[34] and

§ 2. See authorities cited, *supra*, § 537f.

27 Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Chicago, R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055; Arkansas Val. Sm. Co. v. Cowenhoven, 41 Fed. 450; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Yarnell v. Felton, 102 Fed. 369; Huntington v. Pinney, 126 Fed. 237; Blackburn v. Blackburn, 142 Fed. 901; International & G. N. R. Co. v. Hoyle, C. C. A., 149 Fed. 180. *Contra*, Mutual Life Ins. Co. v. Champlin (S. D. N. Y.), 21 Fed. 85; Garner v. Second Nat. Bank of Providence (S. D. N. Y.), 66 Fed. 369; Boston S. D. & Tr. Co. v. Mackay (S. D. N. Y.), 70 Fed. 801; Hunter v. Conrad (D. R. I.), 85 Fed. 803; Mumford Rubber Tire Co. v. Consolidated Rubber Tire Co. (S. D. N. Y.), 130 Fed. 496.

28 Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987; Patchin v. Hunter, 38 Fed. 51. *Contra*, Wormser v. Dahlman, Fed. Cas. No. 18,048 (16 Blatchf. 319); Tremper v. Schwabacher, 84 Fed. 413; Bowles v. H. J. Heinz Co., 188 Fed. 937.

29 Putnam v. Ingrahm, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. ed. 65; Fletcher v. Hamlet, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. ed. 679; affirming order, Hamlet v. Fletcher, 24 Fed. 305; Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Hax v. Caspar, 31 Fed. 499; Fairchild v. Durand (New York), 8 Abb. Prac. 305.

30 Brooks v. Clark, 119 U. S. 502.

31 City of Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; New Jersey Zinc Co. v. Trotter, Fed. Cas. No. 10,167; Hax v. Caspar, 31 Fed. 499; Dow v. Bradstreet Co., 46 Fed. 824; Goodnow v. Litchfield, 47 Fed. 753.

32 Walker v. Richards, 55 Fed. 129.

33 Henderson v. Cabell, 43 Fed. 257; Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386.

34 Cooke v. Seligman, 7 Fed. 262 (17 Blatchf. 452). See *supra*, § 540.

perhaps unnecessary[35] parties need not join in the petition. Where there are two controversies in the case, and one of them is removable, any one or more of the non-resident defendants interested in that controversy may remove the cause.[36] It has been held that in such a case the joinder of a party, who has no right of removal, does not affect the removal by the other.[37] Where a case is removable for prejudice or local influence, the petition may be filed by any one of the defendants who has the right of removal without the joinder of his co-defendants.[38] A removal because of alienage,[39] or because the parties to the controversy are citizens of different States,[40] can only be made by parties who are non-residents of the State where the suit is brought.

Under the Judiciary Act of 1875, it was held that the exception of suits by assignees, which could not have been there instituted by the assignors, from the original jurisdiction of the Circuit Courts of the United States, did not affect the right of removal; and that the right of a defendant to remove was not affected by the citizenship of his assignor.[41] Where, by the State practice, the assignee of a cause of action sued in

35 *Supra*, § 43. But see Buck v. Felder, 196 Fed. 419.

36 Rand v. Walker, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907; Field v. Lownsdale, Fed. Cas. No. 4,769 (Deady, 288); Fields v. Lamb, Fed. Cas. No. 4,775 (Deady, 430); Lewis v. White, Fed. Cas. No. 8,335; McGinnity v. White, Fed. Cas. No. 8,802 (3 Dill. 350); Greene v. Klinger, 10 Fed. 689; Grindrod v. Crine, 22 Fed. 257; *supra*, § 541.

37 Snow v. Smith, 88 Fed. 657.

38 25 St. at L., p. 433, ch. 866, § 2; Fisk v. Henarie, 32 Fed. 417 (reversed upon another point, 142 U. S. 459, 35 L. ed. 1080); Whelan v. N. Y., L. E. & W. R. Co., 35 Fed. 849; Detroit v. Detroit City Ry. Co., 54 Fed. 1; Haire v. Rome R. Co., 57 Fed. 321; *infra*, § 549.

39 Cooley v. McArthur, 35 Fed. 372; Cudahy v. McGeoch, 37 Fed. 1; Walker v. O'Neill, 38 Fed. 374; Eddy v. Casas, 118 Fed. 363.

40 Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602; Wichita National Bank v. Smith, C. C. A., 72 Fed. 568. It has been held that, where there were several defendants, all of whom were citizens of a different State from the plaintiff, and one of whom only was a resident of the State where the suit was brought, there could be no removal. Parkinson v. Barr, 105 Fed. 81.

41 Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. ed. 76; Delaware County Com'rs v. Diebold Safe & Lock Co., 133 U. S. 473, 33 L. ed. 674; Waterbury v. Laredo, Fed. Cas. No. 17,252 (3 Woods 371); Rosenblatt v. Reliance Lumber Co., 18 Fed. 705; Bell v. Noonan, 19 Fed.

his own name, but by the practice of the Federal courts the action could only be sustained in the name of his assignor, and the latter was a citizen of the same State as defendant; it was held that there could be no removal.[42]

§ 543. Time of removal. In suits or criminal prosecutions against revenue officers,[1] officers of either House of Congress,[2] or persons claiming rights under the revenue laws,[3] or against persons who seek protection under the Civil Rights law,[4] a removal may be had "at any time before the trial or final hearing." Removals, for prejudice or local influence, of controversies between citizens of different States,[5] and removals of suits between citizens of the same State claiming land under grants of different States,[6] must be made "before the trial" thereof.

Ordinary suits arising under the Constitution or laws of the United States, or treaties made under their authority, or where there are controversies between citizens of different States, must be removed "at the time, or any time before, the defendant is required by the laws of the State or by the rule of the State court, in which said suit is brought, to answer or plead to the declaration of the complaint of the plaintiff."[7]

According to the preponderance of authority, the removal may take place during a vacation of the State court.[8] It has been

225; Rosenbaum v. Council Bluffs Ins. Co., 3 L. R. A. 189, 37 Fed. 724; Leutze v. Butterfield (New York), 1 7 Daly 24; Leutze v. Butterfield (New York), 52 How. Prac. 376; Leutze v. Butterfield (New York), 1 Abb. N. C. 367. A number of decisions by the Circuit Courts to the contrary were overruled. But see Sharkey v. Port Blakely Mill Co., 92 Fed. 425; Flynn v. Fidelity & Casualty Co., 145 Fed. 265. Compare *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264.

42 Anderson v. Manufacturers' Bank (New York), 14 Abb. Prac. 436.

§ 543. 1 U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

2 18 St. at L., ch. 130, § 8, p. 401.

3 U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

4 U. S. R. S., § 641.

5 25 St. at L., p. 433, ch. 866, § 3.

6 25 St. at L., p. 433, ch. 866, § 3.

7 25 St. at L., p. 433, ch. 866, § 3; Daugherty v. Sharp, 171 Fed. 466.

8 Osgood v. Chicago, D. & V. R. Co., Fed. Cas. No. 10,604 (6 Biss. 330); Burck v. Taylor, 39 Fed. 581; Brown v. Murray, Nelson & Co., 43 Fed. 614; State v. Coosaw Min. Co., 45 Fed. 804, 811; Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151. See Remington v. Central Pacific R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Monroe v.

held: that a case is properly removed if the petition and bond are duly filed, although they are not actually presented to the court until the time to plead has expired.[9] That it is sufficient if the papers are actually filed in the clerk's office in time, although they are not then endorsed by the clerk as "filed."[10]

A defendant may remove the case before an attempt has been made to serve him with process.[11] A corporation, not a party to the record, which has refused to enter itself as a defendant, cannot.[12] An irregularity in the filing of the removal papers, before the entry of an order making the remover a party, is cured by the subsequent entry of an order making him a party and reciting the filing of the removal papers.[13]

A cause is removable as soon as process has been issued[14] or an order to show cause[15] or provisional remedy such as an order of arrest[16] or injunction or restraining order[17] granted. It has been said that it cannot be removed after garnishee process has been issued and levied upon persons holding the property of a non-resident defendant, but no attempt has been made to serve the latter.[18]

A case may be removed before the defendant has filed any pleading.[19] A case cannot be removed after it has been dis-

Williamson, 81 Fed. 977; Johnson v. Computing Scale Co., 139 Fed. 339. *Contra*, Scott v. Otis, Fed. Cas. No. 12,543; Williams v. Massachusetts Ben. Ass'n, 47 Fed. 533; Fox v. Southern Ry. Co., 80 Fed. 945; Howard v. Southern Ry. Co., 122 North Carolina 944, 29 S. E. 778.

9 Burck v. Taylor, 39 Fed. 581; judgment affirmed, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; Texas & P. Ry. Co. v. Bloom, 85 Tex. 279, 20 S. W. 133.

10 Waite v. Phoenix Insurance Co., 62 Fed. 769; Brady v. J. B. M'Crary Co., 244 Fed. 602.

11 Parkinson v. Barr, 105 Fed. 81.

12 Bertha Z. & M. Co. v. Carico, 61 Fed. 132.

13 First Nat. Bank v. Merchants' Bank, 37 Fed. 657, 2 L. R. A. 469.

14 Parkinson v. Barr, 105 Fed. 81.

15 English v. Supreme Conclave, 235 Fed. 630.

16 Williston v. Raymond, 213 Fed. 527.

17 English v. Supreme Conclave, 235 Fed. 830.

18 Sullivan v. Lloyd, 213 Fed. 271, 279.

19 Hodson v. Lake Shore & M. R. Co., Fed. Cas. No. 6,571*a*; Bailey v. American Cent. Ins. Co., 8 Fed. 686 (2 McCrary 413); Egan v. Chicago, M. & St. P. Ry. Co., 53 Fed. 675; Creach v. Equitable Life Assur. Soc., 83 Fed. 849; Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176. A New York case holds that a defendant must enter his appearance in the State court at

missed;[20] nor, it has been held, after a stipulation has been filed by the defendant admitting the plaintiff's claim, and there is no other controversy in the suit.[21]

After the time to remove a case has expired, it cannot be extended by the court;[22] even though defendant's attorney was prevented by inevitable accident from reaching the courthouse until after the last day on which the petition and bond were filed.[23] It has been held: that, when the time to remove an action of ejectment has expired, and that case has been tried, a subsequent cross action of ejectment cannot be removed.[24] That, if a case has been remanded for failure to file a transcript, it cannot again be removed upon the same grounds;[25] nor upon other grounds such as local prejudice, when it does not appear that such grounds did not exist at the time of the first removal.[26]

The objection that the petition was filed too late may be waived by a stipulation made within the time that it be treated as filed,[27] or by taking a subsequent proceeding in the Federal court without raising it.[28]

A removal of a suit where there is a controversy between citizens of different States, and there is no claim of prejudice or local influence, and a removal of an ordinary suit arising under the Constitution or laws of the United States or treaties

the time he files his petition for a removal. Kerille v. Phœnix Life Ins. Co., 3 Thompson & C. 788. But see Durand v. Hollins, 10 New York Superior Court (3 Duer), 686.

20 New England Mortgage Security Co. v. Aughe, 12 Neb. 504, 11 N. W. 753.

21 Keith v. Levi, 2 Fed. 743 (1 McCrary 343).

22 Gibson v. Johnson, Fed. Cas. No. 5,397 (Pet. C. C. 44); Ward v. Arredondo, Fed. Cas. No. 17,148 (1 Paine 410); Daugherty v. W. U. Tel. Co., 61 Fed. 138. But see Livingston v. Frick, 76 Ga. 639.

23 Daugherty v. W. U. Tel. Co., 61 Fed. 138. But see Livingston v. Frick, 76 Ga. 639.

24 Evans v. Smith, 21 Fed. 1.

25 St. Paul & C. Ry. Co. v. McLean, 108 U. S. 212, 27 L. ed. 703, 2 Sup. Ct. 498.

26 Pope v. Cheney, 22 Fed. 177.

27 Bryan v. Barriger, 251 Fed. 328.

28 French v. Hay, 22 Wall. 250, 22 L. ed. 857; Martin's Adm'r v. Baltimore & Ohio R. Co., 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. 533; dismissing writ of error, Martin v. Baltimore & Ohio R. Co., 41 Fed. 125; Knight v. International & G. N. R. Co., 61 Fed. 87, 9 C. C. A. 376, 23 U. S. App. 356; *certiorari* dismissed, 17 Sup. Ct. 995, 41 L. ed. 1187; Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129, 22 U. S. App. 393; Collins v. Stott, 76 Fed. 613; *infra*, § 556.

made under their authority, must be made "at the time or any time before the defendant is required by the laws of the State or the rule of the State court, in which said suit is brought, to answer or plead to the declaration or complaint of the plaintiff." [29] It seems, that a case, not belonging to one of the five

[29] Jud. Code, § 29, 36 St. at L. 1087, see 25 St. at L., p. 433, ch. 866, § 3. As to the day before which the removal must be made in different States, see: *California,* MacNaughton v. Southern Pac. C. R. Co., 19 Fed. 881 (holding that the word "session" in the Constitution of California is equivalent to that of "term" in the act of Congress); Case v. Olney, 106 Fed. 433; *Connecticut,* Head v. Selleck, 110 Fed. 786; *Georgia,* Stafford v. Hightower, 68 Ga. 394; Southern Pac. Co. v. Stewart, 88 Ga. 13, 13 S. E. 824. As to the day before which a removal must be made in *Indiana,* see McKeen v. Ives, 35 Fed. 801; Browning v. Reed, 39 Fed. 625; Amsden v. Norwich, U. F. Co., 44 Fed. 515; *Kansas,* Burnham v. First Nat. Bank, 53 Fed. 163, 3 C. C. A. 486, 10 U. S. App. 485; Van Allen v. Atchison, C. & P. R. Co., 3 Fed. 545 (1 McCrary 598); *Kentucky,* Fidelity Tr. & S. V. Co. v. Newport N. & M. V. Co., 70 Fed. 403; Bryan v. Barriger, 251 Fed. 328; *Maine,* Craven v. Turner, 82 Me. 383, 19 Atl. 864; *Massachusetts,* Frink v. Blackinton Co., 80 Fed. 306; American Finance Co. v. Bostwick, 151 Mass. 19, 23 N. E. 656; Olds v. City Trust, Safe Deposit & Surety Co., 180 Mass. 1, 61 N. E. 223; *Michigan,* Detroit v. Detroit City R. Co., 54 Fed. 1; *Missouri,* Kelly v. Chicago & A. Ry. Co., 122 Fed. 286; *Nevada,* Wedekind v. Southern Pac. Co., 36 Fed. 279 (13 Sawy. 475); *New Hampshire,* Mt. Washington R. Co. v. Coe, 50 Fed. 637; *New York,* Woolf v. Chisolm, 30 Fed. 881; Doyle v. Beaupre, 39 Fed. 289; Mayer v. Ft. Worth & D. C. R. Co., 93 Fed. 601; *North Carolina,* Williams v. Southern Bell Telephone & Telegraph Co., 116 N. C. 558, 21 S. E. 298; Avent v. Deep River Lumber Co., 174 Fed. 298; Higson v. North River Ins. Co., 184 Fed. 165; *North Dakota,* Minneapolis, St. P. & S. S. M. Ry. Co. v. Nestor, 50 Fed. 1; State v. Barnes, 5 N. D. 350; 65 N. W. 688; *Pennsylvania,* McHenry v. N. Y., P. & O. R. Co., 25 Fed. 65; First Nat. Bank of Garrett, Pa., v. A. E. Appleyard & Co., 138 Fed. 939; *South Carolina,* Tenney v. Am. P. Mfg. Co., 96 Fed. 919; *South Dakota,* South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co., C. C. A., 141 Fed. 578; *Tennessee,* Deford v. Mehaffy, 13 Fed. 481; Gavin v. Vance, 33 Fed. 84; Tennessee Coal, Lumber & Tan-Bark Co. v. Waller, 37 Fed. 545; Lockhart v. Memphis & L. R. Co., 38 Fed. 274; Turner v. Illinois Cent. R. Co., 55 Fed. 689; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654; *Washington, Re* City of Seattle, 237 Fed. 100; Hidden v. Washington-Oregon Corporation, 217 Fed. 303. The Federal court declined to take judicial notice of a rule of the State court permitting pleading to be filed after the statutory time. Yarnell v. Felton, 102 Fed. 369; *Vermont,* Sowles v. Wit-

classes above specified, cannot be removed after the time to plead in abatement has expired, although the defendant has further time in which to plead or to answer to the merits.[30] The time is not extended by the filing of a plea to the jurisdiction of the State court.[31] Upon appeals in condemnation proceedings it was held, under the New Hampshire statute, that the rule of the State court limiting the time for filing special pleas in proceedings at law applied;[32] and, under that of North Dakota, that the time allowed for the demand of a jury trial was the limit of the time of removal.[33] Such a removal cannot be made after the time to demur has expired, although a demurrer has been overruled with leave to answer;[34] nor after the time to file the first pleading has expired, although the defendant has the right to amend, as of course, within a specified time.[35]

It has been held that the Federal court will not take notice of a rule of the State court limiting the time for pleading, unless such rule is brought to its attention by a pleading or an affidavit.[36] Where the State statute did not fix the time within which the pleadings must be filed; it was held that it

ters, 43 Fed. 700; *Virginia,* Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673, 38 L. ed. 311; Mahoney v. New So. B. & L. Ass'n, 70 Fed. 513; Mays v. Newlin, 143 Fed. 574; *West Virginia,* Wilson v. Winchester & T. R. Co., 82 Fed. 15.

30 Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673, 38 L. ed. 311; Gurnee v. Brunswick County, Fed. Cas. No. 5,872 (1 Hughes 270); City of Chicago v. Hutchinson, 15 Fed. 129 (11 Biss. 484); First Littleton Bridge Corp. v. Con. R. L. Co., 71 Fed. 225; Olds v. City Tr., S. D. & Security Co., 114 Fed. 975; Fidelity & Casualty Co. v. Hubbard, 117 Fed. 949; First Nat. Bank of Garrett, Pa., v. A. E. Appleyard & Co., 138 Fed. 939. But see Lockhart v. Memphis & L. R. R. Co., 38 Fed. 274; Mahoney v. New South B. & L. Ass'n, 70 Fed. 513; Wilson v. Winchester & P. R. Co., 82 Fed. 15.

31 Olds v. City Trust, Safe Deposit & Surety Co., 114 Fed. 975.

32 Mt. Washington R. Co. v. Coe, 50 Fed. 637.

33 Minneapolis, St. Paul & S. S. M. Ry. Co. v. Nestor, 50 Fed. 1; State v. Barnes, 5 N. D. 350, 65 N. W. 688.

34 Delbanco v. Singletary, 40 Fed. 177; McDonald v. Hope Min. Co., 48 Fed. 593; Frink v. Blackinton, 80 Fed. 306; Maher v. Tower Hotel Co., 94 Fed. 225; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305.

35 Woolf v. Chisolm, 30 Fed. 881; Doyle v. Beaupre, 39 Fed. 289.

36 Yarnell v. Feltin, 102 Fed. 369; Randall v. New England Order of Protection, 118 Fed. 782.

was the duty of the State court to fix the time, and that, this having been done, the time so fixed was the limit for the removal.[37] Where there are two defendants, and but one controversy, and the time for removal has expired as to one, it is too late for the other to remove the case, although he has not been previously served; provided that he was named as a party in the plaintiff's original pleading.[38]

The time to remove the case is not shortened by the pleading of the defendant before his time to plead has expired;[39] nor by the denial of a motion to take the bill off the file;[40] nor by his appearance and argument against a motion for an injunction,[41] or a receiver,[42] or for any other provisional remedy,[43] even though an appeal has been taken to a higher State court from a decision upon such a motion;[44] nor by overruling a demurrer.[45] But, it has been held, that the time to answer runs

37 Van Allen v. Atchison C. & P. R. Co., 3 Fed. 545 (1 McCrary 598).

38 Houston & T. C. Ry. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Hakes v. Burns, 40 Fed. 33; Rogers v. Van Nortwick, 45 Fed. 513; Davis v. Tillotson, 48 Fed. 606; Calderhead v. Downing, 103 Fed. 27. But see Mutual L. Ins. Co. v. Champlin, 21 Fed. 85; Swan v. Mansfield, C. & L. M. R. Co. (Ohio Com. Pl.), 4 Wkly. Law Bul. 898, and *infra*.

39 Gavin v. Vance, 33 Fed. 84; Tennessee Coal, L. & T. B. Co. v. Waller, 37 Fed. 545; Conner v. Skagit C. C. Co., 45 Fed. 802; Brisenden v. Chamberlain, 53 Fed. 307; Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co., 83 Fed. 853; Champlain Const. Co. v. O'Brien, 104 Fed. 930; Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 131 Fed. 657. See Burck v. Taylor, 39 Fed. 581; Evans v. Dillingham, 43 Fed. 177. *Contra*, Duncan v. Associated Press, 81 Fed. 417; Howard v. Southern Ry. Co. (North Carolina), 29 S. E. 778.

40 Tennessee Coal, L. & T. B. Co. v. Waller, 37 Fed. 545.

41 Champlain Const. Co. v. O'Brien, 104 Fed. 930; Cella v. Brown, 136 Fed. 439.

42 Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381.

43 Garrard v. Silver Peak Mines, 76 Fed. 1; Champlain Const. Co. v. O'Brien, 104 Fed. 930; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Cella v. Brown, 136 Fed. 439.

44 Farmers' Loan & Trust Co. v. Chicago, P. & W. S. R. Co., Fed. Cas. No. 4,665 (9 Biss. 133); Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381. See *supra*, § 537n.

45 Tennessee Coal, L. & T. B. Co. v. Waller, 37 Fed. 545; Garrard v. Silver Peak Mines, 76 Fed. 1. But see Delbanco v. Singletary, 40 Fed. 177; Case v. Olney, 106 Fed. 433; Lantz v. Fretts, 173 Fed. 1007.

while the demurrer is pending;[46] and that a cause cannot be removed after it has been set down for trial, without objection by the defendant who had previously answered.[47]

The resignation of a trustee, who is a citizen of the same State as the complainant, does not make the cause removable by the remaining defendants.[48] Where the plaintiff's original pleading does not present a removable case, but subsequent events made it plain that there then existed a removable controversy between the original parties, a removal may be made as soon as this appears.[49] Where a separable controversy first appeared upon the filing of a reply by the plaintiff, a removal was then allowed.[50]

§ 543a. Extensions of time as affecting right to removal. The preponderance of authority supports the proposition that if the defendant's time to plead or answer has been, before its expiration, extended by an order of the State court,[1] or by a

46 Martin v. Carter, 48 Fed. 596.

47 American Bonding Co. v. Mills, 152 Fed. 107. See Case v. Olney, 106 Fed. 433.

48 Ruohs v. Jarvis-Conklin Mortg. Trust Co., 84 Fed. 513.

49 Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, affirming judgment 65 Fed. 129; Fritzlen v. Boatmen's Bank, 212 U. S. 364.

50 Fritzlen v. Boatmen's Bank, 212 U. S. 364.

§ 543a. 1 That it does, is said in Winberg v. Berkeley Co. Ry. & L. Co. (S. D. N. Y.), 29 Fed. 721; Simonson v. Jordan (S. D. N. Y.), 30 Fed. 721; Wedekind v. So. Pac. Co., 36 Fed. 279, 281; Sowles v. Witters (D. Vt.), 43 Fed. 700; Rycroft v. Green (E. D. Pa.), 49 Fed. 177; People's Bank v. Aetna Ins. Co. (D. S. C.), 53 Fed. 161; Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co. (D. S. C.), 60 Fed. 929; Allmark v. Platte S. S. Co. (S. D. N. Y.), 76 Fed. 614; Chiatovitch v. Hanchett (D. Nev.), 78 Fed. 193; Tracy v. Morel (D. Nev.), 88 Fed. 801; Mayer v. Ft. Worth & D. C. R. Co. (S. D. N. Y.), 93 Fed.. 601; Lord v. Lehigh Val. R. Co. (S. D. N. Y.), 104 Fed. 929; Dancel v. Goodyear Shoe Mach. Co. (S. D. N. Y.), 106 Fed. 551; Sanderlin v. People's Bank (E. D. N. C.), 140 Fed. 191; Russell v. Harriman Land Co. (E. D. N. Y.), 145 Fed. 745; Avent v. Deep River Lumber Co. (E. D. N. C.), 174 Fed. 298; Higson v. North River Ins. Co. (E. D. N. C.), 184 Fed. 165; State Improvement-Development Co. v. Leininger, 226 Fed. 884; Hinman v. Barrett, 244 Fed. 621; Citizens' Trust & Savings Bank v. Hobbs (S. D. Cal.), 253 Fed. 479. See also McKeen v. Ives (D. Ind.), 35 Fed. 801. *Contra*, Dixon v. W. U. Tel. Co. (N. D. Cal.), 38 Fed. 377; Austin v. Gagan (N. D. Cal.), 5 L.R.A. 476, 39 Fed. 626; Velie v. Manu-

stipulation authorized by a State statute or court rule,[2] his time to remove is likewise extended. It has been held that an *ex parte* order of extension,[3] or an oral stipulation,[4] not authorized by the State practice, will not extend the time of removal.

facturers' Acc. Ind. Co. (E. D. Wis.), 40 Fed. 545; Spangler v. Atchison, T. & S. F. Co. (W. D. Mo.), 42 Fed. 305, 306; Martin v. Carter (D. Mont.), 48 Fed. 596; Rock Island Nat. Bank v. J. S. Keator L. Co. (D. Ill.), 52 Fed. 897; Ruby C. G. Min. Co. v. Hunter (W. D. S. D.), 60 Fed. 305; Fox v. Southern Ry. Co. (D. N. C.), 80 Fed. 945; Kelly v. Virginia Bridge & Iron Co., 203 Fed. 566; Williams v. Wilson Fruit Co., D. Idaho, 222 Fed. 467; Pilgrim v. Aetna Life Ins. Co., D. N. J., 234 Fed. 958; Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., N. D. Iowa, 239 Fed. 561; Solomon v. Pennsylvania R. Co., E. D. N. Y., 240 Fed. 231; Mecke v. Valleytown Mineral Co., 122 N. C. 790, 29 S. E. 781; Bryson v. Southern Ry. Co., 141 N. C. 594, 54 S. E. 434. See for *dicta* tending the same way, Murray v. Holden (W. D. Mo.), 2 Fed. 740; Heller v. Ilwaco Mill & Lumber Co. (D. Oregon), 178 Fed. 111; Wayt v. Standard Nitrogen Co. (N. D. Ga.), 189 Fed. 231. See also Pullman's P. C. Co. v. Speck, 113 U. S. 84, 86, 28 L. ed. 925, 926; Kaital v. Wylie (N. D. Ill.), 38 Fed. 865; Delbanco v. Singletary (D. Nev.), 40 Fed. 177; Daugherty v. W. U. Tel. Co. (D. Ind.), 61 Fed. 138. It has been held that an extension of the time "to plead or otherwise move" extends the time of removal. Gail v. Atlantic Coast Line R. R. Co., 82 Misc. (N. Y.) 296.

[2] Peoples' Bank v. Aetna Ins. Co., 53 Fed. 161; judgment reversed, Aetna Ins. Co. v. Peoples' Bank of Greenville, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554; Allmark v. Platte S. S. Co., 76 Fed. 614; Chiatovich v. Hanchett, 78 Fed. 193; Tracy v. Morel, 88 Fed. 801; Mayer v. Ft. Worth & D. C. R. Co., 93 Fed. 601; Groton Bridge & Mfg. Co. v. Am. Bridge Co., 137 Fed. 284; Sanderlin v. Peoples' Bank of Buffalo, N. Y., 140 Fed. 191; Russell v. Harriman Land Co., 145 Fed. 745; Tevis v. Palatine Ins. Co., 149 Fed. 560; Williams v. Wilson Fruit Co. (D. Idaho), 222 Fed. 467. But see Pullman's Palace Car Co. v. Speck, 113 U. S. 84, 5 Sup. Ct. 374, 28 L. ed. 925. *Contra,* Dixon v. Western Union Tel. Co., 38 Fed. 377; Austin v. Gagan, 39 Fed. 626, 5 L.R.A. 476; Velie v. Manufacturers' Acc. Indemnity Co., 40 Fed. 545; Martin v. Carter, 48 Fed. 596; Ruby Canyon Gold Min. Co. v. Hunter, 60 Fed. 305; Schippear v. Consumer Cordage Co., 72 Fed. 803; Howard v. Southern Ry. Co. (North Carolina), 29 S. E. 778; Mecke v. Valleytown Mineral Co., Id. 781; Heller v. Ilwaco Mill & Lumber Co. (D. Oregon), 178 Fed. 111; Wayt v. Standard Nitrogen Co. (N. D. Ga.), 189 Fed. 231.

[3] Hurd v. Gere, 38 Fed. 537.

[4] Dwyer v. Peshall, 32 Fed. 497; Price v. Lehigh Valley R. Co., 65 Fed. 825; Disbrow v. Driggs (New York), 8 Abb. Prac. 305; Id., 16 How. Prac. 346.

§ 543b. Removals after defaults. After the time to plead in a case, which the plaintiff's pleading previously showed to be removable, has once expired, the time to remove cannot be extended by an order opening the default and allowing him to plead;[1] although the right to have the default opened is given the defendant by statute[2] or rule.[3] The omission to enter judgment by default does not extend the time.[4]

The facts that the defendant's attorney was prevented by inevitable accident from filing his petition,[5] and that there was an oral understanding that no default should be taken,[6] will not enlarge the time.

Where the defendant made a default in pleading, after service of a summons without a complaint, and the default was opened; it was held that the case might be removed.[7] A removal may be had after the opening of a judgment, taken by default against a defendant, who had not been properly served.[8] Where there are two defendants, and but one controversy, and the time for removal has expired as to one; it is too late for the other to remove the case, although he has not been previously served; provided that he was named as a party in the plaintiff's orig-

§ 543b. 1 Hurd v. Gere, 38 Fed. 537; Rock Island Nat. Bank v. J. S. Keator, L. Co., 52 Fed. 897; Price v. Lehigh Val. R. Co., 65 Fed. 825; Quilhot v. Hamer, 158 Fed. 188; Williams v. Southern Bell Telephone & Telegraph Co., 116 N. C. 558, 21 S. E. 298. See McCallon v. Waterman, Fed. Cas. No. 8,675 (1 Flip. 651); Berrian v. Chetwood, 9 Fed. 678.

2 Davis v. Harris, 124 Fed. 713. Where the order opening the default extended defendant's "time to plead or otherwise move"; it was held that his time to remove his suit was thus extended. Gail v. Atlantic Coast Line R. R. Co., 82 Misc. (N. Y.) 296.

3 Adams v. Puget Sound Traction, Light & Power Co., 207 Fed. 205.

4 Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 34 L. ed. 963; Heller v. Ilwaco Mill & Lumber Co., 178 Fed. 111; Wayt v. Standard Nitrogen Co., 189 Fed. 231; Adams v. Puget Sound Traction, Light & Power Co., 207 Fed. 205.

5 Daugherty v. W. U. Tel. Co., 61 Fed. 138.

6 Price v. Lehigh Valley R. Co., 65 Fed. 825.

7 Remington v. Central Pac. R. R. Co., 198 U. S. 95; Daneel v. Goodyear Shoe Mach. Co., 106 Fed. 551.

8 Harter Tp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; City of Detroit v. Detroit City Ry. Co., 54 Fed. 1; Tortat v. Hardin, M. & M. Co., 111 Fed. 426; State v. Barnes, 5 N. D. 360, 65 N. W. 688; Smith v. Life Ass'n of America, 76 Va. 380.

inal pleading.[9] An intervenor cannot remove the case, when his intervention takes place after the expiration of the original defendant's time to remove.[10] Where, however, after the expiration of the time of the original defendant, others are brought in by amendment, they may remove the case because of a Federal question that appeared in the plaintiff's original pleading;[11] or, it has been held, because of a difference of citizenship.[12]

§ 543c. Amendment by plaintiff as affecting time for removal. The service or filing by the plaintiff of an amended pleading before his original pleading has been answered by the defendant extends the latter's time to remove.[1] Where the plaintiff's original pleading does not present a removable case, but an amendment thereto, by omitting some of the original parties,[2] or by showing that one of the defendants, who was originally charged jointly with the other, is a nominal party,[3] or by correcting a previous misstatement of the citizenship of one of the parties,[4] or by a new allegation concerning the value of the matter in dispute,[5] or by showing that the case arises under the Constitution or laws of the United States,[6] brings it

9 Houston & T. C. Ry. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455; Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679; Hakes v. Burns, 40 Fed. 33; Rogers v. Van Nortwick, 45 Fed. 513; Davis v. Tillotson, 48 Fed. 606; Calderhead v. Downing, 103 Fed. 27. But see Mutual L. Ins. Co. v. Champlin, 21 Fed. 85; Swan v. Mansfield, C. & L. M. R. Co. (Ohio Com. Pl.), 4 Wkly. Law Bul. 898, and *infra*.

10 Hakes v. Burns, 40 Fed. 33; Kidder v. N. W. Mutual Life Ins. Co., 117 Fed. 997. But see Jackson v. Stiles (New York), 4 Johns. 493.

11 Green v. Valley, 101 Fed. 882.

12 Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; American Nat. Bank of Denver v. National Benefit & Casualty Co., 70 Fed. 420; Green v. Valley, 101 Fed. 882 (in which case the defendant, whose time had expired, joined with them in the application). See Robert v. Pineland Club, 139 Fed. 1001.

§ 543c. 1 Bedell v. Baltimore & O. R. Co., 245 Fed. 788.

2 Powers v. Ches. & O. Ry. Co., 160 U. S. 92, 99, 42 L. ed. 673, 675; *supra*, notes, 56-62. See Robert v. Pineland Club, 139 Fed. 1001.

3 Bagenas v. Southern Pac. Co., 180 Fed. 887. See *supra*, § 540.

4 Robinson v. Parker-Washington Co., 170 Fed. 850.

5 Northern Pac. R. Co. v. Austin, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. ed. 218; Huskins v. Cincinnati, N. O. & T. P. Ry. Co., 37 Fed. 504; Enders v. Lake Erie & W. R. Co., 101 Fed. 202; Barber v. Boston & M. R. Co, 145 Fed.. 52.

6 Speekert v. German Nat. Bank,

within the removal act, the time to remove is extended until the defendant must plead to the amended pleading.[7]

It has been held that the same rule applies where the amendment presents an entirely new case;[8] but not otherwise.[9] It was said: "If the time fixed by the rule of the State court, to answer or plead to an amended complaint, is so short as to deny to the defendant a reasonable time within which to prepare and file a petition and bond, such rule, it would seem, ought not to defeat the right of removal, if exercised with reasonable promptness."[10]

§ 543d. Effect of consolidation upon time for removal. A consolidation of two cases between the same parties, the matter in dispute in each case being less than the jurisdictional amount, although their aggregate exceeds this, does not authorize a removal when the original time has expired.[1]

§ 543e. Effect of new parties upon time for removal. Where a diversity of citizenship is created by substitution of plaintiffs, the defendant may remove the cause, if the other jurisdictional facts exist, although his time to answer the original pleading has expired.[1] Where, after the expiration of the time of the original defendant, others are brought in by amendment, they may remove the case because of a Federal question that appeared in the plaintiff's original pleading;[2] or, it has

85 Fed. 12; Bailey v. Mosher, 95 Fed. 223; Guarantee Co. v. Hanway, C. C. A., 104 Fed. 369. But see Houston & T. C. Ry. Co. v. State (Tex. Civ. App.), 39 S. W. 390.

7 Key v. West Kentucky Coal Co., 237 Fed. 258.

8 Edrington v. Jefferson, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. ed. 594; Phœnix Mut. Life Ins. Co. v. Walrath, 117 U. S. 365, 6 Sup. Ct. 768, 29 L. ed. 924; affirming judgment, Id., 16 Fed. 161 (11 Biss. 432); Wehl v. Wald, Fed. Cas. No. 17,356 (17 Blatchf. 342); Evans v. Dillingham, 43 Fed. 177, 180; Mattoon v. Reynolds, 62 Fed. 417; Mecke v. Valleytown Mineral Co., 89 Fed. 209; Youtsey v. Hoffman, 108 Fed. 693; Bailey v. Cincinnati Leaf Tobacco Warehouse Co., Id.

9 Kaitel v. Wylie, 38 Fed. 865; Gregory v. Boston S. D. & Tr. Co., 88 Fed. 3; Painter v. New R. M. Co., 98 Fed. 544; Beyer v. Soper Lumber Co., 76 Wis. 145, 44 N. W. 750, 833.

10 Enders v. Lake Erie & W. R. Co., 101 Fed. 202, 203; per Baker, D. J. See Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471.

§ 543d. 1 E. A. Holmes & Co. v. United States Fire Ins. Co., 142 Fed. 863.

§ 543e. 1 Kelly v. Virginia Bridge & Iron Co., 203 Fed. 586.

2 Green v. Valley, 101 Fed. 882.

been held, because of a difference of citizenship.[3] An intervenor cannot remove the case, when his intervention takes place after the expiration of the original defendant's time to remove.[4]

§ 543f. Effect upon right to removal of dismissal as to other defendants. Where the plaintiff's original pleading does not represent a removable case, but he consents to a discontinuance or to a nonsuit or a voluntary dismissal as regards those defendants who are citizens of the same State as himself; the remaining defendant, who is a citizen of another State, may remove the cause as soon as he is notified of such dismissal or discontinuance;[1] although the defendants thus dismissed appear to be necessary parties to the suit;[2] and even when the discontinuance or voluntary dismissal takes place upon the trial of the action.[3] To have this effect, the dismissal must be the voluntary act of

3 Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; American Nat. Bank of Denver v. National Benefit & Casualty Co., 70 Fed. 420; Green v. Valley, 101 Fed. 882 (in which case the defendant, whose time had expired, joined with them in the application). See Robert v. Pineland Club, 139 Fed. 1001.

4 Hakes v. Burns, 40 Fed. 33; Kidder v. N. W. Mutual Life Ins. Co., 117 Fed. 997. But see Jackson v. Stiles (New York), 4 Johns. 493.

§ 543f. 1 Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 42 L. ed. 673, 18 S. Ct. 264; affirming judgment, 65 Fed. 129; Cookerly v. Great Northern R. Co., 70 Fed. 277; Fogarty v. Southern Pac. Co., 121 Fed. 941 (where the motion for a removal was made 19 days after the voluntary dismissal, and it did not appear when the remaining defendant first learned of the dismissal of the case as against his co-defendant, nor when the petition and bond were filed). Where an action of ejectment had been succeeded by a suit against the plaintiffs by some of the defendants therein, to determine the title to a patent for the same land, as to which the latter had made an adverse claim, and after judgment in favor of the plaintiffs in the first suit, which had been vacated upon the payment by the defendants of the costs and their demand for a new trial, the second suit had been dismissed as to some of the defendants, upon the plaintiff's request, thus making the remainder of the parties on opposite sides citizens of different States; it was held to be too late to remove this second suit, Evans v. Smith, 21 Fed. 1.

2 Cuyler v. Smith, 78 Ga. 662, 3 S. E. 408.

3 Powers v. Ches. & O. Ry. Co., 169 U. S. 92, 94, 42 L. ed. 673, 674. It was so held, when the plaintiff elected to proceed to trial against a foreign defendant without having served process on the one who was a citizen of his own State, Berry v. St. Louis & S. F. R. Co., 118 Fed. 911.

the plaintiff.[4] A failure to oppose a motion for a dismissal does not.[5] An order sustaining a demurrer by such a defendant with permission to the plaintiff to take an involuntary nonsuit against him and leave to set this aside does not end the case as against such defendant until an affirmance of such order by the court of review or the expiration of plaintiff's time to appeal or sue out a writ of error.[6] Where the plaintiff sued a citizen of his own State and a citizen of another State, jointly in tort, and having failed to serve the former when the case was called for trial, refused to continue it for such service, but elected to proceed against the citizen of the other State alone; it was held that this should be treated as an election and severance of the suit; and that it was thereupon removable by the defendant, who had been served.[7] Where the plaintiff, in good faith, insists on the joint liability of all the defendants throughout the trial, and the complaint is dismissed upon the merits as to such as are citizens of his State,[8] or a verdict rendered in their favor,[9] the remaining defendants cannot then remove the case.

Where an action was brought against several defendants jointly, some of whom were citizens of the same State as the plaintiff, and after a dismissal as to all, the State court of appeals affirmed such judgment of dismissal, except as regards a citizen of another State; it was held that there was thus a severance of the action, and that the remaining defendant might remove the same.[10] Where, in a suit upon a joint cause of action against a domestic and a foreign corporation, judgment had been entered against the latter upon substituted service by default; and at the trial the domestic corporation secured a judgment in its favor from which plaintiff appealed; it was

4 Am. Car & Foundry Co. v. Kettelhake, 236 U. S. 311.

5 Moeller v. Southern Pac. Co. et al., 211 Fed. 239.

6 Am. Car Co. v. Kettelhake, 236 U. S. 311; Southern Railway v. Lloyd, 239 U. S. 496.

7 Berry v. St. Louis & San Francisco R. Co., 118 Fed. 911.

8 See McAllister v. Chesapeake & O. Ry. Co., 198 Fed. 660, 669, 674; Illinois C. R. Co. v. Harris (Illinois), 85 Miss. 15, 38 So. 225; Howe v. Northern Pac. Ry. Co., 70 Pac. 1100, 30 Wash. 569.

9 Key v. West Kentucky Coal Co., 237 Fed. 258.

10 Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355 (reversing 64 N. Y. 449, 4 Hun. 628).

held that, until the final disposition of the appeal, the foreign corporation could not apply for a removal.[11]

§ 543g. Change of venue affecting time of removal. Where the case could not have been removed from the county in which it was brought; but after answer the venue was changed to a county in another district wherefrom it was removable: it was held, that the time for removal was thereby extended.[1]

§ 543h. Removals before trial. Removals for prejudice or local influence,[1] and removals of actions between citizens of the same State claiming land under grants of different States,[2] must be made "before the trial." It has been said that the statute requires, in the case of removals because of prejudice or local influence, "the application to remove to be filed before or at the term which the cause could first be tried and before the trial thereof."[3] A removal for prejudice or local influence must be made before the first trial of the cause.[4] A mistrial because of a disagreement of the jury,[5] or an order for a new trial,[6] does not enlarge the time. Such a removal must be made before the first step in the trial is taken.[7] It has been

11 Lathrop, Shea & Henwood Co. v. Interior Const. & Imp. Co., 143 Fed. 687.

§ 543g. 1 Gorey v. Pathe Freres, N. Y. Sup. Ct. Sp. Tm. *per* Jaycox, J., N. Y. L. J., Feb. 13, 1915.

§ 543h. 1 25 St. at L. 433, § 2.

2 25 St. at L. 433, § 3.

3 Fuller, C. J., in McDonnell v. Jordan, 178 U. S. 229, 239, 44 L. ed. 1048, 1052. *Contra*, Huskins v. Cincinnati, N. O. & T. P. Ry. Co., 37 Fed. 504, 3 L.R.A. 545; writ of error dismissed, 154 U. S. 506, 14 Sup. Ct., 1147, 38 L. ed. 1076; Taft, J., Detroit v. Detroit City Ry. Co., 54 Fed. 1, 11; Parker v. Vanderbilt, 136 Fed. 246.

4 Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. ed. 1080; reversing 32 Fed. 417 (13 Sawyer, 38), and 35 Fed. 230 (13 Sawyer, 318); McDonald v. Jordan, 178 U. S. 229.

5 McDonnell v. Jordan, 178 U. S. 229, 44 L. ed. 1048; Davis v. Chicago & N. W. Ry. Co., 46 Fed. 307; Farmers' & Merchants' Nat. Bank v. Schuster, 86 Fed. 161, 29 C. C. A. 649.

6 Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. ed. 1080; reversing 32 Fed. 417, 13 Sawyer 38, and 35 Fed. 230, 13 Sawyer 318.

7 Bank of Maysville v. Claypool, 120 U. S. 268, 7 Sup. Ct. 545, 30 L. ed. 632; Manning v. Amy, 140 U. S. 137, 11 Sup. Ct. 707, 35 L. ed. 386; affirming Amy v. Manning, 144 Mass. 153, 10 N. E. 737; Waggener v. Cheek, Fed. Cas. No. 17,035 (2 Dill. 560); Lewis v. Smythe, Fed. Cas. No. 8,333 (2 Woods 117); Davis v. Chicago & N. W. Ry. Co.,

held: that it is too late after a jury has been accepted, but not sworn;[8] after the case has been called and a motion by defendant for a continuance has been made and overruled;[9] or the plaintiff has answered ready and time granted the defendant to present an application for a continuance;[10] or an hour's time allowed defendant for the procurement of counsel;[11] or the defendant has, after his motion for a postponement was denied, consented to a reference in order to prevent an immediate trial;[12] but that it is not too late, when upon the cause being called for trial, objections were made that it was not ready and it is sent to another part of the court, for the hearing of a motion to vacate an order extending the time to amend the answer;[13] nor when an attempt has been made to begin the trial of a case before it was properly triable in the regular course of procedure.[14]

The preponderance of authority holds that the argument of a general demurrer is a trial within the meaning of the statute.[15]

46 Fed. 307; Fleming v. Fire Ass'n of Philadelphia, 76 Ga. 678; Adams' Exp. Co. v. Trego, 35 Md. 47; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Anglo-American Provision Co. v. Evans, 34 Neb. 44, 51 N. W. 310; Strong v. Black (New York), 5 Alb. Law J. 214; Watt v. White, 46 Tex. 338.

8 Anglo-American Provision Co. v. Evans, 34 Neb. 44, 51 N. W. 310.

9 Fleming v. Fire Ass'n of Philadelphia, 76 Ga. 678.

10 Watt v. White, 46 Tex. 338.

11 Fleming v. Fire Ass'n of Philadelphia, 76 Ga. 678.

12 Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035 (13 Blatchf. 224).

13 Maloy v. Duden, 25 Fed. 673.

14 Removal Cases, 100 U. S. 457, 25 L. ed. 593.

15 Alley v. Nott, 111 U. S. 472, 28 L. ed. 491; Scharff v. Levy, 112 U. S. 711, 28 L. ed. 825; Gregory v. Hartley, 113 U. S. 742, 28 L. ed. 1150; Laidly v. Huntington, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. ed. 883; Boyd v. Gill, 19 Fed. 145 (21 Blatchf. 543); Wilson v. Rock Island Paper Co., 20 Fed. 705; St. Louis & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. 176; Miller v. Kent (New York), 60 How. Prac. 451; all these cases were under the similar language under the act of 1875. Lookout Mountain Ry. Co. v. Houston, 32 Fed. 711; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305. (Both of these were under the act of 1887). *Contra,* Whelan v. N. Y., L. E. & W. R. Co., 35 Fed. 849, 1 L.R.A. 65; under act of 1887. It was held, under the act of 1875, that a case could not be removed after a demurrer to the answer had been sustained and a cross-petition dismissed. Meyer v. Norton, 9 Fed. 433. Where the State statute provided that a demurrer should be

It was held that the hearing and decision of a motion for an injunction and a temporary receiver was not a trial.[16] Where the court of ordinary had made a decree admitting a will to probate, and an appeal had been taken to a court of record, which had the right to try the question anew; it was held that it was not too late to remove the case under the act of 1887 for prejudice or local influence.[17] It has been held: that after the decree of a court of probate upon a petition by an administratrix for final accounting and for a distribution, in which she claimed to be the sole heir at law of the decedent, the cause could not be removed upon an appeal to a court of record, where the questions then decided could be tried anew.[18] That a case could not be removed pending an appeal from an award of arbitrators under the Pennsylvania statute,[19] although it may be after the report of commissioners, to whom a claim had been referred by a probate court under the Michigan statute;[20] nor upon an appeal from the decision of a board of county commissioners upon a claim against their country;[21] nor upon an appeal from an appraisal by commissioners in a condemnation proceeding, when their proceeding was purely administrative in its nature.[22] It has been said that the trial court is under no obligation to delay the trial of the cause in order to enable a party to prepare an application for a removal.[23]

disposed of at the first term, and that the second trial, after service had been perfected, "should be the trial term of all equity causes"; it was held that the cause might be removed, under the act of March 2d, 1867, because of local prejudice after a demurrer had been overruled. Hone v. Dillon, 29 Fed. 465.

16 Franklin v. Wolf, 78 Ga. 446, 3 S. E. 696. *Contra,* Lehigh Coal & Nav. Co. v. Central R. Co., Fed. Cas. No. 8,213.

17 Brodhead v. Shoemaker, 44 Fed. 518. Under Georgia statute, *contra, In re* Frazer, Fed. Cas. No. 5,068.

18 Craigie v. McArthur, Fed. Cas. No. 3,341, 4 Dill. 474 (under the Minnesota statute).

19 Thorne v. Towanda Tanning Co., 15 Fed. 289.

20 Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. ed. 927 (under act of 1875).

21 Delaware County Com'rs v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674 (under U. S. R. S., § 639, ch. 3).

22 Union Pac. Ry. Co. v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; reversing judgment, Myers v. Union Pac. Ry. Co., 16 Fed. 292, 3 McCrary 578 (under act of 1875). See *supra,* § 538.

23 United States Sav. Inst. v. Brockschmidt, 72 Ill. 370.

In suits or criminal prosecutions against revenue officers,[24] officers of either House of Congress,[25] or persons claiming rights under the revenue laws,[26] or against persons who seek protection under the Civil Rights law;[27] a removal may be had "at any time before the trial or final hearing." It has been held that a prosecution begun by information before a justice of the peace for a misdemeanor, which is not the subject of indictment, may be thus removed.[28] No removal can be had before indictment or information in the State court.[29]

Under previous statutes authorizing removals in cases "before trial or final hearing," or "before final hearing or trial"; it was held: that a removal might be made after a new trial had been ordered,[30] or the unsuccessful party had performed all the conditions precedent to obtain the right to a new trial.[31] That the defendants were not bound to take affirmative action in case of a reversal, until the complainants had caused the case to be redocketed on notice to them.[32] That a removal might be had after a jury had disagreed,[33] after a general demurrer had been overruled,[34] after the appellate court had reversed an order for a reference to hear and determine and had ordered

24 U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

25 18 St. at L., ch. 130, § 8, p. 401.

26 U. S. R. S., § 643, as amended by 28 St. at L., p. 36.

27 U. S. R. S., § 641.

28 Virginia v. Bingham, 88 Fed. 561.

29 Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386.

30 Baltimore & O. R. Co. v. Bates, 119 U. S. 464, 7 Sup. Ct. 285, 30 L. ed. 436; Dart v. McKinney, Fed. Cas. No. 3,583 (9 Blatchf. 359); Kellogg v. Hughes, Fed. Cas. No. 7,662 (3 Dill. 357); Minnett v. Milwaukee & St. P. Ry. Co., Fed. Cas. No. 9,636 (3 Dill. 460); Sims v. Sims, Fed. Cas. No. 12,894 (17 Blatchf. 369); Melendy v. Currier, 22 Fed. 129 (22 Blatchf. 503); Sutherland v. Jersey City & B. R. Co., 22 Fed. 356; Virginia v. Bingham, 88 Fed. 561; Brayley v. Hedges, 53 Iowa 582, 5 N. W. 748; Dart v. Walker (New York), 4 Daly 188; Rosenfield v. Condict, 44 Tex. 464.

31 Insurance Co. v. Dunn, 19 Wall. 214, 224, 22 L. ed. 68 (where the language of the statute construed was "before a hearing or trial"; but there were *dicta* to the effect that this language is synonymous with "trial or final hearing").

32 Pettilon v. Noble, Fed. Cas. No. 11,044 (7 Biss. 449).

33 Osborn v. Osborn, 5 Fed. 389 (2 McCrary 455); Burson v. National Park Bank, 40 Ind. 173, 13 Am. Rep. 285; Clark v. Delaware & H. Canal Co., 11 R. I. 36.

34 Field v. Williams, 24 Fed. 513.

issues to be framed for trial in the court below;[35] and that the language construed meant a final hearing or trial on the merits.[36] But that there could be no removal pending a motion for a new trial, which had not been decided;[37] nor pending an appeal, which had not been decided;[38] nor after the appellate court had directed a reversal and a new trial. When the time allowed for a rehearing had not expired, and subsequent to the attempted removal a rehearing was granted and the judgment was affirmed;[39] nor after the court of review had directed the court below to enter a decree in conformity with its opinion;[40] nor after the appellate court had ordered an accounting before a master.[41]

§ 544. Practice on removals. In general. "Where the sole ground for removal is a difference of citizenship, whether or not there is a separable controversy in the case, and in ordinary suits arising under the Constitution of laws or treaties of the United States, the practice upon removals is the same. The party entitled to remove must make and file in the State court a petition duly verified for the removal of the suit into the circuit court to be held in the district where the suit is pending; and he must make and file therewith a bond, with good and sufficient surety, for his or their entering into such district court within thirty days from the date of the filing of the petition a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court, if said district court shall hold that said suit was wrongfully or improperly removed thereto, and also for their appearing and

35 Douglas v. Caldwell, 65 N. C. 248.

36 Akerley v. Vilas, 24 Wis. 165, 1 Am. Rep. 166.

37 Vannevar v. Bryant, 21 Wall. 41, 22 L. ed. 476; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311.

38 Stevenson v. Williams, 19 Wall. 572, 22 L. ed. 162; Lowe v. Williams, 94 U. S. 650, 24 L. ed. 216; Brice v. Somers, Fed. Cas. No. 1,856 (1 Flip. 574); Williams v. Succession of Williams, 24 La. Ann. 55; Meaux v. Pittman, 32 La. Ann. 405; Miller v. Finn, 1 Neb. 254; Whittier v. Hartford Ins. Co., 55 N. H. 141, 20 Am. Rep. 185; Beery v. Irick (Virginia), 22 Grat. 484, 12 Am. Rep. 539.

39 Chicago & N. W. R. Co. v. McKinley, 99 U. S. 147, 25 L. ed. 272; affirming McKinley v. Chicago & N. W. R. Co., 44 Iowa 314, 24 Am. Rep. 748.

40 Darst v. Peoria, 13 Fed. 561.

41 Jifkins v. Sweetser, 102 U. S. 177, 26 L. ed. 129.

entering special bail in such suit, if special bail was originally requested therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same."[1]

Previously to the Judicial Code, no notice to the plaintiff was required. This seems to give the plaintiff a right to a hearing in the State court before the removal is asked,[2] except, perhaps, when the removal is prayed because of prejudice or local influence.[3]

According to the preponderance of authority, the petition and bond may be filed during a vacation of the State court.[4] In the Supreme Court of New York, the papers must be filed in the clerk's office of the county in which the venue is laid.[5] The approval by the presiding justice of another county in the same

§ 544. 1 Jud. Code, § 29, 36 St. at L. 1087; re-enacting with alterations, 25 St. at L., p. 433, ch. 866, § 3.

2 See People ex rel. Mayor v. Nichols, 79 N. Y. 582; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,828 (8 Blatchf. 243); Wormser v. Dahlman, Fed. Cas. No. 18,048 (16 Blatchf. 319, 57 How. Prac. 286); Wehl v. Wald, Fed. Cas. No. 17,356 (17 Blatchf. 342); Stevens v. Richardson, 9 Fed. 191 (20 Blatchf. 53); Chiatovitch v. Hanchett, 78 Fed. 193; Creagh v. Equitable Life Assur. Soc., 83 Fed. 849; Crotts v. Southern Ry. Co., 90 Fed. 1; Ficklin v. Tarver, 59 Ga. 263; Southern Ry. Co. v. Hudgins, 107 Georgia 334, 33 S. E. 442; Louisiana State Bank v. Morgan (Louisiana), 4 Mart. (N. S.) 344.

3 See § 549, *infra*.

4 Osgood v. Chicago, D. & V. R. Co., Fed. Cas. No. 10,604 (6 Biss. 330); Burck v. Taylor, 39 Fed. 581; Brown v. Murray, Nelson & Co., 43 Fed. 614; State v. Coosaw Min. Co., 45 Fed. 804, 811; Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151. See Remington v. Central Pac. R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Monroe v. Williamson, 81 Fed. 977; Johnson v. Computing Scale Co., 139 Fed. 339. *Contra*, Scott v. Otis, Fed. Cas. No. 12,543; Williams v. Massachusetts Ben. Ass'n, 47 Fed. 533; Fox v. Southern Ry. Co., 80 Fed. 945; Howard v. Southern Ry. Co. (North Carolina) 29 S. E. 778, 122 N. C. 944. See Higson v. North River Ins. Co., 184 Fed. 165.

5 Remington v. Central Pac. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Noble v. Massachusetts Benefit Ass'n, 48 Fed. 337; Loop v. Winters' Estate, 115 Fed. 362; Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284; Johnson v. Computing Scale Co., 139 Fed. 339.

district, when there was no court in session in the county where the case was pending, did not cure this error.[6] A case cannot be removed upon motion without a petition.[7]

A case cannot be removed by stipulation or consent, where the record does not show the jurisdiction.[8]

It is the usual and the safer practice to present the petition and bond to a judge of a state court, where the suit is pending, and to obtain the formal acceptance of the same by that court;[9] but some authorities hold that, when they are filed in the clerk's office, this is unnecessary.[10] Were, after the petition and bond had been filed, a motion was made in the State court for a removal, which was denied as premature, and the defendant's counsel then asked leave to withdraw his motion for the time being which was granted; it was held, that the removal did not take effect, and that the State court retained jurisdiction until

6 Noble v. Massachusetts Ben. Ass'n, 48 Fed. 337.

7 Nelson v. Black Diamond Mining Co., 237 Fed. 264.

8 People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101; Kingsbury v. Kingsbury, Fed. Cas. No. 7,817 (3 Biss. 60); First Nat. Bank v. Prager, C. C. A., 91 Fed. 689.

9 Noble v. Massachusetts Ben. Ass'n, 48 Fed. 337, 338, 339; Sanderlin v. Peoples' Bank, 140 Fed. 191 (where, in the State of North Carolina, the clerk had power to enter certain *ex parte* orders, and the petition was presented to such clerk). It has been held that the bond, as well as the petition, must be presented. Roberts v. Carrington, 2 N. Y. Super. Ct. (2 Hall) 694; Mayo v. Dockery, 108 Fed. 897; Higson v. North River Ins. Co., 184 Fed. 165, 168.

10 Osgood v. Chicago, D. & V. R. Co., 6 Biss. 330, 340; Miller v. Tobin, 18 Fed. 609, 613; Brown v. Murray, Nelson & Co., 43 Fed. 614; Noble v. Massachusetts Ben. Ass'n, 48 Fed. 337; Wills v. Baltimore & O. R. Co., 65 Fed. 532; North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co., 3 S. D. 590, 54 N. W. 659; Frazier v. Hines, 260 Fed. 874. *Contra*, Shedd v. Fuller, 36 Fed. 609; Roberts v. Chicago, St. P., M. & O. R. Co., 45 Fed. 433; writ of error dismissed, Chicago, St. P., M. & O. R. Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123, 25 L. ed. 902; Hall v. Chattanooga Agricultural Works, 48 Fed. 599, 601; La-Page v. Day, 74 Fed. 977; Fox v. Southern Ry. Co., 80 Fed. 945; Mays v. Newlin, 143 Fed. 574 (where an oral motion in the State court for the removal was held to be a sufficient presentation of the petition and bond, which were on file with the clerk); Rhode Island Horseshoe Co. v. Goodenough Horseshoe Co., 52 How. Pr. (N. Y.) 111, 1 Abb. N. C. 11; Tunstall v. Parish of Madison (Louisiana), 30 La. Ann. 471; Mayo v. Dockery, 108 Fed. 897; Higson v. North River Ins. Co., 184 Fed. 165, 168.

a subsequent motion was made and granted.[11] When the time expires during vacation, it is the better practice to present the petition and bond to the State judge in chambers, if that is practicable, and to file the petition and bond in the clerk's office.[12] The endorsement by the clerk of an erroneous file mark,[13] or the omission of any file mark,[14] will not affect the validity of the proceedings provided the petition and bond are actually filed.

The District Court of the United States, to which the suit is properly removed, is that held in the district, within the boundaries of which the suit is pending in the State court.[15] This is ordinarily that held in the district, within the limits of which process was served upon the defendant, although the cause of action arose in another district;[16] but if the suit, at the time of the removal, is pending in another district from that within which it was first brought, the District Court of the United States held within the district where it is pending when the petition is filed is the one to which the case should be removed.[17]

The Judicial Code provides: that the removal of suits between citizens of the same State claiming land under grants of different States,[18] where the defendants are revenue officers of the United States, sued for official acts; or persons claiming defenses under the revenue laws;[19] or officers of either House

11 Mays v. Newlin, 143 Fed. 574.

12 Meeke v. Valleytown M. Co., C. C. A., 93 Fed. 697.

13 Wills v. Baltimore & O. R. Co., 65 Fed. 532.

14 Waite v. Phœnix Ins. Co., 62 Fed. 769; Brady v. J. B. M'Crary Co., 244 Fed. 602.

15 *Ex parte* State Ins. Co. of Missouri, 18 Wall. 417, 21 L. ed. 904; Cobb v. Globe Mut. Life Ins. Co., Fed. Cas. No. 2,921 (3 Hughes, 452); Knowlton v. Congress & Empire Spring Co., Fed. Cas. No. 7,902 (13 Blatchf. 170); Burck v. Taylor, 39 Fed. 581; affirming judgment, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; *Ex parte* Groom, 40 Ala. 731; Sinclair v. El Dia Ins. Co., N. Y. Sup. Ct., Sp. Tm., Cohalan, J., N. Y. L. J., Feb. 25, 1914. But see Suydam v. Smith, 1 Denio (N. Y.) 263.

16 Burck v. Taylor, 39 Fed. 581; affirming judgment, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; Suydam v. Smith, 1 Denio (N. Y.) 263.

17 Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. ed. 927.

18 Jud. Code, § 30, re-enacting 25 St. at L., p. 433, § 3.

19 Ibid., § 33, re-enacting U. S. R. S., § 643.

of Congress, sued because of acts done in the discharge of their official duty,[20] or cases where the defense depends upon the civil rights laws,[21] shall be to the next District Court, to be held in the district where the suit is pending. It has been held: that, in the case of prosecutions against revenue officers, this direction is not mandatory; that the petition may be filed in any Federal Court within the district;[22] that it need not then be filed at the place where the next session of such District Court is held after the indictment, where there are several places for holding that court within the district;[23] that a petition and an order for a removal, because of difference of citizenship, into the District Court for another district than that where the case is pending, although such district is in the same State, are void;[24] that where the petition prayed for a removal to a division of the district which did not exist, but correctly designated the city where the court in one of the divisions thereof was held, the defect was immaterial and would be disregarded;[25] and that a prayer for a removal to the District instead of the Circuit Court of the United States, for the proper district might be cured by an amendment.[26]

§ 544a. Notice of application for removal. The requirement of notice was first made by the Act of 1887.[1] Its absence is fatal to the removal, if objection upon this ground is duly made.[2] Service of the petition and bond alone is insuf-

20 Ibid., re-enacting 18 St. at L., p. 401.

21 Ibid., § 31, re-enacting U. S. R. S., § 641.

22 Virginia v. Felts, 133 Fed. 85.

23 Virginia v. Felts, 133 Fed. 85.

24 *Ex parte* State Ins. Co. of Missouri, 18 Wall. 417, 21 L. ed. 904; *Ex parte* Groom, 40 Alabama 731.

25 Hodge v. Chicago & A. Ry. Co., 121 Fed. 48, 57 C. C. A. 388.

26 Hadfield v. N. W. Life Assur. Co., 105 Fed. 530.

§ 544a. 1 Wanner v. Bissinger & Co., 210 Fed. 96.

2 Goins v. Southern Pac. Co., 158 Fed. 434; Arthur v. Maryland Casualty Co., 216 Fed. 386; Goins v. Southern Pac. Co., 198 Fed. 432, 434, 435, 436; *per* Van Fleet, J.: "What was the purpose intended to be subserved by the requirement of preliminary notice of such proceedings in the state court? Plaintiff, as indicated, takes the extreme ground that it was intended to make the notice a jurisdictional prerequisite, in the absence of which the proceeding cannot be competently initiated. If by this is meant that it is jurisdictional in the same sense that a cognizable controversy is necessary, I cannot accede to the proposition, since manifestly, under well-settled principles, the requirement of notice may be waived. And

if plaintiff intends to assert, as would seem to be implied by his argument, that by this new requirement Congress intended to work so radical a change in the effect of removal proceedings as vesting in the state, instead of the federal, courts the power to pass upon the sufficiency of such proceedings, to this I am equally unable to assent, since the provisions of the act in other respects, in the light of established principles of construction, do not sustain any such theory. Moreover, it is at variance with the rule of construction provided by the Code itself (section 294) for the interpretation of its provisions. But I do not deem it at all needful to ascribe to Congress the intention to bring about a change in the established procedure so fundamental as that suggested, in order that we may perceive a sufficiently valuable purpose to be subserved by the requirement. The right of removal is justly regarded as one of great moment to the suitor, and its exercise not infrequently involves important changes in the aspects if not the results, of the controversy; and the history of many cases involving the right tends to disclose the great desirability, if not the necessity, in order to fully protect the rights of the adverse party, by avoiding expensive and unseemly delays and other inconveniences of a more or less serious nature that some notice of the proceeding be had. . . . Without the effect of materially changing the method of procedure, it will tend to protect the parties and the courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed. This view, however, does not aid defendant's position. Defendant relies solely upon cases to the effect that, the cause being one within the jurisdiction of the court, errors or irregularities in merely formal matters, directly in nature and not involving the substance of the right, will be overlooked or allowed to be corrected by amendment, and that the court will not for such a lapse remand the cause. Deford et al. v. Mehaffy (C. C.), 14 Fed. 381; Bryant Bros. v. Robinson, 149 Fed. 321, 79 C. C. A. 259; Northern Pacific T. Co. v. Lowenberg (C. C.), 18 Fed. 339; Woolridge v. McKenna (C.C.), 8 Fed. 650. These cases do not meet defendant's necessities, for such is not this case. It it were a question of the formal sufficiency of a notice actually given, those cases would present some analogy; but it is an instance where a plain and unequivocal requirement of the statute has been wholly ignored, and it is now too late to supply the omission by amendment. The right of removal is purely statutory, and it has always been required that the statute be complied with in its substance. Can it be said that notice, prescribed as the initial step in the proceeding, is not of the substance? It matters not in such a case that the requirement be one not intended as jurisdictional in the extreme sense that it may not be waived. It has not here been waived, and must, I am satisfied, be considered

ficient.[3] An omission to give notice may be waived.[4] An appearance of the plaintiff by counsel upon the application in the State court is such a waiver.[5]

A notice was sustained which failed to state the hour and place of the application.[6]

If the State court is satisfied that the notice was sufficient, the Federal court will rarely remand because of an irregularity or defect therein.[7]

§ 545. Petition for removal in ordinary cases. The petition should be addressed to the State court, not to a judge thereof,[1] state the facts which justify the removal, and give jurisdiction to the District Court of the United States.[2]

It has been said that these facts must be stated positively; not on information and belief;[3] and specifically.[4] Allegations

as sufficiently of the substance that it may not be disregarded against objection. As I regard it, it is akin in its jurisdictional effect to the requirement of the statute involved in *Ex parte* Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. ed. 264, and *In re* Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. ed. 904, 14 Ann. Cas. 1164, that 'suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In analogy with the ruling made in the last case as to the effect of that requirement, if notice be waived, its lack will not prevent jurisdiction attaching; but if it be lacking, and the objection duly insisted upon the court cannot ignore it and retain jurisdiction.'' But see Chase v. Erhart, 198 Fed. 305.

3 Loland v. Northwest Stevedore Co., 209 Fed. 626.

4 Goins v. Southern Pac. Co., 198 Fed. 432, 434, quoted *supra;* Lewis v. Erie R. Co., 257 Fed. 868.

5 Lewis et al. v. Erie R. Co. et al., 257 Fed. 868.

6 Hinman v. Barrett, 244 Fed. 621. It was held that a notice was sufficient when served on March 28, stating that the petition and bond would be filed on or before April 2. Cropsey v. Sun Printing & Publishing Ass'n, 215 Fed. 132; and that so was one which stated that it will be made with justice of a specified court immediately, Potter v. General Baking Co., 213 Fed. 697.

7 Chase v. Erhardt, 198 Fed. 305; Cropsey v. Sun Printing & Publishing Ass'n, 215 Fed. 132.

§ 545. 1 Bigson v. North River Ins. Co., 184 Fed. 165; Higson v. North River Ins. Co., 184 Fed. 165.

2 Railway Co. v. Ramsey, 22 Wall. 322, 328, 22 L. ed. 823, 824; Grace v. Am. C. Ins. Co., 109 U. S. 278, 27 L. ed. 932; Fife v. Whittell, 102 Fed. 537.

3 Wolff v. Archibald, 14 Fed. 369. *Contra,* Carlisle v. Sunset Tel. & T. Co., 116 Fed. 986; N. Y. & T. Land Co. v. Martin (Texas), 25 S. W. 475.

4 Gold W. & W. Co. v. Keyes, 96

upon inferences will be disregarded.[5] A general allegation in the language of the statute is insufficient.[6]

It is the safer practice to state, in the petition, that the time has not arrived at which defendant must answer or plead;[7] but it seems that a general allegation, in the language of the statute, is a sufficient averment of this matter.[8]

It is the safer practice specifically to state, in the petition, that there is a controversy between the parties; and in that case, the petition need not be accompanied by any pleading.[9] An averment in the petition for the removal: that the "matter and amount in dispute" exceeds two thousand dollars is sufficient to show that a "controversy exists."[10] The petition should show that the Federal court could take jurisdiction of the case after the removal unless this appears on the record.[11] It is the safer practice to allege the facts which establish that the defendant has been duly served with process or has made a general appearance in the action.[12] The petition need not state that the petitioner has a just cause or a just defense and intends to prosecute the same.[13] In Iowa, it was held that the petition must show that defendants had a defense to the action,

U. S. 199, 24 L. ed. 656; Grace v. Am. C. Ins. Co., 109 U. S. 278, 27 L. ed. 932.

5 Dodd v. Louisville Bridge Co., 130 Fed. 186, 193; where, after allegations that did not show a difference of citizenship, the petition continued: "Your petitioner therefore avers that, in respect to the obligations said to be enforced by this suit, your petitioner is . . . a citizen of the State of Indiana and no other State." Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

6 Gold W. & W. Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Grace v. Am. C. Ins. Co., 109 U. S. 278, 27 L. ed. 932; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992; Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. ed. 132; Smith v. Horton, 7 Fed. 270; Jones v. Adams Express Co., 129 Fed. 618; Lalor v. Dunning (New York), 56 How. Prac. 209; Pacific Express Co. v. Needham (Texas), 94 S. W. 1070.

7 Remington v. Central Pacific R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Aldrich v. Crouch, 10 Fed. 305 (11 Biss. 180); Waverly Stone & G. Co. v. Waterloo, C. F. & N. Ry. Co., 237 Fed. 561.

8 Remington v. Central Pacific R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963.

9 Wilcoxen v. Chicago, B. & Q. R. Co., 116 Fed. 444.

10 Egan v. Chicago, M. & St. P. R. Co., 53 Fed. 675.

11 Nickels v. Pullman Co., 268 Fed. 610.

12 Ibid. See *infra*, § 555.

13 Chase v. Erhardt, 188 Fed. 305.

and that they had pleaded or answered therein.[14] It has been said that the petition must aver that the suit was duly filed in the State court.[15]

An omission from the petition of a jurisdictional fact will be cured, if this appears in an accompanying affidavit,[16] or in the record in the State court.[17] An allegation in an amended complaint, filed after a remand, does not cure a defect in the original petition.[18]

A conditional application, in which the petition requests a removal, in case a pending motion should be denied or a plea in abatement not sustained, is bad.[19]

A petition is not fatally defective when it contains the jurisdictional allegations, but refers in its prayer to a wrong statute,[20]

14 Stanbrough v. Griffin, 52 Iowa 112, 2 N. W. 1011; Bosler v. Booge, 54 Iowa 251, 6 N. W. 301.

15 Wilson v. Giberson, 124 Fed. 701.

16 Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355; Bixby v. Blair, 56 Iowa 416, 9 N. W. 318.

17 Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92, 101, 42 L. ed. 673, 676; Remington v. Central Pacific R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Chambers v. McDougal, 42 Fed. 694; Shaftuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215; Jumeau v. Brooks, 109 Fed. 353, 48 C. C. A. 397; Wells v. Russellville Anthracite Coal Mining Co., 206 Fed. 528; Vestal v. Ducktown Sulphur, Copper & Iron Co., 210 Fed. 375; Hayes v. Todd, 34 Fla. 233, 15 So. 752; Goodsell v. Delta & Pine Land Co., 72 Miss. 580, 18 So. 452; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co., 17 W. Va. 812. *Contra*, Sherman v. Windsor Mfg. Co., 11 Fed. 852 (19 Blatchf. 314). But see Woolridge v. McKenna, 8 Fed. 650; Craswell v. Belanger, 56 Fed. 529, 6 C. C. A. 1, 15 U. S. App. 104. Where the record contains a reference to a person with the same name as the plaintiff, it will be presumed that the plaintiff is thereby intended, although there is no statement in the record to that effect. Hoge v. Canton Ins. Office, 103 Fed. 513.

18 Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471.

19 Manning v. Amy, 140 U. S. 137, 35 L. ed. 386.

20 Removal Cases; Meyer v. Delaware R. R. Construction Co., 100 U. S. 457, 25 L. ed. 593; Canal & C. Sts. R. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226; Norris v. Mineral Point Tunnel, 7 Fed. 272 (19 Blatchf. 201); Stanley v. Chicago, R. I. & P. R. Co., 62 Mo. 508; Dart v. Walker (New York) 4 Daly 188. Where the petition prayed for removal to a division of the district, which did not exist, but correctly designated the city where the court in one of the divisions was held; it was held that the defect was immaterial and

or is based upon an erroneous ground.[21] But where the petition was based upon a difference of citizenship, the removal was not sustained because it subsequently appeared that one of the parties was an alien,[22] or because the record showed that the case arose under the Constitution or laws of the United States.[23] An irregularity in the prayer, by limiting the relief sought to the petitioners, will not prevent a removal of the whole case, when the averments authorize it.[24]

would be disregarded. Hodge v. Chicago & A. Ry. Co., 121 Fed. 48, 57 C. C. A. 388.

21 Removal Cases; Meyer v. Delaware R. R. Construction Co., 100 U. S. 457, 25 L. ed. 593; Canal & C. Sts. R. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226; Norris v. Mineral Point Tunnel, 7 Fed. 272; 19 Blatchf. 201. In all of these the ground stated was prejudice or local influence; but the petitions showed sufficient to justify a removal under the ordinary circumstances of a difference of citizenship. Northern Pacific Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawyer 348 (where the petition was based upon prejudice and local influence; but it showed a ground for removal because of a separable controversy). Ruckman v. Ruckman, 1 Fed. 587; Merchants, etc., Bank v. Thompson, 4 Fed. 876; State of Idaho v. Am. Surety Co., 218 Fed. 678. In these cases, the petition sought a removal upon the general grounds of a difference of citizenship; but it showed that there was a separable controversy, which made the case removable. See Sharkey v. Port Blakely Mill Co., 92 Fed. 425. In Cleveland v. Cleveland, C. C. & St. L. Ry. Co., C. C. A., 147 Fed. 171, 173, the Circuit Court of Appeals for the Sixth Circuit refused to admit or to controvert the soundness of this position.

Where the petition alleged that the parties were citizens of different States, and upon the trial it appeared that the plaintiff was an alien, a motion by the defendant to dismiss for want of jurisdiction was denied. Katalla Co. v. Rones, C. C. A., 186 Fed. 30, affirming 182 Fed. 946.

Where no petition or bond was filed in the State court, but the formal papers for a removal of a suit against a revenue officer were filed in the Federal court, and the State court entered an order for a removal; it was held that, since the plaintiff's pleading showed that the cause arose under the Constitution and laws of the United States, there should be no remand, although it was doubtful whether a removal could be sustained upon the former ground. Bryant Bros. Co. v. Robinson, C. C. A., 149 Fed. 321, 324, 326.

22 Wallenburg v. Missouri Pac. Ry. Co., 159 Fed. 217.

23 Woolridge v. McKenna, 8 Fed. 650.

24 Northern Pacific Terminal Co. v. Lowenberg, 18 Fed. 339 (9 Sawyer 348). A prayer "that said surety and bond may be accepted that his suit may be removed into

The petition must be duly verified;[25] but if the facts are positively averred, they may be sworn to upon information and belief.[26] The petition may be signed by either the petitioner or his attorney in fact or law,[27] or, it has been held, by an agent upon whom the process was served,[28] except when the removal is for prejudice or local influence,[29] or the suit is between citizens of the same State claiming land under grants of different States,[30] or the proceedings are instituted against officers or soldiers of the United States,[31] or against persons who are or have been officers of either House of Congress for acts done by them in the discharge of their official duties,[32] or against persons having defenses under the revenue laws,[33] or perhaps when fraudulent misjoinder is charged.[34]

the next district court of the United States,'' is sufficient as a prayer for a removal; a semicolon after the word ''accepted'' being obviously omitted inadvertently. Gruetter v. Cumberland Tel. & T. Co., 181 Fed. 248.

25 Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 303, 34 L. ed. 963, 964; Offner v. Chicago & E. R. Co., 148 Fed. 201, 203; Houser v. Clayton, Fed. Cas. No. 6,739 (3 Woods 273); Jud. Code, § 29, 36 St. at L. 1087. Formerly this was unnecessary.

26 Murray v. Southern Bell Telephone & Telegraph Co., 210 Fed. 925; New York & T. Land Co. v. Martin (Texas Civ. App.), 25 S. W. 475.

27 Sweeney v. Coffin, Fed. Cas. No. 13,686, 1 Dill. 73; Osgood v. Chicago, D. & V. R. Co., Fed. Cas. No. 10,604, 6 Biss. 330; Connor v. Scott, Fed. Cas. No. 3,119, 4 Dill. 242; Houser v. Clayton, Fed. Cas. No. 6,739, 3 Woods 273; Harley v. Home Ins. Co., 125 Fed. 792 (a case of a separable controversy); Berry v. Mobile & O. R. Co., 228 Fed. 395; Porter v. Coble, C. C. A., 246 Fed. 240. See Canal & Claiborne Sts. R. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226; Union Pac. R. Co. v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; Dennis v. Alachua County, 3 Woods 683; Wormser v. Dahlman, Fed. Cas. No. 18,048, 16 Blatchf. 319, 57 How. Prac. N. Y. 286; Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452; Fisk v. Fisk (Louisiana), 4 Mart. (N. S.) 676; Guinault v. Louisville & N. R. Co. (Louisiana), 42 La. Ann. 52, 7 South. 62; Vandevoort v. Palmer (N. Y.), 11 N. Y. Super. Ct. (4 Duer) 677; Shaft v. Phœnix Mut. Life Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138.

28 Fayette Title & T. Co. v. Maryland P. & W. V. T. & T. Co., 180 Fed. 928.

29 *Infra*, § 549.

30 *Infra*, § 550.

31 U. S. R. S., § 643; *infra*, § 551.

32 18 St. at L. 401; *infra*, § 551.

33 U. S. R. S., § 643; *infra*, § 551.

34 Offner v. Chicago & E. R. Co., 148 Fed. 201, 203; *supra*, §§ 538, 539.

An omission to sign the petition or an informality in the signature [35] is waived, unless objection upon this ground is made in the State court.[36]

When the removal is based upon difference of citizenship, the petition must show that the difference of citizenship existed at the time of the beginning of the suit,[37] and also at the time when the petition is filed; [38] unless these facts appear in the pleadings, or elsewhere on the record.[39] It has been held, however, that a petition for removal by an intervener, which is filed simultaneously with his petition of intervention, is sufficient, if it aver

35 Removal Cases, 100 U. S. 457, 25 L. ed. 593.

36 Removal Cases; Meyer v. Delaware R. R. Const. Co., 100 U. S. 457, 25 L. ed. 593; Cooke v. Seligman, 7 Fed. 263.

37 Phœnix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427; Gibson v. Bruce, 108 U. S. 561, 2 Sup. Ct. 873, 27 L. ed. 825; Houston & T. C. Ry. Co. v. Shirley, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; Smith v. Akers, 117 U. S. 197, 6 Sup. Ct. 669, 29 L. ed. 888; Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. ed. 914; Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; La Confiance Campagnie D'Assurance Contre L'Incendie v. Hall, 137 U. S. 61, 11 Sup. Ct. 5, 34 L. ed. 573; Kellam v. Keith, 144 U. S. 568, 12 Sup. Ct. 922, 36 L. ed. 544; Mattingly v. Northwestern Virginia R. Co., 158 U. S. 53, 15 Sup. Ct. 725, 39 L. ed. 894; Rawle v. Phelps, Fed. Cas. No. 11,588, 2 Flip. 471; Beede v. Cheeney, 5 Fed. 388; Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187; Brinkerhoff v. Morris Canal & Banking Co., 18 Fed. 97; Ferry v. Town of Merrimack, 18 Fed. 657; McNaughton v. South Pac. C. R. Co., 19 Fed. 881; Carrick v. Landman, 20 Fed. 209; Endy v. Commercial Fire Ins. Co., 24 Fed. 657; Hone v. Dillon, 29 Fed. 465; Seddon v. Virginia, T. & C. Steel & Iron Co., 36 Fed. 6 (1 L.R.A. 108); Camprelle v. Balbach, 46 Fed. 81; Laskey v. Newtown Min. Co., 56 Fed. 628; Foster v. Paragould S. E. R. Co., 74 Fed. 273; Dalton v. Germania Insurance Co., 118 Fed. 936; State of Missouri v. Chicago & A. R. Co., 216 Fed. 562; People v. Superior Court of Chicago, 34 Ill. 356; Laird v. Connecticut & P. R. R., 55 N. H. 375, 20 Am. Rep. 215; Holden v. Putnam Fire Ins. Co., 46 N. Y. 1, 7 Am. Rep. 287; Tugman v. National S. S. Co., 76 N. Y. 207; affirming 13 Hun 332; Pechner v. Phœnix Ins. Co. (New York), 6 Lans. 411; affirmed 65 N. Y. 195; Herndon v. Ætna Ins. Co., 107 N. C. 194, 12 S. E. 240, 10 L.R.A. 53.

38 Gibson v. Bruce, 108 U. S. 561, 2 Sup. Ct. 873, 27 L. ed. 825; Bruce v. Gibson, 9 Fed. 540; Foster v. Paragould S. E. R. Co., 74 Fed. 273. *Contra*, Houser v. Clayton, Fed. Cas. No. 6,739 (3 Woods 273).

39 Bondwant v. Watson, 103 U. S. 281, 285, 26 L. ed. 447, 449; Steam-

the citizenship of the parties in the present tense.[40] Where the plaintiff is the assignee of the cause of action, it is the safer practice to state the citizenship of his assignor at the time of the assignment, and also at the times when the suit was begun and the petition for removal made.[41]

The citizenship of each defendant should be separately alleged.[42] It has been held that it is insufficient: to allege merely the residence and citizenship of the plaintiff, the residence of the defendants, and that none of the petitioners are residents and citizens of the plaintiff's State;[43] to present a petition in the name of a copartnership,[44] or association[45] stating that the firm, or association as the case may be, is a citizen and resident of a specified state, without naming the members individually or describing their citizenship; to allege "that said plaintiffs as such executors are citizens of" a specified State;[46] and that the Board of Trustees of a State institution, which is made a defendant by that name, is a citizen of a specified State without averring the citizenship of its different members, although the Constitution of the

ship Co. v. Tugman, 160 U. S. 118, 40 L. ed. 362. Where the complaint averred that, at certain specified dates, which were before the commencement of the action, the diversity of citizenship existed, and the petition for removal stated that the diversity then existed; it was held that the case must be remanded, since it did not sufficiently appear that the diversity existed at the time of the commencement of the action. Craswell v. Belanger, 56 Fed. 529.

40 Burdick v. Peterson, 6 Fed. 840 (2 McCrary 135).

41 Flynn v. Fidelity & Casualty Co., 145 Fed. 265. See Hall v. Tevis, 177 Fed. 600, and § 63, *supra*.

42 Grace v. American C. Ins. Co., 109 U. S. 278, 27 L. ed. 932; Thomas v. Board of Trustees of the Ohio State University, 195 U. S. 207, 218, 49 L. ed. 160, 167; Laden v. Meek, C. C. A., 130 Fed. 877.

43 Laden v. Meek, C. C. A., 130 Fed. 877.

44 Adams v. May, 27 Fed. 907; Van Horn v. Kittitas County, 112 Fed. 1; Fred Macey Co. v. Macey, 135 Fed. 725, 68 C. C. A. 363.

45 Rife v. Lumber Underwriters, C. C. A., 204 Fed. 32.

46 Amory v. Amory, 95 U. S. 186, 24 L. ed. 428. But, it was held sufficient to allege, that the defendants, who were named, "as they are the qualified executors of the last will and testament of James Brown, deceased, were each and all, at the time of the commencement of this suit, and still are, citizens of the State of New York, and that the defendant, John S. Schultze, also a qualified executor of the last will and testament of James Brown, deceased, was then, and still is, a citizen of the State of New Jersey." Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452. See *supra*, § 135.

State provides that no person shall be elected or appointed to office unless he is a citizen of the State.[47]

An allegation that the State, of which a party is a citizen or resident, is unknown, is insufficient to show that is citizenship is different from that of the other.[48] An allegation of residence in a certain State, without an allegation of citizenship, is insufficient,[49] unless it is alleged, that the plaintiff is a citizen of the United States and a resident of one of those States; in which case, it has been held that, under the Fourteenth Amendment, it will be presumed that he is a citizen of the State also.[50]

If one of the parties is an alien, it is sufficient for the petitioner to allege that he is, and when the suit was brought was, a citizen or subject of a specified foreign State.[51] So is a mere

47 Thomas v. Board of Trustees of the Ohio State University, 195 U. S. 207, 218, 49 L. ed. 160, 167.

48 Tug River C. & S. Co. v. Brigel, 67 Fed. 625; Tracy v. Moral, 88 Fed. 801.

49 Parker v. Overman, 18 How. 137, 15 L. ed. 318; Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. ed. 932; Pennsylvania Co. v. Bender, 148 U. S. 255, 13 Sup. Ct. 591, 37 L. ed. 441; Neel v. Pennsylvania Co., 157 U. S. 153, 15 Sup. Ct. 589, 39 L. ed. 654; Overman v. Parker, Fed. Cas. No. 10,623; Merchants' Nat. Bank v. Brown, 17 Fed. 161 (4 Woods 263); Kelly v. Houghton, 23 Fed. 417; Southwestern Telegraph & Telephone Co. v. Robinson, 48 Fed. 769, 1 C. C. A. 91; Craswell v. Belanger, 56 Fed. 529, 6 C. C. A. 1, 15 U. S. App. 104; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Gale v. Southern Building & Loan Ass'n, 117 Fed. 732; Board of Trustees of Mohican Tp., Ashland County v. Johnson, 133 Fed. 524, 66 C. C. A. 592; Harding v. Standard Oil Co., 182 Fed. 421; Herndon v. Ætna Ins. Co., 107 N. C. 194, 12 S. E. 240, 10 L.R.A. 53; Pechner v. Phœnix Ins. Co. (New York), 6 Lans. 411; affirmed 65 N. Y. 195.

50 Clausen v. American Ice Co., 144 Fed. 723.

51 Hennessy v. Richardson Drug Co., 189 U. S. 25, 23 Sup. Ct. 532, 47 L. ed. 697; Hennessy v. Moise, 189 U. S. 35, 23 Sup. Ct. 534, 47 L. ed. 698; C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181. *Contra*, Von Voight v. Michigan Cent. R. Co., 130 Fed. 398 (where an allegation of citizenship alone, in a foreign monarchy, was held to be insufficient). See Wilson v. City Bank (New York), 3 Summer, 422. It was held that the description of the plaintiff "as a citizen of London, England," was not a sufficient averment that he was a subject of the United Kingdom of Great Britain and Ireland. Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341. Where a bill alleged that the complainant was by birth a citizen of one of the United States, but by her marriage to a British subject became a citizen of Great Britain, no British law making her a citizen

description of a party as "of" a specified State;[52] or of a certain county,[53] city, or town, in a specified State;[54] or that a party "lives" or "lived" in a specified city and State.[55]

The petition should also state the non-residence of the defendant at the time, both when the action was begun[56] and when the petition was filed.[57] An allegation of citizenship and residence in another State is equivalent to an allegation of non-residence in the State where the suit is brought.[58]

It is the safer practice to allege the residence of the plaintiff within the district at both those times.[59] It seems that an averment that a party is "of" a specified place is equivalent to the statement that he is a resident thereof.[60]

The omission from the plaintiff's writ,[61] or pleading;[62] of any allegation of diversity of citizenship, is immaterial; provided that this is duly alleged in the petition of removal.

Where a corporation is a party, the petition should state that it was organized or created by, or under, the laws of a specified State or foreign government.[63] The allegation that it is a citizen of a certain State is insufficient; when it is not described

by reason of such acts being pleaded; it was held that her alienage was not sufficiently averred, although the bill set forth a Canadian statute, which it was claimed effected her naturalization. Jennes v. Landes, 84 Fed. 73.

52 Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Dinet v. Delavan, 117 Fed. 978; Carswell v. Schley, 59 Ga. 17.

53 Carswell v. Schley, 59 Georgia 17.

54 Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Dinet v. Delavan, 117 Fed. 978.

55 Gale v. Southern Building & Loan Ass'n, 117 Fed. 732.

56 Martin v. Snyder, 148 U. S. 663, 11 Sup. Ct. 706, 37 L. ed. 602; Freeman v. Butler, 39 Fed. 1; Camprelle v. Balbach, 46 Fed. 81.

57 Martin v. Snyder, 148 U. S. 663. *Contra,* Baltimore & O. R. Co. v. Doty, C. C. A., 133 Fed. 866.

58 Lawrence v. Southern Pac. Co., 165 Fed. 241; Zebert v. Hunt, 108 Fed. 449. *Contra,* Fife v. Whittell, 102 Fed. 537.

59 *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264. *Contra,* Baltimore & O. R. Co. v. Doty, C. C. A., 133 Fed. 866. See Gillespie v. Pocahontas Coal & Coke Co., 162 Fed. 742; La Belle Box Co. v. Stricklin, C. C. A., 218 Fed. 529.

60 Hennessy v. Richardson Drug Co., 189 U. S. 25, 23 Sup. Ct. 532, 47 L. ed. 697; Hennessy v. Moise, 189 U. S. 35, 23 Sup. Ct. 534, 47 L. ed. 698.

61 Ladd v. Tudor, Fed. Cas. No. 7,975 (3 Woodb. & M. 325).

62 City of Ysleta v. Canda, 67 Fed. 6.

63 Sun Printing & Publishing Ass'n v. Edwards, 194 U. S. 377, 48 L. ed. 1027; Lonergan v. Illinois

as a corporation, although it has a company name.[64] An averment stating that it was a corporation and a resident of a given State was held to be equivalent to an allegation that it was organized under the laws thereof.[65] An allegation that a corporation is "duly established by law, having its principal place of business" in a specified State, is insufficient.[66] It is insufficient to allege that the defendant "claims to be" a corporation organized under the laws of a specified State as a company of a specified character.[67] Where the corporation is chartered by several States, the facts which show the difference of citizenship, such as the name of the State which first gave it its charter, must be specifically pleaded.[68] It is insufficient to allege merely the residence,[69] or the location,[70] of the corporation, even if it

Central R. R. Co., 55 Fed. 550; Ward v. Blake Mfg. Co., C. C. A., 56 Fed. 437; Frisbie v. Chesapeake & O. Ry. Co., 57 Fed. 1; Shattuck v. No. Br. & Mer. Ins. Co., 58 Fed. 609; De Loy v. Travelers' Ins. Co., 59 Fed. 319; Robertson v. Scottish U. & Nat. Ins. Co., 68 Fed. 173; Continental W. P. Co. v. Lewis Voight & Sons, 106 Fed. 550; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404. See Southern Ry. Co. v. Hudgins, 33 S. E. 1011, 108 Ga. 524, *supra*, § 135. An allegation that defendant is a corporation under the laws of the State of Virginia, and a citizen of Virginia, and a resident of the Western District of that State, is equivalent to an allegation that it was created by, or organized under, or existing under, the Virginia laws. Mathieson Alkali Works v. Mathieson, 150 Fed. 241.

64 Thomas v. Board of Trustees of Ohio State University, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160; Lonergan v. Illinois Cent. R. Co., 65 Fed. 550; Frisbie v. Chesapeake & O. R. Co., 57 Fed. 1; De Loy v. Travelers' Ins. Co., 59 Fed. 319; American S. R. Co. v. Johnson, 60 Fed. 503; *supra*, § 135; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404. *Contra*, Oakey v. Commercial & Railroad Bank, 14 La. 515; Guarantee Co. of North America v. First Nat. Bank, 95 Virginia 480, 28 S. E. 909.

65 Vestal v. Ducktown Sulphur, Copper & Iron Co., 210 Fed. 375. *Contra*, Wells v. Russellville Anthracite Coal Mining Co., 206 Fed. 528.

66 New York & New England R. R. Co. v. Hyde, C. C. A., 56 Fed. 188, 191.

67 Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983.

68 Dodd v. Louisville Br. Co., 130 Fed. 186.

69 Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Cleveland, C., C. & St. L. Ry. Co. v. Doerr, 41 Ill. App. 530.

70 Germania Fire Ins. Co. v. Francis, 11 Wall. 210, 20 L. ed. 77.

is a national bank.[71] It is unnecessary to aver the citizenship of the corporation, when its creation or organization by the laws of a specified State are sufficiently pleaded.[72] It has been held that it is unnecessary to aver that a corporation, created by or under the laws of another State, or a foreign country, is not a resident of the State and district where the suit is brought;[73] nor that the defendant corporation had the same citizenship at the time of the commencement of the suit as when the petition was filed,[74] although the fact that the plaintiff's citizenship, at the time when the suit was brought, was the same as at the time when the petition was filed must be alleged when the corporation removes the case; but it is the safer practice to allege both those facts.[75]

When the removal is because of a separable controversy, the

71 Thomas v. National Bank, C. C. A., 106 Fed. 438. A description of the plaintiff in the title of a pleading, as a national bank, is insufficient to show that it was incorporated under the laws of the United States, when the only allegation upon the subject in the pleading is that plaintiff is a corporation engaged in the banking business in a specified State and county. Alexandria Nat. Bank v. Willis C. Bates Co., C. C. A., 160 Fed. 839.

72 Shattuck v. No. Br. & Mer. Ins. Co., 58 Fed. 609; Robertson v. Scottish U. & Nat. Ins. Co., 68 Fed. 173; Block v. Standard Distilling & Distributing Co., 95 Fed. 978; Continental W. P. Co. v. Lewis Voight & Sons, 106 Fed. 550; Lee v. Atlantic Coast Line R. Co., 150 Fed. 775.

73 Myers v. Murray, Nelson & Co., 43 Fed. 695, 11 L. R. A. 216; Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215; Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co., 60 Fed. 929; Charleston Bridge Co. v. Phœnix Ins. Co., 60 Fed. 929; judgment affirmed, Phœnix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628, 13 C. C. A. 58, 25 U. S. App. 190; Howard v. Gold Reefs of Georgia, 102 Fed. 657; Roberts v. Pac. & A. Ry. & Nav. Co., 104 Fed. 577; Baltimore & O. R. Co. v. Doty, C. C. A., 133 Fed. 866; Koshland v. National Fire Ins. Co. (Oregon), 49 P. 845. *Contra*, Hirschl v. J. I. Case Threshing-Mach. Co., 42 Fed. 803; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Guinault v. Louisville & N. R. Co., 41 La. Ann. 571, 6 South. 850.

74 National Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87 (where the complaint averred that the defendant was then a foreign corporation); Roberts v. Pacific & A. Ry. & Nav. Co., 104 Fed. 577, 579; Continental Wall Paper Co. v. Lewis Voight & Sons, 106 Fed. 550. *Contra*, Dalton v. Germania Ins. Co., 118 Fed. 936.

75 Laskey v. Newtown Mine Co., 56 Fed. 628; Foster v. Paragould S. E. R. Co., 74 Fed. 273.

petition should show how the controversy arises and should name the parties to the same, in addition to the other jurisdictional allegations except perhaps when that clearly appears in the plaintiff's pleading.[76] Where a defendant, who is a citizen of the same State as the plaintiff, is joined with another, who is a citizen of a different State, and a removal is sought because of his fraudulent misjoinder, the petition or its accompanying affidavits must state specifically, the facts which show the fraud;[77] except, perhaps, when they are manifest upon the face of the plaintiff's pleading.[78] Defects or imperfections in a petition for removal which are formal or modal are waived when no specific objection thereto is duly made.[79]

§ 545a. Second petition for removal. A second petition for removal may be filed after the cause has been remanded when, before the trial upon the merits, the case has been changed by the plaintiff's acts, by amendment, voluntary dismissal as to certain defendants, or otherwise, so as to remove the objection to the removal and bring the case for the first time within the statute.[1] The decision of the court that there is no case against one of the defendants does not justify the second petition.[2]

§ 545b. Allegations to show that suit comes under Constitution or laws of the United States. Where a removal is claimed upon the ground that the suit arises under the Constitution and laws of the United States, the petition must state the facts showing that such is the case, unless they appear in pleadings previously filed or served.[1] If so, they may be incorporated into

[76] Gates Iron Works v. James E. Pepper & Co., 98 Fed. 449; Laden v. Meek, C. C. A., 130 Fed. 877. See Connell v. Smiley, 156 U. S. 335, 341, 39 L. ed. 443, 445. But see Donovan v. Wells-Fargo & Co., C. C. A., 169 Fed. 363.

[77] Offner v. Chicago & E. R. Co., C. C. A., 148 Fed. 201, *infra*, § 548a.

[78] *Supra*, note 15; *infra*, § 545c.

[79] White v. Chase, C. C. A., 201 Fed. 896.

§ 545a. [1] Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 93, 18 Sup. Ct. 264, 42 L. ed. 673; Key v. West Kentucky Coal Co., 237 Fed. 258, 261.

[2] Springer v. Am. Tobacco Co., 208 Fed. 199; Key v. West Kentucky Coal Co., 237 Fed. 258, 261. See *supra*, § 545.

§ 545b. [1] Gold W. & W. Co. v. Keyes, 96 U. S. 199, 204, 24 L. ed. 656, 659; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992; Trafton v. Nougues, 4 Sawyer 178; New Castle v. Postal Telegraph Cable Co., 152 Fed. 572; Hubbard v. Chicago, M. & St. P. Ry. Co., 176 Fed. 994; Rural Home Tel. Co. v. Powers, 176

the petition by reference.[2] Where it does not appear in the plaintiff's pleading, that the defendant is a corporation incorporated by an act of Congress,[3] or that the defendant is a receiver appointed by the Federal court;[4] it is the better practice to allege in the petition such fact if it exists; but the court will take judicial notice of the incorporation of a party by an act of Congress.[5] When it is claimed that the plaintiff has fraudulently omitted, from his pleading, a material allegation, which would show that the case arose under the Constitution or a law or a treaty of the United States; that fact must be alleged in the petition for the removal.[6] It has been held that, where the petition was based upon a difference of citizenship, the removal would not be sustained, although the record showed that the case arose under the Constitution or laws of the United States.[7]

§ 545c. Allegations as to value of matter in dispute. The petition for a removal should show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of three thousand dollars;[1] unless this appears elsewhere in the record.[2] An allegation that the "amount in dispute;"[3] or the "amount involved"[4] in the suit, exceeds the jurisdictional amount, is ordinarily sufficient, unless the record shows the contrary. The amount stated in the prayer for relief or recovery governs although in the body of the pleading, a greater amount of damages is averred.[5]

Fed. 986; Dale v. Smith, 182 Fed. 360.

2 Ibid. See also cases cited, *supra.*

3 Texas & P. Ry. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132.

4 Winters v. Drake, 102 Fed. 545.

5 Matter of Dunn, 212 U. S. 374, 53 L. ed. 558.

6 Winters v. Drake, 102 Fed. 545. See Washington v. Island Lime Co., 117 Fed. 777, 778.

7 Woolridge v. McKenna, 8 Fed. 650. But see authorities cited, *supra,* § 544.

§ 545c. 1 Keith v. Levi, 2 Fed. 743 (1 McCrary 343); Banigan v. City of Worcester, 30 Fed. 392, *supra,* § 545. It has been said, that, unless this appears in the record, an allegation to that effect in the petition is insufficient. Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co., 89 Fed. 113.

2 Chambers v. McDougal, 42 Fed. 694.

3 Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. ed. 276.

4 State v. Frost, 89 N. W. 915, 113 Wis. 623. See Studebaker v. Salina Waterworks Co., 195 Fed. 164; §§ 6, 13, 135, *supra.*

5 Iowa Central Railway Company v. Bacon, 236 U. S. 305.

Where the suit is brought for an injunction, it will ordinarily be sufficient to aver, in general language in the petition, that the value of the right sought to be protected thereby exceeds the jurisdictional amount.[6] It has been held that a petition is not defective because it states the matter in controversy "is of the sum and value of over" three "thousand dollars, as petitioner is informed and verily believes."[7] It is the better practice to aver, in a petition for removal, that the matter in dispute exceeded the jurisdictional amount at the time when the suit was begun, as well as at the time when the petition is filed.[8] Where the relief sought was the conveyance of a tract of land, the value of which appeared to be in excess of such amount; it was held to be unnecessary to insert, in the petition, an allegation that the amount involved exceeded that sum, exclusive of interest and costs.[9] Where a suit is brought to enjoin the collection of taxes for certain years and there is no allegation as to the amount of the tax for more than one of such years, it will not be presumed, in order to make up the jurisdictional amount, that a like tax was assessed for each of the other years.[10]

§ 546. Amendment of petition. By the Act of March 3, 1915 "where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the" District Court "is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the Appellate Court upon such terms as the court may impose, so as to show on

6 Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290; Spaulding v. Evenson, 149 Fed. 913; s. c., Evenson v. Spaulding, C. C. A., 150 Fed. 517; State v. Frost, 89 N. W. 915, 113 Wis. 623.

7 New York & T. Land Co. v. Martin (Texas Civ. App.), 25 S. W. 475. Denials of allegations in the complaint, which tend to show the propriety of the joinder, are insufficient unless the petition for removal also avers that the plaintiff knew them to be false. Evansberg v. Insurance Stove, Range & Foundry Co., 168 Fed. 1001. But see Shaver v. Pacific Coast Condensed Milk Co., 185 Fed. 316.

8 Strasburger v. Beecher, 44 Fed. 209; Huntington v. Pinney, 126 Fed. 237.

9 Weber v. Travelers' Ins. Co., 45 Fed. 657.

10 Citizens' Bank of Louisiana v. Cannon, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451.

the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.''[1] It was formerly held: that, if the jurisdictional facts were not set forth in the petition or the accompanying papers or elsewhere on the record of the State court, an amendment stating them cannot be allowed by the Federal court.[2] Leave to amend was denied: when there had been an omission to allege diversity of citizenship,[3] or nonresidence,[4] at the time when the action was begun; although diversity and nonresidence, when the case was removed, were properly pleaded; when there was no allegation of the nonresidence of the defendant at any time;[5] when there was no allegation of diversity of citizenship at any time,[6] although the nonresidence of the defendant was alleged in the petition, and the residence of the plaintiff appeared in the record;[7] when the petition of removal originally alleged diversity of citizenship between the plaintiff and one

§ 546. 1 38 St. at L. 956, Comp. St., § 1251c.

2 Crehore v. Ohio & M. Ry. Co., 131 U. S. 240, 33 L. ed. 144; Jackson v. Allen, 132 U. S. 27, 33 L. ed. 249; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; De Loy v. Travelers' Ins. Co., 59 Fed. 319; Frisbie v. Ches. & O. Ry. Co., 59 Fed. 369; s. c., 57 Fed. 1; Murphy v. Payette Alluvial Gold Co., 98 Fed. 321; Fife v. Whittell, 102 Fed. 537; Dinet v. Delavan, 117 Fed. 978; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Security Co. v. Pratt, 65 Conn. 161, 32 Atl. 396.

3 Crehore v. Ohio & M. Ry. Co., 131 U. S. 240, 33 L. ed. 144; Jackson v. Allen, 132 U. S. 27, 33 L. ed. 249; McNaughton v. South Pac. C. R. Co., 19 Fed. 881; Grand Trunk Ry. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Endy v. Commereial Fire Ins. Co., 24 Fed. 657. It was said: that, after the time to remove has expired, the State court may allow the petition to be amended by inserting the allegation that an alien corporation, which had removed the case, was incorporated by the laws of the same foreign country before the suit was brought. Roberts v. Pac. & A. Ry. & Nav. Co., 104 Fed. 577.

4 Freeman v. Butler, 39 Fed. 1; Camprelle v. Balbach, 46 Fed. 81. But see Kyle v. Chicago, R. I. & P. Ry. Co., 173 Fed. 238.

5 Fife v. Whittell, 102 Fed. 537.

6 Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; Dinet v. Delavan, 117 Fed. 978.

7 Dinet v. Delavan, 117 Fed. 978.

only of two defendants, coupled with an averment that the other was fraudulently joined, and the removing defendant wished to add an averment that such other was also a citizen of a different State from that of the plaintiff;[8] when there was no allegation of nonresidence of the defendant at any time;[9] when the defendant, which was a corporation, alleged that it was a citizen of a certain State, but did not state that it was organized under the laws thereof.[10]

But when the jurisdictional facts are stated informally,[11] or in the form of conclusions of law,[12] in the petition or in an

8 Shane v. Butte Electric Ry. Co., 150 Fed. 801.

9 Fife v. Whittell, 102 Fed. 537.

10 Frisbie v. Chesapeake & O. Ry. Co., 57 Fed. 1; s. c., 59 Fed. 369; De Loy v. Travelers' Ins. Co., 59 Fed. 319; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876. When the original petition prayed a removal for difference of citizenship, Thompson v. Ward, 199 Fed. 861, or for prejudice or local influence, Carson & Rand Lumber Co. v. Holtzclaw, 44 Fed. 785. See Winnemans v. Edgington, 27 Fed. 324. And the defendant asked leave to show the existence of a separable controversy, or, in the former case, that one of the parties was an alien, Wallenburg v. Missouri Pac. Ry. Co., 159 Fed. 217.

11 Ayres v. Watson, 113 U. S. 594, 598, 28 L. ed. 1093, 1094; Martin's Adm'r v. Baltimore & O. R. R. Co., 151 U. S. 673, 691, 38 L. ed. 311, 318; Glover v. Shepperd, 15 Fed. 833 (11 Biss. 572). See Robertson v. Scottish Union & National Ins. Co., 68 Fed. 173, 177; Mexican Central Ry. Co., Ld. v. Duthie, 189 U. S. 76, 47 L. ed. 715 (where an original declaration, filed in the Federal court, averred that the plaintiff was a resident of a specified town, county, State and district, and that defendant was a citizen of another State, without alleging the citizenship of the plaintiff); Peoples' Tel. & Tel. Co. v. East Tennessee Tel. Co. (C. C. A.), 103 Fed. 212, 215 (where the title of a bill originally filed in the Federal court described the complainant "as duly incorporated under the laws of the State of Kentucky;" but the body of the bill merely alleged that it was a non-resident of the State, of which the defendant was a citizen; and the informality was held to be immaterial, when first taken upon appeal). *Contra*, In Removal Cases, Dinet v. Delavan, 117 Fed. 978; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688; Vestal v. Ducktown Sulphur, Copper & Iron Co., 210 Fed. 375.

12 Kinney v. Columbia Savings & Loan Ass'n, 191 U. S. 78, 48 L. ed. 103; Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616; Stadelmann v. White Line Towing Co., 92 Fed. 209. See also Tremper v. Schwabacher, 84 Fed. 413; following the case in which Kinney was plaintiff.

accompanying affidavit,[13] or in the record in the State court;[14] such an amendment may be allowed by the Federal court, even it seems, after judgment.[15] Earlier cases hold that the amendment can only be allowed by the State court.[16]

Amendments may be allowed where the petition alleged no diversity of citizenship but merely diversity of residence.[17] To show the citizenship of the plaintiffs' assignor.[18] Where the petition of removal stated "that the controversy in said suit is between citizens of different States" and then alleged the residence and citizenship of the defendant only;[19] where it appeared by the pleadings, that the husband of the plaintiff's assignor was a citizen and resident of a different State from that of the

Rife v. Lumber Underwriters, C. C. A., 204 Fed. 32.

13 Hall v. Chattanooga Agricultural Works, 48 Fed. 599, 605.

14 Kinney v. Columbia Savings & Loan Ass'n, 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; Flynn v. Fidelity & Casualty Co., 145 Fed. 265. See Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 42 L. ed. 673, 18 S. Ct. 264; Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1 (2 McCrary, 187); Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

15 Mexican Central Ry. Co., Ld. v. Duthie, 189 U. S. 76, 47 L. ed. 715 (where the suit was originally brought in the Federal court).

16 Winnemans v. Edgington, 27 Fed. 324; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577. See also Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1 (2 McCrary 187); Roberts v. Pac. A. Ry. & Nav. Co., 104 Fed. 577. Nor, under the former statute, where after naming the proper Court of the United States, it was conditioned that the petitioner should enter in such Court, on the first day of its session next after the granting of such petition, a copy of the record. Ellis v. Atlantic & P. R. R. Co., 134 Mass. 338.

17 Hinman v. Barrett, 244 Fed. 621.

18 Brady v. J. B. McCrary Co., 244 Fed. 602.

19 Kinney v. Columbia Savings & Loan Ass'n, 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; Woolridge v. McKenna, 8 Fed. 650, 680, 681; Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616; Stadelmann v. White Line Towing Co., 92 Fed. 209. See also Tremper v. Schwabacher, 84 Fed. 413 (where the petition said that two of the defendants were residents of a city in a certain State, but omitted to state specifically that they were citizens of that State as well). *Contra*, Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876 (where leave was refused to amend the petition so as to aver the organization of the defendant corporation under the laws of a State, of which the petition averred that it was a citizen and resident). See Chase v. Erhardt, 198 Fed. 305, and other authorities cited *infra*. But it was held that bonds were insufficient when conditioned simply that the petitioner shall file in the Federal court "copies of all process."

defendant's residence and citizenship, at a date a few months prior to the commencement of the action, but there was no averment as to her residence and citizenship when the suit was brought, nor when the petition for a removal was filed,[20] where the petition showed a diversity of citizenship but, through misinformation, erroneously alleged the citizenship of the plaintiff as of a different State from that where the suit was brought, he in fact being a citizen of that State and the defendant a citizen of a third State.[21] Where the petition described the plaintiff as a citizen of the United States in order to allege that he was an alien such facts have been subsequently discovered.[22]

Where the petition averred: that two defendants, who were citizens of the same State, had been fraudulently and improperly joined as parties defendant, for the sole purpose of defeating the petitioner's right to remove the cause; that the suit as to them had been dismissed, and that it was now pending against the removing defendant alone, omitting by mistake all reference to a fourth defendant, a citizen of the same State as the plaintiff, as to whom the case had also been dismissed;[23] that the case arose under the Constitution and laws of the United States, without specifying the facts showing this to be the case;[24] and even when there was no allegation in the petition for the removal showing that the value of the matter in dispute exceeded the jurisdictional amount, but that fact had been often stated to the court by counsel on both sides.[25]

A petition may be amended in the Federal, District and Circuit Court of the United States so as to correct a mistake, through which the defendant prayed a removal to the District Court of the United States,[26] where the prayer asked for a removal only as to the petitioners, and not of the whole case,[27] and to cure a defect in the verification.[28]

20 Flynn v. Fidelity & Casualty Co., 145 Fed. 265.

21 Wilbur v. Red Jacket Consol. Coal & Coke Co., 153 Fed. 662.

22 Matarazzo v. Hustis, 256 Fed. 882.

23 Powers v. Chesapeake & O. Ry. Co., 65 Fed. 129; affirmed 169 U. S. 92, 98, 101, 42 L. ed. 673, 675, 676.

24 Walser v. Memphis, C. & N. W. 421, 30 L. ed. 992.

25 Carr v. Fife, 45 Fed. 209; affirmed 156 U. S. 494, 39 L. ed. 508.

26 Hadfield v. N. W. Life Assur. Co., 105 Fed. 530.

27 Northern Pac. Terminal Co. v. Lowenberg, 118 Fed. 339, 343.

28 Murray v. Southern Bell Telephone & Tel. Co., 210 Fed. 925.

An answer filed by the defendant may be treated as an amendment to the petition.[29] It was held, however, that a petition, subsequently presented to the State court, could not be treated as an amendment.[30] It has been said that leave to file an amendment cannot be granted upon the hearing of a motion to remand.[31]

It was held, where the defendant admitted upon the trial the falsity of an allegation in his petition, that the petition should be treated as if amended accordingly.[32]

Formerly an amendment was not allowed in the Supreme Court,[33] nor in the Circuit Court of Appeals;[34] except by consent, when it was permitted.[35] Formerly a denial of an application for leave to amend the petition for removal, made by the State court after a remand, could be reviewed by the Supreme Court of the United States upon writ of error.[36] Where the removal was unauthorized, the District Court has no power to make a change of the parties to the suit, so as to retain the jurisdiction.[37]

§ 547. Bond. The Judicial Code requires that the party who files a petition for a removal "shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and

29 Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992.

30 Waite v. Phoenix Ins. Co., 62 Fed. 769.

31 Key v. West Kentucky Coal Co., 237 Fed. 258.

32 Koshland v. Home Mut. Ins. Co., 31 Or. 321, 49 Pac. 864.

33 Cameron v. Hodges, 127 U. S. 322, 32 L. ed. 132.

34 Grand Trunk Ry. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; where sufficient to justify a removal appeared in the bill of exceptions and in the bond filed with the petition for the writ of error.

35 Kansas City Southern Ry. Co. v. Prunty (C. C. A.), 133 Fed. 13, 17.

36 Carr v. Nichols, 157 U. S. 370, 15 Sup. Ct. 640, 39 L. ed. 736; affirming Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

37 Walser v. Memphis, C. & N. W. Ry. Co., 19 Fed. 152.

entering special bail in such suit if special bail was originally requisite therein." [1]

The bond required upon a removal for prejudice or local influence is the same as that in ordinary cases of removal for difference of citizenship.[2]

The bond must be filed at or before the time to answer expires.[3] An order cannot be made thereafter, allowing the bond to be filed *nunc pro tunc* as of the date of filing the petition.[4] It seems, that, if the bond is filed before the time to remove expires, the fact that it was filed after the petition is immaterial.[5]

A bond is sufficient which follows substantially the language of the statute.[6]

A bond conditioned simply that the petitioner shall file in the District Court "copies of all process" [7] is insufficient. That the copy be filed "on or before the first day of the next regular session," instead of "within thirty days from the date of the filing of said petition" [8] is insufficient. So is a bond conditioned on the filing of the record either in the District

§ 547. [1] Jud. Code, § 29, 36 St. at L., 1087, re-enacting 25 St. at L., p. 433, § 3.

[2] Bates v. Baltimore & O. R. Co., 39 Ohio St. 157; reversing Baltimore & O. R. Co. v. Bates, 119 U. S. 464, 7 Sup. Ct. 205, 30 L. ed. 436; and overruling Gutwilling v. Zuberbier, 28 Fed. 721.

[3] Austin v. Gagan, 39 Fed. 626, 5 L. R. A. 467. See also Wilcox & Gibbs Sewing Mach. Co. v. Follett, Fed. Cas. No. 17,643, 2 Flippin, 263. But see Campbell v. Wallen's Lessee, 8 Tenn. (Mart. & Y.) 266.

[4] Ibid.

[5] Campbell v. Wallen's Lessee, 8 Tenn. (Mart. & Y.) 266. But see Kirkpatrick v. Hopkins (Penn.), 2 Miles, 277; Best v. New York Life Ins. Co. (Ohio), 2 Cin. Super. Ct. Rep'r. 329.

[6] Cooke v. Seligman, 7 Fed. 263; Ellis v. Atlantic & P. R. Co., 134 Mass. 338.

[7] Burdick v. Hale, Fed. Cas. No. 5,147 (7 Biss. 96). And when it misdescribed the defendant as an individual, instead of a corporation, although his name was part of that of the company. Alexandria Nat. Bank v. Willis C. Bates Co., C. C. A., 160 Fed. 839.

Under the statute of Florida which provides that a foreign corporation not complying with its requirements to authorize the doing of business in the state cannot take advantage of such noncompliance, but bound by its contracts. Brady v. J. B. M'Crary Co., 244 Fed. 603. A bond is not invalid because it does not show that a foreign corporation which executed it had complied with the statute.

[8] Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688; but see State Improvement Development Co. v. Leininger, 226 Fed. 884.

Court for the district wherein the action was begun or in the District Court for another district;[9] but a bond is not fatally defective because it provides for the filing of the transcript in the wrong division of the District Court of the United States.[10]

The bond must provide for the payment of costs in case of a remand.[11] It has been held that a bond, defective in that respect, is not cured by a provision that the removing parties shall "do such other appropriate acts as by the Act of Congress in that behalf are required."[12]

Where special bail was not originally required in the State court, the bond need contain no condition for the entry of such bail in the Federal court.[13] The provision for the special bail in the bond must be made as an undertaking for the personal appearance of a party, not as a delivery bond for property attached in the State court.[14] Where special bail is given, and the bail wish to surrender the principal after the removal, such surrender must be made in open court, and not by his summary seizure and commitment to jail, according to the State law; but when a party was so committed, the court of the United States, upon the petition of the bail, granted a writ of *habeas corpus* to bring him into court for surrender, in discharge of his bail.[15]

It has been held that, when only one of several defendants

9 Webb v. Southern Ry. Co., C. C. A., 248 Fed. 618.

10 Hodge v. Chicago & A. Ry. Co., 121 Fed. 48, 57 C. C. A. 388.

11 Torrey v. Grant L. Works, Fed. Cas. No. 14,105, 14 Blatchf. 269; Webber v. Bishop, 13 Fed. 49; Sheldrick v. Cockcroft, 27 Fed. 579. It has been held, however, that such an omission may be cured by amendment. Dennis v. Alachua County, Fed. Cas. No. 3,791, 3 Woods, 683, 688; Deford, Hinkle & Co. v. Mehaffy, 13 Fed. 481, 487.

12 Harrold v. Arrington, 64 Tex. 233. But see Cooke v. Seligman, 7 Fed. 263 (17 Blatchf. 452). A condition for the entry of an appearance in the United States court and for the payment of such costs as might accrue in consequence of the "improper removal of said cause" was held to be sufficient. Hayes v. Todd, 34 Fla. 233, 15 So. Rep. 752.

13 Burck v. Taylor, 39 Fed. 581; judgment affirmed, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; Preston v. McNeil Lumber Co., 143 Fed. 555. But see Bell v. Bell, 3 W. Va. 183.

14 Ramsey v. Coolbaugh, 13 Iowa 164.

15 Holbrook v. Seagraves, Fed. Cas. No. 6,593 (1 Story 546).

has been served, the bond need not be conditioned for the appearance of any defendant, except the one served.[16]

It is the proper practice to insert in the bond, a specified sum, as the penalty for a failure to comply with the condition.[17] A penalty of five hundred dollars has been held to be sufficient, when the defendant had not been held to bail.[18] Where the amount of the penalty was left in blank, the bond was held to be insufficient.[19] It has been held that an omission of any penalty from the bond is not a ground for a remand;[20] but that the State court may, for this reason, refuse its approval of the bond.[21]

The bond must be conditioned, that the petitioning party will take the necessary steps to affect the removal; and a bond conditioned that one, not a party to the suit, will perform the required acts, is insufficient.[22] The obligee should be the plaintiff and not the people.[23] It has been held that a formal de-

16 Vandevoort v. Palmer, 11 N. Y. Super. Ct. (4 Duer) 677.

17 Quoted with approval in Kentucky v. Louisville Bridge Co., 42 Fed. 241; Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616; Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284, 292; Quarrier v. Baltimore & O. R. Co., 20 W. Va. 424.

18 Kentucky v. Louisville B. Co., 42 Fed. 241; Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284, 291. In New York, a penalty of one thousand dollars was held to be sufficient, in a suit to recover damages for fourteen thousand dollars, when the defendant had not been held to bail. Blanchard v. Dwight, 12 Wendell (N. Y.) 192.

19 Burdick v. Hale, Fed. Cas. No. 2,147, 7 Biss. 96; Austin v. Gagan, 39 Fed. 626.

20 Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616.

21 Quarrier v. Baltimore & O. R. Co., 20 W. Va. 424.

22 Clippinger v. Missouri Val. Life Ins. Co., 26 Ohio St. 404.

23 Grow v. Wiman, 3 N. Y. St. Rep. 281. Where the name of the obligee was misspelled and the bond contained interlineations not properly authenticated; it was held that the bond, although not void, was properly rejected by the State court. Greacen v. Beam, 15 N. J. Law (3 J. S. Green) 460. It has been held that the bond must be joint and several; Roberts v. Carrington, 2 N. Y. Super. Ct. (2 Hall) 694; Hazard v. Durand, 9 R. I. 602; but that it need not be executed by the petitioner, provided it have a principal and a sufficient surety. Stevens v. Richardson, 20 Blatchf. 53; s. c., 9 Fed. 191; Public G. & S. Exch. v. W. U. Tel. Co., 16 Fed. 289; s. c., 11 Biss. 568; People's Bank of Greenville v. Ætna Ins. Co., 53 Fed. 161. *Contra*, Rough v. Booth

fendant, who is a nominal party and has not joined in the petition, and whose citizenship does not affect the jurisdiction, can be a surety.[24] It is the better practice to have the bond sealed by the principal and surety.[25] It has been held when the State statutes so provide, that the initial letters "L. S." or the word "Seal" may be a sufficient substitute for the affixture of a formal seal to a document.[26] A scrawl set without wax, or an impression on the paper, will be sufficient, at least in a State, by the law of which such scrawl or impression is equivalent to a seal;[27] and when the State statute makes a bond valid without a seal,[28] or provides that an omission of a seal shall not affect the validity of any document, the bond is sufficient, although no formal seal is affixed to the same.[29]

When the petitioner is named as prineipal, the bond may be executed in his name by his attorney at law,[30] and execution thereof by him, without his elient's authority, may be ratified by the client at any time before an order for a remand.[31] Where the petitioner is a corporation, it is the proper practice to affix the corporate seal, together with proof that the person who signs and seals the same has authority to do so.[32]

An attorney at law is a sufficient surety, if he is accepted by

(California), 3 Pac. 91; Weed Sewing Mach. Co. v. Smith, 71 Ill. 204; Farmers' Loan & Trust Co. v. Lake Street El. R. Co., 173 Ill. 439, 51 N. E. 55 (affirming 68 Ill. App. 666).

24 Steiner v. Mathewson, 77 Ga. 657.

25 Speer on Removal of Causes, p. 119.

26 G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 33, 36 C. C. A. 663.

27 U. S. v. Stephenson, Fed. Cas. No. 16,386, 1 McLean 462; Loop v. Winters' Estate, 115 Fed. 362, 363.

28 G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 33, 36 C. C. A. 633.

29 Loop v. Winters' Estate, 115 Fed. 362.

30 Dennis v. Alachua County, Fed. Cas. No. 3,791, 3 Woods 683, 687.

31 Ashe v. Union Cent. Life Ins. Co., 115 Fed. 234. Where the surety is a corporation, an affidavit by the subscribing witness, that he saw the corporate seal affixed to the bond, and that he saw the signer "attorney in fact of said" corporation sign the same, is sufficient proof of the authority of the attorney, although no copy of the power of attorney is annexed. Mutual Life Ins. Co. v. Langley, 145 Fed. 415, 418.

32 Alexandria Nat. Bank v. Willis C. Bates Co., C. C. A., 160 Fed. 839, holding that, in the absence of such proof, a bond signed and sealed by the treasurer was void. *Contra,*

the State court, although a rule of the practice of such court disqualifies him.[33] It is safer practice to add to the bond, an affidavit of a surety, that he has sufficient property, subject to execution in the district and over and above all other debts and liabilities, to meet the penalty of the bond.[34] It has been held that the objection that there is no evidence of the sufficiency of the sureties is waived if not made at the time when the bond is presented to the State court;[35] and that the sureties are not bound to justify until a rule or order to that effect has been made.[36]

Technical defects in the form of a bond may be cured by amendment after the time for a removal has expired.[37] Such have been held to be: the omission of a seal,[38] a mistake in the name of the obligee,[39] an omission of a penal clause,[40] an error in the statement of the time when the transcript shall be filed.[41] But not where there is a penal clause, an omission of the amount of the penalty,[42] nor an omission of a provision for the payment of costs in case of a remand.[43]

Fayette Title & Tr. Co. v. Maryland, P. & W. V. T. & T. Co., 180 Fed. 928.

33 Probst v. Cowen, 91 Fed. 929.

34 Weed Sewing Mach. Co. v. Smith, 71 Ill. 204; Cleveland C. C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869 (affirming 41 Ill. App. 498); Farmers' Loan & Trust Co. v. Lake Street El. R. Co., 173 Ill. 439, 51 N. E. 55 (affirming 68 Ill. App. 666); Goddard v. Bosson, 21 Kansas 139.

35 Terre Haute & I. R. Co. v. Abend, 9 Ill. App. (9 Bradw.) 304; Western Union Tel. Co. v. Horack, Id. 309; Stone v. Sargent, 129 Mass. 503; Bates v. Baltimore & O. R. Co., 39 Ohio St. 157.

36 Empire Transp. Co. v. Richards, 88 Ill. 404.

37 Beede v. Cheeney, 5 Fed. 388; Deford v. Mehaffy, 13 Fed. 481; Harris v. Delaware, L. & W. R. Co., 18 Fed. 833; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Loop v. Winters' Estate, 115 Fed. 362.

38 Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Loop v. Winters' Estate, 115 Fed. 362.

39 Harris v. Delaware, L. & W. R. Co., 18 Fed. 833.

40 Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616.

41 Chase v. Erhardt, 198 Fed. 305; State Improvement Development Co. v. Leininger, 226 Fed. 884.

42 Burdick v. Hale, 7 Bissell 96, Fed. Cas. No. 2,147; Austin v. Gagan, 5 L. R. A. 476, 39 Fed. 626.

43 Torrey v. Grant Locomotive Works, Fed. Cas. No. 14,105 (14 Blatchf. 269); Webber v. Bishop, 13 Fed. 49. *Contra,* Dennis v. Alachua, Fed. Cas. No. 3,791, 3 Woods, 683, 688; Deford v. Mehaffy, 13 Fed. 481, 487, 492.

By taking subsequent steps in the case, without moving to remand, defects in the form of the bond,[44] or to the sufficiency of the sureties, are waived.[45] It is the regular and the safer practice to procure the approval of the bond by the State court. It has been held: that the State court has the power to determine whether the bond is sufficient in substance and form;[46] but that its rejection cannot be arbitrary;[47] that the determination of the sufficiency of the sureties is largely within the discretion of the State court, to which the bond is presented;[48] that the refusal to approve the bond, at least when not based upon the insufficiency of the sureties, may be reviewed by the District Court of the United States, when a motion for a remand is made,[49] or by the Supreme Court of the United States, upon writ of error to the final judgment in the case by the State court of last resort;[50] and that the objection that the signatures to the bond were not properly acknowledged or provided, if not raised in the State court, is waived.[51] Where the State court had denied and refused the petition, without assigning any reason for the same, the Federal court refused to remand the cause because there was no sufficient surety to the bond, when the principals were amply responsible.[52]

44 Hervey v. Illinois Midland Ry. Co., 3 Fed. 707; Grow v. Wiman, 3 N. Y. St. Rep. 281.

45 Probst v. Cowen, 91 Fed. 929.

46 Miller v. Soule, 221 Fed. 493; Mix v. Andes Ins. Co., 74 N. Y. 53, 56. See State ex rel. Basket v. Woodson (Missouri), 64 S. W. 774; Henen v. Baltimore & O. R. Co., 17 W. Va. 881. It was held, upon a record showing that a petition and bond were filed in the State court, and that subsequently a motion was made to strike the petition from the files, but not showing that any action was ever had on such motion, although other entries were afterwards made in the cause; that it could not be assumed that the petition and bond were never presented to the State court for approval. Probst v. Cowen, 91 Fed. 929.

47 Taylor v. Shew, 54 N. Y. 75.

48 Fitz's Syndic v. Hayden (Louisiana), 4 Mart. (N. S.) 653; Bell v. Lycoming Fire Ins. Co. (New York), 3 Hun 409, 6 Thomp. & C. 54.

49 Fiske v. Union Pac. R. Co. Fed. Cas. No. 4,827 (6 Blatchf. 362); Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods 683); Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284; Mutual Life Ins. Co. v. Langley, 145 Fed. 415.

50 Removal Cases, 100 U. S. 457, 25 L. ed. 593.

51 Cooke v. Seligman, 7 Fed. 263, 266.

52 Chambers v. McDougal, 42 Fed. 694.

The presence of the defendant in court at the time when the bond is presented is unnecessary;[53] and if the surety is present, the bond itself need not be presented to the State Court, but may be filed after his acceptance.[54]

It has been held that the State court cannot reject a bond because of a technical objection, without affording the applicant an opportunity to correct the error;[56] but that the court need not postpone the trial in order to allow a party time to amend his bond.[57]

The penal sum named in the bond is a penalty, and not liquidated damages.[58] The damages for which the sureties are liable cannot exceed the costs awarded upon the remand.[59]

No suit can be brought thereupon until after the cause has been remanded. A dismissal of the case that has been removed, upon a failure of the defendant to appear and put in special bail, will prevent a suit against the surety.[60] It has been held that, in the absence of any stipulation in the removal bond that judgment may be entered thereupon in case of a breach, without the necessity of any new action, no such judgment can be entered, and the surety is not liable until after judgment in an independent suit;[61] but that the District Court of the United States, upon a remand, has jurisdiction to enter judgment for costs, including the attorney's docket fee, against the plaintiff.[62]

§ 548. Order of State court upon removal. No order of the State court is necessary upon a removal.[1] Such orders have, however, been often made. It has been held that such an order,

53 Brown v. Crippin (Virginia), 4 Hen. & M. 173.

54 Tunstall v. Parish of Madison, 30 La. Ann. 471.

56 Taylor v. Shew, 54 N. Y. 75; Grow v. Wilman, 3 N. Y. St. Rep. 281; Chase v. Erhardt, 198 Fed. 305.

57 Harrold v. Arrington, 64 Tex. 233.

58 Henry v. Louisville & N. R. Co., 91 Ala. 585, 8 South 343.

59 Hale v. Fallon, 4 N. J. L. J. 308.

60 Welch v. Thorn, 16 La. 188.

61 Colburn v. Hill, 103 Fed. 340, 43 C. C. A. 253.

62 Pellett v. Great Northern Ry. Co., 105 Fed. 194.

§ 548. 1 Insurance Co. v. Dunn, 19 Wallace 214. 22 L. ed. 68; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827 (6 Blatchf. 362); Hatch v. Chicago, R. I. & P. R. Co., Fed. Cas. No. 6,204 (6 Blatchf. 105); Commercial & Sav. Bank v. Corbett, Fed. Cas. No. 3,057 (5 Sawy. 172); Petrie v. Pennsylvania R. Co., Fed. Cas. No.

upon a petition which set forth the jurisdictional facts, should not be subsequently set aside by the court that made it.[2] An order by a State court denying the prayer for a removal was said to be a breach of judicial comity.[3] Such an order is always disregarded by the Federal courts, which considers the question *de novo,* upon a motion for a remand.[4]

§ 548a. Practice upon removal for fraudulent joinder of parties. A petition for removal because of the fraudulent joinder of parties should be verified [1] or supported by an affidavit.[2] It should show that there could be a removal if the petitioner were the sole defendant and then set forth the facts showing the fraudulent joinder.[3] It must allege facts and not con-

11,040*a*; Wilson v. Western Union Tel. Co., 34 Fed. 562; La Page v. Day, 74 Fed. 977; Eisenmann v. Delama Gold Min. Co., 87 Fed. 248; Mutual Life Ins. Co. v. Langley, 145 Fed. 415; City of Montgomery v. Postal Telegraph-Cable Co., 218 Fed. 471; State Improvement-Dev. Co. v. Leininger, 226 Fed. 884; Nelson v. Black Diamond Mining Co., 237 Fed. 264; Muir v. Louisville & N. R. Co., 247 Fed. 885; Duff v. Hildreth, 67 N. E. 356, 183 Mass. 440; Le Roux v. Bay Circuit Judge, 4 Mich. 189, 9 N. W. 154; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Scheffer v. National Life Ins. Co., 25 Minn. 534; Richards v. Modern Woodmen of America, 85 N. W. 999, 14 S. D. 440.

2 State Improvement-Dev. Co. v. Leininger, 226 Fed. 884; Chamberlain v. American Nat. Life & Tr. Co., 11 Hun (N. Y.) 370.

3 Chambers v. McDougal, 42 Fed. 694, 696.

4 Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; and authorities cited, *infra,* § 556.

§ 548a. 1 Jud. Code, § 29, 36 St. at L. 1087; Kansas City Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 303, 34 L. ed. 963, 964. *Supra,* § 545.

2 Offner v. Chicago & E. R. Co., C. C. A., 148 Fed. 201, 203.

3 Offner v. Chicago & E. R. Co., C. C. A., 148 Fed. 201 (where the allegations that one of the defendants "was not a party to the alleged negligence" and "was fraudulently joined as a party defendant, solely for the purpose of defeating your petitioner's right to remove this cause," were held to be *insufficient,* since the declaration charged facts sufficient to establish a cause of action against that defendant); Clark v. Chicago, R. I. & P. Ry. Co., 194 Fed. 505, holding that the petition should also aver that the plaintiff knew when he joined a resident defendant, or had then sufficient reason in law to know, that he had no cause of action against the latter. Eastin & Knox v. Texas & P. Ry. Co. (Texas), 92 S. W. 838; reversing 89 S. W. 440. But see Donovan v. Wells, Fargo & Co., C. C. A., 169 Fed. 363. The following allegations have been held to be *sufficient:* "As to Wettengel, the citizen of

Missouri, it was alleged in the removal petition that he was not, at the time of the accident or prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the petitioner in respect to his duties, as charged in the complaint, and, after stating that Schenck, like the defendant corporation, was a nonresident of Missouri and a citizen of another State, charged that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that the plaintiff well knew, at the time of the beginning of the suit, that Wettengel was not charged with the duties aforesaid, and that he was joined as a party defendant to prevent the removal of the cause and not in good faith." Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 180, 51 L. ed. 430, 433. "That the defendant Strause was at the time of the injury in question an employe of the petitioner, and had nothing whatever to do with the inspection or other control over the engine of which the plaintiff complains, and that the duties of said Strause were those of a yard master—confined exclusively to the making up of trains; and that said Strause was joined as a co-defendant for the sole purpose of avoiding and defeating the jurisdiction of the United States court, and to fraudulently deprive the petitioner of the right of removal." Kelly v. Chicago & A. Ry. Co., 122 Fed. 286, 289. "Your petitioner further says: that in this suit plaintiff has fraudulently, wrongfully, improperly, and illegally joined as co-defendant one George Coffman, who is alleged by plaintiff in his petition to be a citizen and resident of the State of Kentucky; and your petitioner says that George Coffman was fraudulently, wrongfully, improperly and illegally joined as a co-defendant in this suit because of the alleged fact, if it is a fact, that said George Coffman is a citizen and resident of the State of Kentucky, for the sole purpose of defeating the jurisdiction of the United States court. Your petitioner says that it denies that the said George Coffman is a citizen and resident of the State of Kentucky, and says that George Coffman has never been served with summons herein, and that it is not the purpose or intent of the plaintiff to prosecute the action in good faith against the said George Coffman, but that the said George Coffman was made a party defendant herein for the sole purpose and reason of attempting to defeat the removal of this cause to the Circuit Court of the United States, and to defeat the jurisdiction of the said Circuit Court of the United States; and your petitioner further says that the said George Coffman did not in any manner or degree contribute to the death or injury of

clusions of law.[4] The description of the joinder as "fraudulent"[5] or a mere denial of joint negligence alleged in the complaint is insufficient.[6]

Such a petition will justify a remand unless the plaintiff by a verified pleading traverses the allegations concerning fraud or offers evidence to the contrary.[7] When there is a proper traverse by the plaintiff, the burden of proof is upon the defendant to

said plaintiff's decedent through his own negligence, or through any joint negligence with this petitioner. Your petitioner further says that it is the only defendant in court in this action, and that said plaintiff at the time of filing his said petition well knew that the said George Coffman was not guilty with the petitioner of any joint negligence, and that said George Coffman is a sham defendant, and is so made a defendant for the sole and only purpose of fraudulently, improperly, and illegally defeating the removal of this case to the United States court, and defeating the jurisdiction of the United States court in this cause as aforesaid." Dishon v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 133 Fed. 471, 473; Gibson v. Chesapeake & O. Ry. Co., C. C. A., 215 Fed. 24.

4 Offner v. Chicago & E. R. Co., C. C. A., 148 Fed. 201. See *supra*, § 540.

5 Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146; Russell v. Champion Fibre Co., C. C. A., 214 Fed. 963; Martin v. Matson Nav. Co., 239 Fed. 188.

6 Southern Railway v. Lloyd, 239 U. S. 496; Thresher v. Western Union Tel. Co., 148 Fed. 649. *Contra*, Landers v. Felton, 73 Fed. 311. It has been held that a denial, in the petition for a removal, of the joint negligence alleged in the complaint, raises no issue of fraudulent joinder; although the petition contains the further allegation that the plaintiff knew that the two defendants were not jointly operating the car, upon which the plaintiff received the injury for which he sued. There, the plaintiff filed affidavits denying these allegations in the petition. Shane v. Butte Electric Ry. Co., 150 Fed. 801.

7 Goodnow v. Litchfield, 47 Fed. 753; Durkee v. Illinois Cent. R. Co., 81 Fed. 1; Free v. Western Union Tel. Co., 122 Fed. 309; Bryce v. Southern Ry. Co., 122 Fed. 709; Weaver v. Northern Pac. Ry. Co., 125 Fed. 155 (where an affidavit of the plaintiff's counsel contradicting some of the facts in the petition was held to be insufficient); Dishon v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 133 Fed. 471; Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908; Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., C. C. A., 153 Fed. 122. See Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Hunter v. Illinois Cent. R. Co., C. C. A., 188 Fed. 645.

establish the fraud [8] unless the complaint fails to show a joint cause of action against the defendant.[9]

The issue of fraud will be tried in the Federal court [10] but the inquiry therein will not go to the extent of the trial of the whole case upon the merits.[11]

The motive which prompted the joinder is immaterial even though it is conclusively proved that it was for the purpose of preventing removal.[12] It is insufficient to prove that the defendant whose presence prevents the removal is not pecuniarily responsible.[13]

If there is reasonable doubt concerning the joint liability of the defendant the motion to remand will usually be denied.[14] If they are manifestly not jointly liable it must be granted.[15] Where it is clearly proven that the local defendant had no connection with the transaction which is the foundation of the suit, a remand may be denied although there is no evidence that the plaintiff knew of this party's true relation to the transaction.[16] "Even in cases where direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach." [17] The fact that plaintiff has previously sued the defendant seeking the removal alone upon the same cause of action, and that upon the removal of the former

8 Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956; Clark v. Chicago, R. I. & P. Ry. Co., 194 Fed. 505; Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004; Welch v. Cincinnati, N. O. & F. P. Ry. Co., 177 Fed. 760; Foster v. Coos Bay Gas & El. Co., 185 Fed. 979.

9 Ibid.; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654.

10 Clark v. Chicago, R. I. & P. Ry. Co., 194 Fed. 505, *supra*, § 556.

11 Ibid.

12 Illinois Cent. R. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; McAllister v. Ches. & Ohio Ry. Co., 243 U. S. 302; Hukill v. Maysville & B. S. R. Co., 72 Fed. 745, 750, quoted *supra*, § 540.

13 Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; *supra*, § 540.

14 Alabama Great So. Ry. Co. v. Thompson, 200 U. S. 206, 217, 50 L. ed. 441, 447; Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184, 56 L. ed. —; *supra*, § 540.

15 Reinartson v. Chicago Great Western Ry. Co., 174 Fed. 707; Macutis v. Cudahy Packing Co., 203 Fed. 291; *supra*, §§ 540, 540a.

16 Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 51 L. ed. 430, quoted *supra*, § 540.

17 Ibid.

suit he discontinued this and brought the present one, joining another defendant, is a circumstance tending to show that the joinder is fraudulent;[18] but when the fraud was denied, this was held not to be sufficient in the absence of other evidence to justify a removal.[19]

§ 549. Removal for prejudice or local influence. The practice on the removal of cases for prejudice or local influence is prescribed by the Judicial Code as follows: "Where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any District Court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff, that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the District Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction

[18] Arrowsmith v. Nashville & D. R. Co., 57 Fed. 165; Warax v. Cincinnati, N. O. & T. P. Ry. Co., 72 Fed. 637, 640; Evans v. Sioux City Service Co., 206 Fed. 841.

[19] Warax v. Cincinnati, N. O. & T. P. Ry. Co., 72 Fed. 637, 640; Chesapeake, O. & S. W. R. Co. v. Hendricks, 88 Tenn. (4 Pickle), 710, 13 S. W. 696, 14 S. W. 488. See § 556, *infra*.

of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.'' [1]

§ 549. [1] Jud. Code, § 28, 36 St. at L. 1087 re-enacting 18 St. at L. 470, § 2; as amended by 24 St. at L. 552, and 25 St. at L. 433. These acts have repealed U. S. R. S., § 639. Baltimore & O. R. Co. v. Bates, 119 U. S. 464, 467, 30 L. ed. 436, 438; *Re* Pennsylvania Co., 137 U. S. 451, 34 L. ed. 738; Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1080; Hanrick v. Hanrick, 153 U. S. 192, 197, 38 L. ed. 685. See Foster's Federal Judiciary Acts, pp. 35, 56-58. Prejudice or local influence has been thus defined: ''An opinion or decision of mind formed without due examination; prejudgment; a bias, or leaning towards one side or the other of a question from other considerations than those belonging to it; and unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge. It is in this general sense that the removal acts use the word 'prejudice,' and it cannot be properly applied to the solemn judgment of the highest court of a State, on the mere ground that said judgment differs from that of the Supreme Court of the United States on the same question. The term 'local influence,' if not synonymous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of one side or against the other, which will prevent the latter from obtaining justice in the State courts. The 'prejudice or local influence' which the law meant to make the grounds of removal may relate to the person of the litigant or the subject-matter of the litigation; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility, in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice.'' Jackson, J., in Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843. ''Merely because a judge is to be elected by the people is no reason why this removal act of Congress should be enlarged and extended to remedy any evil that may be thought to exist in that regard.'' Hammond, J., in Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4, 7. ''The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against the party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community. Then there is the element of local influence, which implies that in a controversy between a stranger and resident parties having the power through wealth, business, or social relations, or personal popularity, or all combined, to direct or materially aid in the direction of political parties, and control the selection of public officers and the distribution of party emoluments, the former may be at a great disadvantage, if not powerless to assert his right.'' Deady, J., in

Neale v. Foster, 31 Fed. 53, 55. "We think it reasonable, under a statute in terms framed to protect nonresident litigants from injustice arising from prejudice and local influence, to presume that judges, dependent for their election and continuance in office upon the suffrages of a community, are disqualified to hear and determine a legal controversy between a nonresident and that community, when it is clearly shown that the community has prejudged the case, and would be likely to visit the judges, in case of an adverse decision, with its ill will." Taft, J., in Detroit v. Detroit City Ry. Co., 54 Fed. 1, 19. Proceedings at a public meeting of citizens of the community, where the defendant was denounced, and its attorney interrupted and shouted down a message of the mayor, in which he criticised the defendant, are also evidence of prejudice and local influence. Detroit v. Detroit City Ry. Co., 54 Fed. 1, 13, 14. The following evidence was held to be insufficient; that defendant had no acquaintance in the county in which the State court would be held, that plaintiff was well-known there as a lawyer and a politician, having lived and practiced law at the county seat for many years, and having been a candidate for the office of State Attorney-General; Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Dennison v. Brown, 38 Fed. 535; Amy v. Manning, 38 Fed. 536, s. c., 38 Fed. 868; P. Schwenk & Co. v. Strang, 59 Fed. 209; in a suit by a foreign corporation, that the defendant, who is a resident of the county, had a large and influential business acquaintance in that and the adjoining counties, and that such county and the adjoining counties had had more or less litigation in their corporate capacities, which had excited a prejudice against nonresident foreign corporations; Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 885, that the county newspapers had denounced the defendant to alleged fraudulent transactions, and that the Judge of the Court of Common Pleas, when a motion was heard for the appointment of a receiver of the defendant, had said: "We will see to it that they are not allowed to carry this property out of the country." Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4.

Removals were allowed in the following cases: Where the affidavits averred, substantially, the existence of a widespread prejudice among the citizens of the county against the defendant, a general sympathy for the plaintiff, and particularly for his father, both of whom had many friends throughout the county, and had been well-known business men, and were generally supposed to have been ruined financially through their relations with the defendant company; that the case was frequently talked about, opinions expressed in favor of the plaintiff and against the defendant; that a desire existed that the plaintiff should win his case. And the affidavits also expressed the opinion that the defendant could not, under the circumstances, obtain a fair and impartial trial in the county." Smith v. Crosby Lumber Co., 46 Fed. 819, 820; affirmed without discussing this question, C. C. A., 51 Fed. 63. Where the affidavit stated in substance: "that the Chattanooga Agricultural Works is a corporation organized

in Tennessee to purchase the property of the William Anson Wood Mower & Reaper Company of Youngstown, Ohio, and it did purchase it, and that petitioners, as trustees for citizens of Ohio, and in their individual right, own a majority of the stock in the agricultural works; that many stockholders at Chattanooga are refusing to pay for the stock subscribed, because, as they say, the property of said mower and reaper company was valued at a fraudulent and unreasonable valuation, and the Chattanooga stockholders were thus defrauded by the Youngstown people; that much talk of this kind has been indulged in by those refusing to pay, and much local prejudice has been created thereby and exists against the Youngstown, Ohio, stockholders; that some of the resident stockholders have been sued for their subscriptions, and that they make the defense of fraud and misrepresentation and over-valuation, and, unwilling to leave the controversy to the decision of the judge, demand a jury to try the issue; that these issues are prepared by one of the leading solicitors in the present bill, and affiant is informed and believes that it is intended to ask for a jury in this case; that a jury will be demanded in order to appeal to their prejudice against corporations generally, as well as to their prejudices against the non-residents in this controversy with the resident stockholders.'' No part of this affidavit, except that in relation to the jury that would be called, was stated on information and belief. The record showed that the resident stockholders consisted of ''a large number of leading and influential men in this locality, representing various professions and lines of trade, business and manufacture.'' The bill further showed ''from its general scope and many of its allegations and expressions, an inclination or disposition to appeal to prejudice as against the non-resident stockholders.'' Hall v. Chattanooga Agricultural Works, 48 Fed. 599, 603. Where it appeared that a few years before, ''there was a bitterly contested litigation between the city of Durham and the Richmond & Danville Railway Company, of which the Southern Railway Company is the successor; that during this litigation there was almost a riot, and several of the servants of the company were arrested in consequence of this litigation; and that litigation still exists between the Southern Railway Company and the city of Durham.'' Herndon v. Southern R. Co., 76 Fed. 398. Where the affidavits showed that there had been public denunciation of the defendant and his associates, on account of the transactions out of which the case arose; and that there had been, and still was, in the minds of a great number of citizens of the city, a strong belief that the people of the city had been defrauded in these transactions and a disposition to hold the defendant responsible therefor; and the amount at stake in the litigation was so large, in proportion to the amount of taxes annually collected in the locality, that it was argued that every taxpayer of the city and county had a direct pecuniary interest, sufficient in amount to create a presumption of bias. Tacoma v. Wright, 84 Fed. 836. ''It is a singular fact that the best of men

A suit to which an alien,[2] or a citizen of a Territory or of the District of Columbia,[3] is a party, cannot be thus removed.

A plaintiff cannot remove a case for prejudice or local influence;[4] except, perhaps, when a counterclaim has been pleaded by the defendant, in which case, when the plaintiff was a citizen of another State and such defendant a citizen of the State where the suit was brought, it was held that the former might remove the same.[5] Upon a taxpayer's appeal from the decision of a board, allowing a claim against a county, the claimant was considered to be the plaintiff, and was, consequently, denied the right of removal.[6]

Any one of several defendants; who is a citizen and resident of another State, may remove the case for prejudice or local influence;[7] but only when all the parties on his side of the controversy are citizens of a different State from that of all the plaintiffs,[8] and when all the plaintiffs are citizens of the State when the suit is brought.[9] A defendant, who is a citizen

are often unconscious of any bias or prejudice, which shapes their views, and are as sincere and conscientious in denying the existence of prejudice as men can be.'' Jones, J., in Montgomery County v. Cochran, 116 Fed. 985, 1000; reversed on another point. Cochran v. Montgomery County, 199 U. S. 260, 50 L. ed. 182. *Cf.* § 372, *supra.*

2 Cohn v. Louisville, N. O. & T. R. Co., 39 Fed. 227; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473.

3 Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473.

4 Campbell v. Collins, 62 Fed. 849.

5 Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 578; Walcott v. Watson, 46 Fed. 529. But see *supra,* § 542.

6 Tullock v. Webster County, 40 Fed. 706; Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; *supra,* § 542.

7 Cochran v. Montgomery County, 199 U. S. 260, 273, 50 L. ed. 182, 188; Parker v. Vanderbilt, 136 Fed. 246.

8 Cochran v. Montgomery County, 199 U. S. 260, 273, 50 L. ed. 182, 188; reversing Montgomery County v. Cochran, 116 Fed. 985; and overruling a number of decisions of the lower courts to the contrary. Anderson v. Bowers, 43 Fed. 321; Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676; Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co., 47 Fed. 836; Terre Haute v. Evansville & T. H. R. Co., 106 Fed. 545; Campbell v. Milliken, 119 Fed. 982; Weldon v. Fritzlen, 128 Fed. 608, 614 (reversed, Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650). But see Parker v. Vanderbilt, 136 Fed. 246.

9 Thouron v. East Tennessee, V.

of another State, cannot remove a cause because of prejudice or local influence, in favor of other defendants, citizens of the State where the suit is brought, with whom he has a controversy, when he and some of the plaintiffs are citizens of the same State.[10] It seems, that an intervenor may remove a case for prejudice or local influence under proper circumstances;[11] but not unless all the parties on his side of the controversy are citizens of a different State from all those upon the other.[12]

The difference of citizenship must have existed at the time of the commencement of the suit as well as when the petition is filed.[13] It is doubtful whether the restriction as to suits by assignees applies to removals for prejudice or local influence.[14] A case in which the value of the matter in dispute, exclusive of interests and costs, does not exceed three thousand dollars, cannot be removed on account of prejudice or local influence.[15]

It is not necessary that the Federal court should be satisfied from the evidence presented, that the judge of the court in which the case was begun, and all the other judges of the State courts, who can be called to hear and decide the case, are so far affected by prejudice and local influence as to be incapable of rendering a fair decision.[16] Where the defendant has the right to move

& G. Ry. Co., 38 Fed. 673; Rike v. Floyd, 42 Fed. 247; Niblock v. Alexander, 44 Fed. 306; Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836; Gann v. Northwestern Ry. Co., 57 Fed. 417.

10 Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685.

11 *Re* Iowa & M. Construction Co., 10 Fed. 401, 3 McCrary 310 (under U. S. R. S., § 639).

12 Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co., 47 Fed. 836; Martin v. Coons, 24 La. Ann. 169.

13 Young v. Ewart, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352; Goodnow v. Grayson, 15 Fed. 1 (5 McCrary 16); Miller v. Chicago, B. & Q. R. Co., 17 Fed. 97 (3 McCrary 460); Frelinghuysen v. Baldwin, 19 Fed. 49; Schnadig v. Fleseher, 29 Fed. 465; Martin v. Coons, 24 La. Ann. 169.

14 Under the statute of 1867, it was held that it did not. Barclay v. Levee Com'rs, Fed. Cas. No. 977 (1 Woods 254). See Claflin v. Commonwealth Ins. Co., 110 U. S. 81. But see *Re* Pennsylvania Co., 137 U. S. 451, 456, 34 L. ed. 738, 741.

15 *Re* Pennsylvania Co., 137 U. S. 451, 457, 34 L. ed. 738, 741.

16 Tacoma v. Wright, 84 Fed. 836. See also Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L. R. A. 65; Cooper v. Richmond & D. R. Co., 42 Fed. 697, 8 L. R. A 366; Walcott v. Watson, 46 Fed. 529. "It

for a change of venue, and it does not appear that the same prejudice or local influence exists in the counties to which the change can be made,[17] or that the motion for such change will

seems conclusively to follow, from the reasons of the removal statute, that the local judge's fitness was never intended to be inquired into on an application of this sort, and that his uprightness, firmness, or ability, or the reverse, cannot constitute an element of the 'prejudice or local influence' against which the legislation sought to guard. The plain policy of the constitution is that, when 'prejudice or local influence' is found to exist, the local judge, whether pure and fearless or impure and weak, shall not be put to the test of breasting such obstacles to justice, if the nonresident citizen properly asks for removal of the cause from the State court. It is not for the Federal court to inquire into the actual effect of 'prejudice or local influence' upon the local judge. The nonresident litigant defendant may do that. If he is not satisfied, he has a remedy by asking for removal. When the matter is brought before the Federal court, the question is not what are the qualities of the local judge, nor how far he has been affected by 'prejudice or local influence,' but whether they exist, and he is exposed to them. If these influences exist, and he is exposed to them, and they are such as naturally might tempt or influence him to favor the resident citizen in his court, the case is made out, in the constitutional sense, where the nonresident is not 'able to obtain justice' in such State court, regardless of the ability of the local judge to surmount the 'local influences,' or how they actually affect him. 'Justice in cases of this sort should not only be above reproach, but beyond all suspicion.'" Jones, J., in Montgomery County v. Cochran, 116 Fed. 985, 993; reversed on another point, Cochran v. Montgomery County, 199 U. S. 260, 50 L. ed. 182. Citing Story on the Constitution, Vol. II, § 1691. The fact that the decisions of the State courts upon the question in controversy differ from those of the Federal courts does not constitute prejudice or local influence. Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836; *Re* Breckenridge, 31 Neb. 489, 48 N. W. 142. It was held, in Nebraska, that the decisions of the State courts, refusing to allow attorneys' fees to the plaintiff, in an action upon a mortgage or promissory note, which provided for such an allowance, did not constitute prejudice or local influence; and that an attorney, who made a general affidavit of prejudice or local influence, with no other support than this, should be disciplined by a reprimand. *Re* Breckenridge, 31 Neb. 489, 48 N. W. 142. The fact that the grand jury of a county recommended that one of the defendants make no opposition to the suit is strong evidence of local prejudice. Montgomery County v. Cochran, 116 Fed. 985, 998; reversed on another point. Cochran v. Montgomery County, 199 U. S. 260, 50 L. ed. 182.

17 Walcott v. Watson, 46 Fed. 529, 532.

be denied;[18] it seems that there can be no removal.[19] Where the judge, who would regularly sit in the counties where the prejudice and local influence were shown to exist, was authorized to hold court in any county of the State, and might have presided at the trial, in any county to which the venue could be changed; it was held that the case could be removed.[20] The existence of the right of appeal upon the facts to an unprejudiced State court of review is no objection to the removal.[21]

The waiver of a jury trial, and the fact that the case will be tried before a judge alone, does not prevent a removal upon this ground;[22] nor does the fact that the Federal judge, who

18 Smith v. Crosby Lumber Co., 46 Fed. 819, 824.

19 Southworth v. Reid, 36 Fed. 451; Rike v. Floyd, 42 Fed. 247, 248; Board of Water Com'rs v. Robbins, 125 Fed. 656. In Robinson v. Hardy, 38 Fed. 49; the affidavit in connection with the false imprisonment alleged: That there had been four long jury trials involving the same matters before the Circuit Court of Cook County, a hearing before a justice of the peace, the grand jury, the appellate court, and the directors of the Board of Trade; that the case involved the manner of doing business of the Board of Trade; that it had caused a great deal of talk around the courthouse, and had become widely known; that many warehousemen, elevator men, brokers, commission men, and many thousands of people in and around Cook County had discussed it; and that through the influence of plaintiff and his friends, defendants believed a prejudice had grown up against them, who were non-residents. It was held that, as the Illinois statute provides that a cause may be removed for local prejudice to some other court of competent jurisdiction in some other convenient county, to which there is no valid objection, the existence of prejudice was not sufficiently shown to justify a removal to the Federal court, since the affidavit showed that the prejudice was confined mainly, if not entirely, to Cook County.

Where the right to a change of venue was in the discretion of the State court, unless there was proof that the local judges were actually prejudiced or financially interested, a removal was ordered. Tacoma v. Wright, 84 Fed. 836. In Detroit v. Detroit City Ry. Co., 54 Fed. 1, 13, there was no right to a change of venue, but the local circuit judge had the power to invite a judge from another circuit to hear the case. This was held not to cure the local prejudice.

20 Walcott v. Watson, 46 Fed. 529, 532.

21 Detroit v. Detroit City Ry. Co., 54 Fed. 1, 14.

22 Montgomery County v. Cochran, 116 Fed. 985, 993; reversed on another point, Cochran v. Montgomery County, 199 U. S. 260, 50 L. ed. 182.

will try the cause, is a member of the community where the prejudice or local influence exists.[23]

The removal may be had at any time before the trial of the suit in the State court.[24] What constitutes a trial has been previously explained.[25]

The petition and other motion papers upon a removal for prejudice or local influence must be presented to the Federal court and filed in the clerk's office of the same.[26] It is the better practice to file also a certified copy thereof in the office of the clerk of the State court.[27]

The motion papers must contain, in a verified petition or an affidavit, a statement of the facts which shows that the prejudice or local influence exists. A statement in the language of the statute is insufficient.[28] "The amount and manner of proof required in each case must be left to the discretion of the court itself."[29] An affidavit containing nothing but general allegations, in the language of the statute has been held to be insuf-

23 Montgomery County v. Cochran, 116 Fed. 985, 1001; reversed on another point, Cochran v. Montgomery County, 199 U. S. 260, 50 L. ed. 182. See also Detroit v. Detroit City Ry. Co., 54 Fed. 1, 19.

24 25 St. at L. 433, § 2.

25 *Supra*, § 543.

26 City of Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; Malone v. Richmond & D. R. Co., 35 Fed. 625, 628; Kaitel v. Wylie, 38 Fed. 865; Bonner v. Meikle, 77 Fed. 485; Rome & C. Const. Co. v. Smith, 84 Ga. 238, 10 S. E. 728; Mason v. Interstate Consol. St. Ry. Co., 170 Massachusetts 382, 49 N. E. 645; Blackwell v. Lynchburg & D. R. Co., 107 N. C. 217, 12 S. E. 133; Baird v. Richmond & D. R. Co., 113 N. C. 603, 18 S. E. 698; Williams v. Southern Bell Telephone & Telegraph Co., 116 N. C. 558, 21 S. E. 298. *Contra*, Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Id., 34 Fed. 225 (holding that the affidavit may be filed in the State court and a certified copy in the Circuit Court of the United States).

27 Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Baird v. Richmond & D. R. Co., 113 N. C. 603, 18 S. E. 698.

28 *Re* Pennsylvania Co., 137 U. S. 451, 34 L. ed. 738; Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Id., 34 Fed. 225; Malone v. Richmond & D. R. Co., 35 Fed. 625; Goldworthy v. Chicago, M. & St. P. R. Co., 38 Fed. 769; Amy v. Manning, 38 Fed. 536; s. c., 38 Fed. 868; Hakes v. Burns, 40 Fed. 33; Minnick v. Union Ins. Co., 40 Fed. 369; Hall v. Chattanooga Agricultural Works, 48 Fed. 599; P. Schwenk & Co. v. Strang, C. C. A., 59 Fed. 209; Collins v. Campbell, 62 Fed. 850.

29 *Re* Pennsylvania Co., 137 U. S. 451, 457, 34 L. ed. 738, 741.

ficient.[30] An affidavit was held to be sufficient, which averred the prejudice and local influence positively, and then alleged upon information and belief the facts which were evidence thereof.[31] The affidavit should show that the same prejudice or local influence exists in all the counties in the State to which the venue could be changed.[32] The papers should show that the necessary difference of citizenship existed at the time when the suit was begun;[33] and also at the time when the application is made.[34] Under the Revised Statutes, an affidavit, sworn to before a suit was brought, which correctly described the case by its title and by the number subsequently given thereto was held to be sufficient.[35]

It has been held: that the petition may be verified by an agent of the petitioner; and that the petitioner's own affidavit is not required when the facts are proved by the affidavits of others,

30 Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Amy v. Manning, 38 Fed. 536; s. c., 38 Fed. 868; Niblock v. Alexander, 44 Fed. 306; P. Schwenk & Co. v. Strang, 59 Fed. 209. See *Re* Pennsylvania Co., 137 U. S. 451, 453, 34 L. ed. 738, 739; Collins v. Campbell, 62 Fed. 850. *Contra,* Cooper v. Richmond & D. R. Co., 8 L.R.A. 366, 42 Fed. 697; Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 841.

31 Detroit v. Detroit City Ry. Co., 54 Fed. 1, 13.

32 Southworth v. Reid, 36 Fed. 451; Robison v. Hardy, 38 Fed. 49; Board of Water Com'rs v. Robbins, 125 Fed. 656; Parker v. Vanderbilt, 136 Fed. 246.

33 Young v. Ewart, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352; Miller v. Chicago, B. & Q. R. Co., 17 Fed. 97 (3 McCrary 460); Frelinghuysen v. Baldwin, 19 Fed. 49; Schnadig v. Fleseher, 29 Fed. 465; Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co., 47 Fed. 836; Martin v. Coons, 24 La. Ann. 169.

34 Cochran v. Montgomery County, 199 U. S. 260, 273, 50 L. ed. 182, 188; reversing Montgomery County v. Cochran, 116 Fed. 985; and overruling a number of decisions of the lower courts to the contrary. Rike v. Floyd, 42 Fed. 247; Anderson v. Bowers, 43 Fed. 321; Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676; Terre Haute v. Evansville & T. H. R. Co., 106 Fed. 545; Campbell v. Milliken, 119 Fed. 982; Weldon v. Fritzlen, 128 Fed. 608, 614 (reversed Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650).

35 Canal & C. Sts. R. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. ed. 226. When the date of the affidavit was more than a year prior to its presentation to the court, it was held that it would not be presumed that the local prejudice still existed. Metropolitan Life Ins. Co. v. Ethier, 44 Mich. 144, 6 N. W. 201, 369.

who state that they have personal knowledge thereof;[36] although one contains the additional averment, "that affiant knows the facts of such prejudice and local influence, and makes this affidavit from such knowledge."[37] The petition may be verified and an affidavit made by any person acquainted with the facts. The oath of the petitioner is not required.[38] If made without the State, it is the proper practice to have the proof of the authority of the officer taking the same authenticated, in the manner that is required by the State statutes.[39] If made within the State, it has been held that the State statute, concerning the form of the certificate to the jurat by the officer, must be followed.[40]

Notice of the application must be given to the plaintiff.[41] It is the usual and the better practice, to allow a hearing to both sides, upon the application for the removal for prejudice or local influence.[42]

It has been held that the court may, in its discretion, refuse to allow the affidavit of the defendant to be controverted.[43]

36 Parker v. Vanderbilt, 136 Fed. 246.

37 Niblock v. Alexander, 44 Fed. 306.

38 Dennis v. Alachua County, 3 Woods 683, Fed. Cas. No. 3,791; Bonner v. Meikle, 77 Fed. 485.

39 Bowen v. Chase, Fed. Cas. No. 1,720 (7 Blatchf. 255).

40 Sutherland v. Jersey City & B. R. Co., 22 Fed. 356. Jud. Code, § 29, 36 St. at L. 1087.

41 P. Schwenk & Co. v. Strang, 59 Fed. 209, 8 C. C. A. 92; Herndon v. Southern Ry. Co., 73 Fed. 307; Bonner v. Meikle, 77 Fed. 485; Reeves v. Corning, 51 Fed. 774, 776; Malone v. Richmond & D. R. Co., 35 Fed. 625, 629, per Harlan, J. *Contra,* Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L.R.A. 65; Amy v. Manning, 38 Fed. 868, 869; Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535; Reeves v. Corning, 51 Fed. 774; Crotts v. Southern Ry. Co., 90 Fed. 1; Montgomery County v. Cochran, 116 Fed. 985, 990; reversed on another point, 199 U. S. 260, 50 L. ed. 182.

Where a notice was served three days before the appointed time, two weeks additional time was given to the party opposing the removal. Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 578.

42 Reeves v. Corning, 51 Fed. 774, 776; P. Schwenk & Co. v. Strang, C. C. A., 59 Fed. 209.

43 Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L.R.A. 65; Huskins v. Cincinnati, N. O. & T. P. R. Co., 37 Fed. 504, 3 L.R.A. 545; Cooper v. Richmond & D. R. Co., 42 Fed. 697; 8 L.R.A. 366;

When the original application was *ex parte*, the court may, in its discretion, allow a rehearing on affidavits by the plaintiff; but, it has been said, that it ordinarily will refuse a rehearing;[44] "unless it is clearly made to appear that the court has been imposed upon or misled."[45] It has been held that leave to move for a rehearing must be obtained, even though the first application was *ex parte*.[46]

A plea in abatement is not indispensable to raise an issue upon the allegations in the petition.[47] It was held that a plea to the petition, which simply denied the allegations as to the petitioner's belief, but not the allegations as to the existence of prejudice or local influence, did not raise an issue.[48]

An order of the Federal court, granting or denying the application, must be obtained and filed in the State court.[49] The State court does not lose jurisdiction until this is done.[50] An entry of a finding of the jurisdictional facts, in the record of docket or journal of the District Court, is not sufficient.[51]

The transcript, including a copy of the order, must be subsequently filed in the Federal court.[52]

Brodhead v. Shoemaker, 44 Fed. 518, 11 L.R.A. 567; Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535; Reeves v. Corning, 51 Fed. 774. *Contra*, P. Schwenk & Co. v. Strang, C. C. A., 59 Fed. 209; Maher v. Tower Hotel Co., 94 Fed. 225; Ellison v. Louisville & N. R. Co., 112 Fed. 805, 50 C. C. A. 530.

44 Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535; Reeves v. Corning, 51 Fed. 774. *Contra*, Short v. Chicago, M. & St. P. Ry. Co., 34 Fed. 225, 227; Ellison v. Louisville & N. R. Co., C. C. A., 112 Fed. 805.

45 Reeves v. Corning, 51 Fed. 774.

46 Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. 535.

47 Short v. Chicago, M. & St. P. Ry. Co., 34 Fed. 225.

48 County Court of Taylor County v. Baltimore & O. R. Co., 35 Fed. 161.

49 Pennsylvania Co. v. Bender, 148 U. S. 255, 257, 258, 13 S. Ct. 591, 37 L. ed. 441, 442; Tod v. Cleveland & M. V. Ry. Co., 65 Fed. 143, 12 C. C. A. 521.

50 Pennsylvania Co. v. Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod v. Cleveland & M. V. Ry. Co., 65 Fed. 145, 12 C. C. A. 521; Sparkman v. Supreme Council American Legion of Honor, 35 S. E. 391, 57 S. C. 16.

51 Pennsylvania Co. v. Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod v. Cleveland & M. V. Ry. Co., 65 Fed. 145, 12 C. C A. 521.

52 Pennsylvania Co. v. Bender,

When there are two separable controversies in the case, the District Court may remand, to the State court, such one of them as does not affect the defendant who procured the removal.[53] Otherwise, the whole case remains in the Federal court.[54]

The statements in the papers upon the application are privileged and an attorney cannot be punished by a State court for making or presenting them.[55]

§ 550. Removal of suits between citizens of the same State claiming land under grants of different States. The statute regulating the removals of suits in which there is a controversy between citizens of the same State claiming land under grants of different States, is as follows: "If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceed the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform that

148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod v. Cleveland & M. V. Ry. Co., 65 Fed. 145, 12 C. C. A. 521.

53 18 St. at L. 470, § 2, as amended by 24 St. at L. 552 and 25 St. at L. 433. See Whelan v. N. Y., L. E. & W. R. Co., 35 Fed. 849; Haire v. Rome R. Co., 57 Fed. 321, 323.

54 Ibid.

55 *Re* Sherwood (Pa. Jan., 1918), 103 Atl. 42, where the attorney had stated that "the five judges of the Luzerne court are so prejudiced that the defendant could not get a fair trial in our courts," the order of the common pleas suspending the attorney from practice for six months was reversed.

In *Re* Breckenridge, 31 Neb. 489, 48 N. W. 142, an attorney was reprimanded because of statements made by him upon such an application.

he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."[1]

§ 551. Removal of proceedings against officers and soldiers of the United States, court officers, house officers and persons having defenses under the revenue laws. By the Judicial Code, which re-enacts with some alterations, the provision of the Revised Statutes in this respect, "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of

§ 550. [1] Jud. Code, § 30, re-enacting 18 St. at L. 470, § 33, as amended by 25 St. at L. 45. See *supra*, § 50.

the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said District Court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the District Court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or any other process except capias, the clerk of the District Court shall issue a writ of *certiorari* to the State court requiring it to send to the District Court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa,* a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the District Court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa,* to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the District Court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the District Court that no copy of the record and proceedings therein in the State court can be obtained, the District Court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said District Court. On failure of the

plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant."[1]

An indictment against Federal revenue officers for killing a man while enforcing the National Prohibition law[2] may be thus removed.[3]

A receiver is an officer of the court which appointed him and may remove a case under this statute.[4] The phrase "revenue laws" does not extend to an appropriation law.[5] A suit against a naval officer to restrain him from action under a naval appropriation act cannot be removed.[6]

The Reclamation Act of June 17, 1902,[7] is not a revenue law within the meaning of the statute; and a suit against a Federal officer in charge of reclamation work to determine the water rights to a stream,[8] or to enjoin the operation of a canal from which the water percolates on to private property,[9] cannot be removed under this section. An action of libel against individuals cannot be removed by them because they claim that they are revenue officers and made the statements in such capacity.[10]

There can be no removal under the statute of a prosecution for the violation of a State liquor law by the sale of liquor which the Federal Prohibition Commissioner has approved.[11]

The Judicial Code continues, "Whenever a personal action

§ 551. 1 U. S. R. S., § 643, Act of March 3, 1875, ch. 130, § 8, 18 St. at L. 401, Act of Feb. 8, 1894, ch. 25, § 1, 28 St. at L. 36. Act of March 3, 1911, ch. 231, § 33, 36 St. at L. 1097. Act of Aug. 23, 1916, ch. 399, 39 St. at L. 532. Comp. St. § 1015.

2 41 St. at L. 305. *Supra*, § 506q.

3 State of Oregon v. Wood, 268 Fed. 975.

4 Matarazzo v. Hustis, 256 Fed. 882.

5 Underwood v. Dismukes, 266 Fed. 559.

6 Ibid.; State of Oregon v. Wood, 268 Fed. 975.

7 Ch. 1093, 32 St. at L. 388, Comp. St. Supp. 1909, p. 596.

8 Twin Falls Canal Co. v. Foote, 192 Fed. 583.

9 City of Stanfield v. Umatilla River Water Users' Ass'n, 192 Fed. 596.

10 People's U. S. Bank v. Goodwin, 160 Fed. 727. *Cf.* § 34, *supra*.

11 Application of Shumpka, 268 Fed. 686. It was so held before the Eighteenth Amendment of a prosecution under the State Prohibition Law of a man holding a license under the Internal Revenue Laws of the United States. State v. Elder, 54 Maine 381, citing Commonwealth v. Keener, 11 Allen (Mass.) 262.

has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.'' [12]

This does not prohibit the removal of such a suit under the former section.[13]

By the Act of June 4, 1920, providing for the new Articles of War, ''When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the District Court of the United States in the district where the same is pending in the manner prescribed in section 33 of the Act entitled ''An Act to codify, revise, and amend the laws relating to the judiciary,'' approved March 3, 1911, and the cause shall thereupon be entered on the docket of said District Court and shall proceed therein as if the cause had been originally commenced in said District Court and the same proceedings had been taken in such suit or prosecution in said District Court as shall have been had therein in said State court prior to its removal, and said District Court shall have full power to hear and determine said cause.'' [14]

The removal of suits against officers of the United States where the defense depends on the Civil Rights Laws is described in

12 U. S. R. S. § 644, Act of March 3, 1911, ch. 231, § 34, 36 St. at L. 1008, Comp. St. § 1016.

13 Matarazzo v. Hustis, 256 Fed. 882.

14 Article 117, — St. at L. —, Comp. St. § 2308a.

the following section.[15] A petition by revenue officer is sufficient, if it avers, in general language, that the suit or prosecution in the State court, which it describes, was brought against him for and on account of an act done by him in his official capacity under a revenue law of the United States, without specifying the facts.[16] Where, however, the petitioner, in addition to the general averment in the statutory language, sets forth the specific facts of the case, and it appears that they do not fall within the statute, the case will be remanded.[17] The petition need not contain allegations of local prejudice.[18] It should show that no trial had been had in the State court.[19] It may be signed by the District Attorney of the United States when it states that it was presented as the petition of one or more revenue officers.[20] When there are several petitioners, the affidavit may be executed by one of them.[21]

It has been held that the removal may be had when the complaint or information has been filed with a State justice of the peace, and a warrant issued by him in a prosecution for a misdemeanor, which is not the subject of indictment;[22] but otherwise, the removal cannot be had before an indictment or an information in the State court.[23]

The State court does not lose jurisdiction until after service upon it, or its clerk, of the writ of *certiorari* or *habeas corpus cum causa*.[24] An order of the Federal court directing a removal cannot be substituted for these writs, which are specified in the statute.[25] It has been held: that when the petition is

15 *Infra*, § 552.

16 Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Abranches v. Schell, Fed. Cas. No. 21, 4 Blatchf. 256; Illinois v. Fletcher, 22 Fed. 776, 778. See also Kain v. Texas Pac. R. Co., Fed. Cas. No. 7,596; Reding v. Texas & P. R. Co., Fed. Cas. No. 11,630*a*. *Contra*, Salem & L. R. Co. v. Boston & L. R. Co., Fed. Cas. No. 12,249; Skeen v. Huntington, 25 Ind. 510; State of Alabama v. Peak, 252 Fed. 306.

17 Illinois v. Fletcher, 22 Fed. 776.

18 Virginia v. Felts, 133 Fed. 85.

19 State of Oregon v. Wood, 261 Fed. 975.

20 Ibid.

21 Ibid.

22 Virginia v. Bingham, 88 Fed. 561.

23 Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. ed. 386.

24 Virginia v. Paul, 148 U. S. 107, 116, 13 Sup. Ct. 536, 37 L. ed. 386.

25 Virginia v. Paul, 148 U. S. 107, 117, 13 Sup. Ct. 536, 37 L. ed. 386.

filed during vacation, and the clerk is absent, his deputy may issue the proper writ;[26] and that the address of the writ of *certiorari* to the United States marshal of the district, commanding him to make known to the clerk of the State court the removal of the cause, and that such court is required to send a transcript of the record to the Court of the United States, is equivalent to the address of the writ to the State court.[27]

When the officer or other person is under arrest,[28] or is on bail,[29] the writ of *habeas corpus cum causa* should issue. When the defendant has been arrested and has given bail, the writ of *habeas corpus cum causa* may be addressed to the marshal, with a direction that a duplicate be served upon the clerk of the State court;[30] but there is a decision to the effect that, in such a case, when no application for the writ of *habeas corpus cum causa* has been made, the writ of *certiorari* may be issued.[31]

Where there are several clerk's offices in the district, the petition should regularly be filed at the place where the next session of the Court of the United States is to be held; but the filing of the petition in another clerk's office is not a ground for remanding the cause.[32] The truth of the allegations in the petition may be put in issue by any appropriate pleading. The filing of a plea to the jurisdiction is the better practice.[33] It has been held that the issue thus raised should be tried by a jury, subject to the right of the court to direct a verdict, when proper, the burden of proof on the issue resting upon the petitioner.[34]

The State court loses all jurisdiction of the case as soon as compliance has been made with the statutory requirements and the writ of *certiorari* or *habeas corpus com causa* duly

26 North Carolina v. Sullivan, 50 Fed. 593. *Contra*, State v. Sullivan, 110 N. C. 513, 14 S. E. 796.

27 North Carolina v. Sullivan, 50 Fed. 593. *Contra*, State v. Sullivan, 110 N. C. 513, 14 S. E. 796.

28 Virginia v. Felts, 133 Fed. 85.

29 State of Oregon v. Wood, 268 Fed. 975.

30 Virginia v. Felts, 133 Fed. 85.

31 North Carolina v. Sullivan, 50 Fed. 593.

32 Virginia v. Felts, 133 Fed. 85.

33 *Re* Duane, 261 Fed. 242.

34 Virginia v. Felts, 133 Fed. 85.

served.[35] "Any further proceedings, trial, or judgment therein in the State court shall be void." [36]

The writ need not in all respects conform to the writ of *certiorari* at common law. It is sufficient if it informs the State court of proper grounds upon which the Federal District Court assumes jurisdiction and notifies the State court to make return of the record. It need not show that the clerk of the Federal court has adjudged the petition sufficient, nor need it state the grounds of the authority of the Federal court, nor the purpose of the writ.[37]

No order of the State or of the Federal court is necessary for a removal under this statute.[38]

After the removal, it is the duty of the State prosecuting attorney to continue the prosecution, and the duty of the United States District Attorney to defend the suit.[39]

It seems that the indictment is the only record, the procurement of which is necessary, and that it is immaterial whether the original or a certified copy is transmitted.[40]

It has been suggested that, if the petitioner is unable to pay the fees of the clerk of the State court, the best course would be to supply the contents of the indictment by affidavit.[41]

The accused is called upon to answer to the offense as defined by the laws of the State; not to the crime as defined by a Federal statute.[42]

Since the Federal court has no express statutory power to order the payment of witness fees, except in cases to which the United States is a party, special authority to the marshal to pay the fees of defendant's witnesses should be asked from

35 Virginia v. Paul, 148 U. S. 107, 116, 13 Sup. Ct. 536, 37 L. ed. 386; State v. Davis, 12 S. C. 528. *Contra*, State v. Circuit Judge, 33 Wis. 127 (holding that the State court has jurisdiction to determine whether the case falls within the statute).

36 U. S. R. S., § 643; North Carolina v. Kirkpatrick, 42 Fed. 689; State v. Davis, 12 S. C. 528.

37 North Carolina v. Sullivan, 50 Fed. 593.

38 Virginia v. Paul, 148 U. S. 107, 117, 13 Sup. Ct. 536, 37 L. ed. 386.

39 Delaware v. Emerson, 8 Fed. 411.

40 Virginia v. Felts, 133 Fed. 85, 89.

41 Virginia v. Felts, 133 Fed. 85, 89.

42 Georgia v. O'Grady, 3 Woods 496, Fed. Cas. No. 5,352; North Carolina v. Gosnell, 74 Fed. 734.

the Department of Justice, if he desires that they be paid by the Government.[43]

It has been said that, since no procedure is prescribed by the statute, and the offense as charged is against the State law and prosecuted by the State, the State practice should be followed, at least in prosecutions for felony, in all substantive matters, such as the impaneling and charging of the jury, the number of challenges allowed, ruling upon the competency of witnesses, and the confinement of the jurors during the trial.[44]

Where the State fails or refuses to prosecute in such a case, after its removal; it has been said that the proper course is for the Federal court to impanel a jury and direct a verdict of not guilty.[45] It has been said: "Inasmuch as the defendant is prosecuted for an offense against the State law, it follows, in cases of conviction, that the State should execute the sentence. If the verdict and sentence be that the defendant be hanged, the order should direct that he be delivered to the sheriff of the county from which the case came for execution of sentence. If the sentence be imprisonment, the order should direct the marshal to deliver the defendant to the sheriff for transportation to jail or the State penitentiary, as the case may be. If the State authorities decline to receive the convict, an order should be made directing the marshal to liberate him. I perceive no reason why the federal government should execute such sentences. If the jury merely imposes a fine on the defendant, and it is not paid, he should, I think, be delivered to the sheriff of the proper county. If the fine should be forthwith paid by the defendant, I think the clerk of this court should receive it, and pay the sum to the clerk of the court from which the prosecution was removed; reserving, however, so much of the sum as represents the costs in the Federal court, if the costs be adjudged against the defendant."[46]

If the indictment is for any reason dismissed after the removal, the Federal court has no jurisdiction to find a new indictment for the offense against the State law.[47]

[43] Virginia v. Felts, 133 Fed. 85, 95.

[44] Virginia v. Felts, 133 Fed. 85.

[45] Virginia v. Felts, 133 Fed. 85.

[46] Virginia v. Felts, 133 Fed. 85, 95, 96, *Cf.* §§ 340, 343, 523, *supra.*

[47] Bush v. Kentucky, 107 U. S. 110, 115, 27 L. ed. 354, 356.

§ 552. Removal of cases where the defense depends upon the Civil Rights Laws. "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial, into the next District court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleading, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause, and, in case of his default, may order a nonsuit, and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter

in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the District Court, as herein provided, a certificate, under the seal of the District Court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for a removal had been filed."[1] "When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is an actual custody on process issued by said State court, it shall be the duty of the clerk of said District Court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said District Court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."[2]

A suit cannot be removed under the civil rights laws, where the Constitution and laws of the State do not discriminate against the accused, and the only grievance is against wrongs committed by the State judicial tribunals in the administration of a constitutional law.[3] A criminal prosecution cannot be removed because of an unjust discrimination against the defendant before the trial[4] or upon the trial.[5]

A civil action by a State against one of its own citizens cannot be removed under the civil rights laws.[6]

It has been held that the mere presentation of a petition for

§ 552. [1] Jud. Code, § 33, re-enacting U. S. R. S., § 641.

[2] U. S. R. S., § 642.

[3] Virginia v. Rives, 100 U. S. 313, 320, 25 L. ed. 667, 670; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; (1896) Gibson v. Mississippi, 16 U. S. 565, 40 L. ed. 1075; (1906) Kentucky v. Powers, 10 U. S. 1, 50 L. ed. 633; (1890) California v. Chue Fan (C. C.), 42 Fed. 865; (1905) Scott v. R. D. Kinney & Co. (C. C.), 137 Fed. 1009. As to the right of an alien to a jury *de medietate linguæ*, see Commonwealth of Kentucky v. Wendling, 182 Fed. 140.

[4] (1896) Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075; (1890) California v. Chue Fan (C. C.), 42 Fed. 865.

[5] (1896) Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87.

[6] (1883) Alabama v. Wolffe (C. C.), 18 Fed. 836.

a removal, under color of the statute, is not sufficient to arrest the jurisdiction of the State court when the petitioner states no valid ground for the removal.[7] But, the Federal court has the right to re-examine the petition, and if found sufficient, to issue a writ of *certiorari* or other proper writ to remove the cause.[8] It seems that the proper practice is for the State court to order all proceedings suspended, except those which support the removal, until the Federal court has passed upon the question.[9]

After the District Court of the United States has quashed an indictment in such a cause, it has no jurisdiction to find a new indictment; but it may remand the prisoner to the custody of the State court, which may then find a new indictment.[10]

In case of an erroneous removal, under color of this statute, the remedy of the State is an application to the Supreme Court of the United States for the writ of mandamus, to compel the remand of the prosecution and the restoration of the custody of the accused to the State court;[11] and also an appeal to the same court from the order of the District Court granting the writ of *habeas corpus cum causa*, which appeal is founded upon a want of jurisdiction.[12]

§ 553. Filing of record. "In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be

7 *Ex parte* Wells, 3 Woods 128, Fed. Cas. No. 17,386; *Ex parte* State, 71 Alabama 363. See Stommel v. Timbrel, 84 Iowa 336, 51 N. W. 159.

8 *Ex parte* Wells, 3 Woods 128, Fed. Cas. No. 17,386; *Ex parte* State, 71 Alabama 363.

9 State v. Dunlap, 65 N. C. 491, 6 Am. Rep. 746.

10 Bush v. Kentucky, 107 U. S. 110.

11 Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. ed. 386; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633.

12 Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633.

supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court."[1]

"In all cases removable under this chapter, if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the District Court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. And the district court to which any cause shall be removable under this chapter shall have power to issue a writ of *certiorari* to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the District Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceedings. But if such order shall be complied with, then said District Court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said District Court may make an order requiring the parties thereto to plead *de novo*; and the bond given,

§ 553. [1] Jud. Code § 35, 36 St. at L. 1087.

conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid."[2]

In cases where the defense depends upon the civil rights laws, "it shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the District Court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the District Court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the District Court as herein provided, a certificate, under the seal of the District court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for removal had been filed."[3]

In proceedings against revenue officers or persons having defenses under the revenue laws, or persons who are or have been, officers of either House of Congress, the Revised Statutes provide: "When the suit is commenced in the State court by summons, subpœna, petition, or another process except *capias*, the clerk of the District Court shall issue a writ of *certiorari* to the State court, requiring it to send to the District Court the record and proceedings in the cause. When it is commenced by *capias* or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the

[2] Ibid.; § 39; re-enacting 18 St. at L. 470; Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146, 154.

[3] Jud. Code § 31, re-enacting U. S. R. S. § 641.

State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the District Court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa,* to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the District Court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the District Court that no copy of the record and proceedings therein in the State court can be obtained, the District Court may allow and require the plaintiff to proceed *de novo,* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said District Court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant.''[4]

It has been held that an order of a State court, directing its clerk to certify the record after a removal, is not appealable.[5]

A formal motion to docket the cause, after the transcript has been filed, is not necessary.[6] The transcript should regularly be filed by the petitioner for the removal,[7] even when he is a revenue officer.[8] Any party may, however, file the transcript by leave from the District Court of the United States,[9] or even without such leave,[10] at least when immediate action in the case, to protect his interest, is required.

4 Jud. Code, § 33, re-enacting U. S. R. S., § 643.

5 Mayo v. Dockery, 37 S. E. 62, 127 N. C. 1.

6 Glover v. Shepperd, 15 Fed. 833 (11 Biss. 572).

7 Hatcher's Adm'x v. Wadley, 84 Fed. 913.

8 Virginia v. Felts, 133 Fed. 85.

9 Mahoney M. Co. v. Bennett, 5 Sawy. 141; Commercial & S. Bank v. Corbett, 5 Saw. 172; Hartford & C. W. R. Co. v. Montague, 94 Fed. 227. *Contra,* K. C. & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9; Hamilton v. Fowler, 83 Fed. 321.

10 Anderson v. Appleton, 32 Fed. 855; Mills v. Newell, 41 Fed. 529;

It is not the duty of the clerk of the State court to file the transcript.[11]

The transcript must contain copies of the pleadings in the cause;[12] of all depositions on file in the State court;[13] of all ancillary proceedings, such as garnishee proceedings in an other county in the State;[14] and also, it has been held, of all entries in the journals of the State courts.[15] An omission of a small part of the record is not a ground for a remand, but may be cured upon a suggestion of a diminution of the record.[16]

That the entire record on the removal of a cause to the Federal court was not returned, in that the bond accompanying the petition for removal was not in the record as returned, was not ground for remanding the cause to the State court.[17]

That a State court, removing a cause to a Federal court, transferred to the Federal court the original papers filed in the State court, and not copies thereof, was not ground for remanding the cause of the State court.[18]

It has been said that, where the Federal court has sessions in different places in the district, the record should be filed in the clerk's office at that place where the suit was pending in the State court, or in the nearest and most convenient place thereto.[19] But it seems that the filing of the record in another office of the clerk of the Federal court, if made in due time, is not a ground for a remand.[20] If the Federal court has terms at different places within the district, it is the safer practice to file the transcript before the first, wherever the same may be held.[21]

Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Coeur d'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280. See Delbanco v. Singletary, 40 Fed. 177.

11 Hatcher's Adm'x v. Wadley, 84 Fed. 913.

12 McBratney v. Usher, 1 Dill. 367.

13 Miller v. Tobin, 18 Fed. 609.

14 Woodward Lumber Co. v. Vizard, 144 Fed. 982.

15 Probst v. Cowen, 91 Fed. 929, 931.

16 Probst v. Cowen, 91 Fed. 929.

17 Miller v. Soule, 221 Fed. 493.

18 Ibid.

19 Cobb v. Globe Mutual Life Ins. Co., Fed. Cas. No. 2,921 (3 Hughes 452). *Contra*, Hatcher's Adm'x v. Wadley, 84 Fed. 913, 916 (holding that it should be filed at the place where the first session is held). See Henderson v. Cabell, 43 Fed. 257.

20 Henderson v. Cabell, 43 Fed. 257.

21 Hatcher's Adm'x v. Wadley, 84

It has been held that the defendant is not in default, because he postpones filing his transcript while he is awaiting the action of the State court upon his petition; although, in consequence, the filing is not made until after the statutory time.[22] If a reasonable excuse for the delay exists, leave is usually given to file a transcript after the statutory time.[23] Under a previous statute, it was said that the question whether the defendant had a reasonable excuse for his delay in filing the transcript rested in the discretion of the Federal court and would not be reviewed by appeal or writ of error.[24] Misinformation from the clerk of the Federal court as to the time when the record should be filed was held to be a sufficient excuse.[25] If the removing party is forced by his adversary to remain in the State court, such adversary waives the statutory requirement as to the time of filing the record, until the State court lets go of its jurisdiction.[26] Where but two terms of the Federal court had elapsed subsequent to the removal, and the only excuse for the delay was an affidavit by the defendant's counsel that they and the defendants had paid the clerk for the record and under-

Fed. 913. *Cf.* Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831. *Contra,* Cobb v. Globe Mutual Life Ins. Co., 3 Hughes 452, Fed. Cas. No. 2,921 (holding that it is sufficient if the record is filed before the first term held in that place in the district nearest to the clerk's office of the State court).

22 Kelly v. Chicago & A. Ry. Co., 122 Fed. 286. See Railroad Co. v. Koontz, 104 U. S. 5, 16, 26 L. ed. 643, 646; Lewis v. Erie R. Co., 257 Fed. 868. *Contra,* Cobb v. Globe Mutual Life Ins. Co., 3 Hughes 452, Fed. Cas. No. 2,921; Waverly Stone & G. Co. v. Waterloo, C. F. & N. Ry. Co., 239 Fed. 561.

23 Bright v. Milwaukee & St. P. R. Co., 14 Blatchf. 214; Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; St. Paul & C. Ry. Co. v. McLean, 108 U. S. 212, 216, 27 L. ed. 703, 704; Kidder v. Fetteau, 2 Fed. 616 (1 McCrary 325); Woolridge v. McKenna, 8 Fed. 650; Hall v. Brooks, 14 Fed. 113 (21 Blatchf. 167); Winchell v. Coney, 27 Fed. 482; Rowell v. Hill, 28 Fed. 433; McGregory v. McGillis, 30 Fed. 388; Lucker v. Phoenix Assur. Co., 66 Fed. 161; Chase v. Erhardt, 198 Fed. 305.

24 McLean v. St. Paul & C. Ry. Co., Fed. Cas. No. 8,892 (16 Blatchf. 309); affirmed St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703.

25 Burgunder v. Browne, 59 Fed. 497.

26 Railroad Co. v. Koontz, 104 U. S. 5, 16, 26 L. ed. 643, 646; Kelly v. Chicago & A. Ry. Co., 122 Fed. 286. *Contra,* Hatcher's Adm'x v. Wadley, 84 Fed. 913.

stood that it was the clerk's duty to transmit the same; it was held that the laches was inexcusable, and that the cause must be remanded.[27]

§ 554. Proceedings in the State court after the removal. The State court has the power to examine the petition and bond, in order to ascertain whether they are sufficient. If they are insufficient, it may disregard them and proceed with the suit.[1] It may do this although the Federal court has acted in the case[2] and even after the latter court has dismissed the suit for want of prosecution,[3] provided that a motion to remand has been denied.[4]

It is the duty of the State court, and not of the clerk, to determine the sufficiency of the bond.[5]

Where the question is doubtful, it seems to be the better practice for the State court to take no action until the Federal court has passed upon a motion to remand the cause.[6] But

27 Hatcher's Adm'x v. Wadley, 8 Fed. 913.

§ 554. 1 Amory v. Amory, 95 U. S. 186, 24 L. ed. 428; Yulee v. Vose, 99 U. S. 539, 545, 25 L. ed. 355; Phœnix Ins. Co. v. Pechner, 95 U. S. 185, 24 L. ed. 427; City of Montgomery, Ala. v. Postal Tel.-Cable Co., 218 Fed. 471; Miller v. Soule, 221 Fed. 492; Orr v. Baltimore & Ohio R. R. Co., 83 Misc. (N. Y.) 221, per Green, J.; affirming Pechner v. Phœnix Ins. Co., 65 N. Y. 195; Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

2 Iowa Cent. Ry. v. Bacon, 236 U. S. 305.

3 Ibid.

4 Ibid.

5 Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168.

6 Stuart v. Bank of Staplehurst, 57 Neb. 569, 575; Kamenicky v. Catteral Printing Co., N. Y. Sup. Ct. Sp. Tm., per Brady, J., N. Y. L. J. August 5 and 16, 1914, in which the author was counsel. Removal Cases, 100 U. S. 457, 474, 25 L. ed. 593, 599; Gregory v. Hartley, 113 U. S. 742, 5 Sup. Ct. 743, 28 L. ed. 115; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; Tennessee v. Bank of Commerce, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511; *Ex parte* Grimball, 61 Ala. 598; *Ex parte* Mobile & O. R. Co., 63 Ala. 349; Colorado Fuel & Iron Co. v. Four Mile Ry. Co., 29 Colo. 90, 66 Pac. 902; Carswell v. Schley, 59 Ga. 17; Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60; McWhinney v. Brinker, 64 Ind. 360; State ex rel. Jumel v. Johnson, 29 La. Ann. 399; State v. Murray, 47 La. Ann. 1421, 17 South. 832; Jackson v. Alabama Great Southern R. Co., 58 Miss. 648; Hickman v. Missouri, K. & T. Ry. Co., 151 Mo. 644, 52 S. W. 351; Blair v. West Point Mfg. Co., 7 Neb. 146; Trester v. Missouri Pac. Ry. Co., 23 Neb. 242, 36 N. W. 502; Stuart v. Bank of Staplehurst, 57 Neb. 569, 78 N. W. 298; National Docks &

its decision is subject to the review of the Federal court.[7]

If the petition and bond are sufficient, the State court is divested of jurisdiction over the case. It has no power to try questions of fact arising upon the petition, but must accept the facts therein alleged as true.[8] As soon as a sufficient bond and

N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co., 52 N. J. Eq. (7 Dick.) 58, 28 Atl. 71; Lawson v. Richmond & D. R. Co., 112 N. C. 390, 17 S. E. 169; Bradley v. Railroad Co., 119 N. C. 744; Howard v. Railway Co., 122 N. C. 944, 953, 954, 29 S. E. 778; Debnam v. Southern Bell Tel. Co., 126 N. C. 831, 65 L.R.A. 915, 36 S. E. 269; State v. Southern Pac. Co., 23 Or. 424; Williams v. Adkins, 46 Tenn. (6 Coldw.) 615; Texas & P. Ry. Co. v. McAllister, 59 Tex. 349. But see Brodhead v. Shoemaker, 85 Ga. 728, 11 S. E. 845; Robertson v. Kettell, 64 N. H. 430, 14 Atl. 78.

It has been held: that an acceptance and approval of the bond and petition cannot be reviewed by another judge, except upon a motion to set the same aside. Occum Co. v. A. & W. Sprague Mfg. Co., 35 Conn. 496.

7 Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Field v. Lownsdale, Fed. Cas. No. 4,769 (Deady, 288); United States v. Judges, Fed. Cas. No. 15,501; Taylor v. Rockefeller, Fed. Cas. No. 13,802; Traders' Bank v. Tallmadge, 9 Fed. 363 (20 Blatchf. 39); Walker v. O'Neill, 38 Fed. 374; Postal Tel. Cable Co. v. Southern Ry. Co., 88 Fed. 803; Brodhead v. Shoemaker, 85 Ga. 728, 11 S. E. 845; Louisiana State Bank v. Morgan (Louisiana), 4 Mart. (N. S.) 344; Forncrook Mfg. Co. v. Barnum Wire & I. Works, 54 Mich. 552, 20 N. W. 582; Jackson v. Alabama Great Southern R. Co., 58 Miss. 648; National Union Bank v. Dodge, 42 N. J. Law (13 Vroom.) 316; Bell v. Dix, 49 N. Y. 232; Chamberlain v. American Nat. Life & Trust Co. (New York), 11 Hun 370; Northern Pac. R. Co. v. McMullen, 86 Wis. 501, 56 N. W. 629.

8 Burlington, C. R. & N. Ry. Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. ed. 1159; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. ed. 963; affirming 88 Tenn. (4 Pickle) 721, 13 S. W. 698; Sinclair v. Pierce, 50 Fed. 851; Powers v. Chesapeake & O. R. Co., 65 Fed. 92, 18 Sup. Ct. 264, 42 L. ed. 673; Fidelity Trust & Safety-Vault Co. v. Newport News & M. V. Co., 70 Fed. 403; Shane v. Butte Electric Ry. Co., 150 Fed. 801; Stix v. Keith, 90 Ala. 121, 7 South. 423; Horan v. Strachan, 82 Ga. 566, 9 S. E. 429; Southern Ry. Co. v. Hudgins, 107 Ga. 334, 33 S. E. 442; Western Union Tel. Co. v. Horack, 9 Ill. App. 309; Van Horn v. Litchfield, 70 Iowa 11, 29 N. W. 783; Byson v. McPherson, 71 Iowa 437, 32 N. W. 418; Hardwick v. Kean, 95 Ky. 563, 26 S. W. 589; Guinault v. Louisville & N. R. Co., 42 La. Ann. 52, 7 South. 62; Craven v. Turner, 82 Maine 383, 19 Atl. 864; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478; Town of Monroe v. Connecticut River Lumber Co., 66 N. H. 628, 32

petition are filed and presented, all subsequent action by the State court is void.[9] A subsequent judgment of the State court

Atl. 152. *Contra,* Orosco v. Gagliardo, 22 Cal. 83; Delaware R. Const. Co. v. Davenport & St. P. Ry. Co., 46 Iowa 406; Burch v. Davenport & St. P. R. Co., 46 Iowa 449; Dunne v. Burlington, C. R. & N. R. Co., 35 Minn. 73, 27 N. W. 448; Disbrow v. Driggs, 16 How. Pr. (N. Y.), 346; 8 Abb. Pr. (N. Y.) 305, note; Miller v. Kent, 60 How. Pr. (N. Y.) 451; Levy v. O'Neil (New York), 14 Abb. Prac. (N. S.) 63; Clark v. Opdyke (New York), 10 Hun 383; Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168.

[9] Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. ed. 536; Matthews v. Lyall, Fed. Cas. No. 9,285 (6 McLean 13); U. S. v. Judges, Fed. Cas. No. 15,501; State v. Tiedermann, 10 Fed. 20 (3 McCrary 399); Wellman v. Howland Coal & Iron Works, 19 Fed. 51; McCullough v. Large, 20 Fed. 309; North Carolina v. Sullivan, 50 Fed. 593; Shepherd v. Bradstreet Co., 65 Fed. 142; Wills v. Baltimore & O. R. Co., 65 Fed. 532; Monroe v. Williamson, 81 Fed. 977; Postal Tel. Cable Co. v. Southern Ry. Co., 88 Fed. 803; Miller v. Soule, 221 Fed. 493; Webb v. Southern Ry. Co., 235 Fed. 78; Indianapolis, B. & W. Ry. Co. v. Risley (Indiana), 50 Ind. 60, Wilson, 572; Rosenfield v. Adams Exp. Co., 21 La. Ann. 233; Stanley v. Chicago, R. I. & P. R. Co., 62 Mo. 508; Beery v. Chicago, R. I. & P. R. Co., 64 Mo. 533; Powell v. Chicago, R. I. & P. R. Co., 64 Mo. 544; Winslow v. Collins, 110 N. C. 119, 14 S. E. 512; Blair v. West Point Mfg. Co., 7 Neb. 146; National Union Bank v. Dodge, 42 N. J. Law (13 Vroom.) 316; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Bell v. Dix, 49 N. Y. 232; Shaft v. Phœnix Mut. Life Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138; Benedict v. Dixon, 47 N. Y. Super. Ct. (15 J. & S.) 477; Erisman v. Pidcock, 62 How. Pr. (N. Y.) 327; Bushnell v. Parker Bros. & Co., 59 Hun (N. Y.) 625, 13 N. Y. Supp. 695; State v. Dunlap, 65 N. C. 491, 6 Am. Rep. 746 (after removal under the civil rights law); Shelby v. Hoffman, 7 Ohio St. 450; Richardson v. Jenks (Ohio), 47 N. E. 49; Hall v. Stevenson, 19 Oregon 153, 23 Pac. 887; Pelzer Mfg. Co. v. Sun Fire Office of London, 36 S. C. 213, 15 S. E. 562; Williams v. Adkins, 46 Tenn. (6 Coldw.) 615; Southern Pac. Ry. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168; City of Ashland v. Whitcomb, 121 Wis. 646, 98 N. W. 531.

It has been held: that, after a removal, the State court may allow the substitution of a new delivery bond for that formerly filed, and the withdrawal of the former bond (Ramsey v. Coolbaugh, 13 Iowa 164); that it may modify its former order of discontinuance as to part of the defendants, so as to preserve their rights upon an injunction bond given by the plaintiff (Benedict v. Dixon, 47 N. Y. Super. Ct. (15 J. & S.) 379); and that, after removal, an appeal will lie

is a nullity.[10] An amendment reducing the same claim below the jurisdictional amount was allowed in a State court, after the defendant's counsel had stated to the court that he had a petition for a removal; but the paper had not been formally presented nor filed.[11] A Federal court approved the continuance after the removal of the publication of a notice entitled in the State court which was required to perfect an attachment when the record was not filed in the former court until the publication had been completed.[12] It has been held: that the State court cannot set aside its order of removal after it has been made.[13] That the State court has not even the power to enter judgment for the costs of an appeal to the State Appellate Courts, and a writ of error from the Supreme Court of the United States, which resulted in a reversal of its order denying the removal.[14] That a defendant may raise, by answer,

from a prior order discharging a sheriff as defendant and substituting a creditor in his place. Sunberg v. Babcock, 61 Iowa 601, 16 N. W. 716; Flint v. Coffin, C. C. A., 176 Fed. 872; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956. It cannot take a default, Mattoon v. Hinkley, 33 Ill. 208; Stoker v. Leavenworth, 7 La. 390; nor decide a motion to dismiss, which is already pending, Chambers v. Illinois Cent. R. Co., 104 Iowa 238, 73 N. W. 593. *Contra*, Edgarton v. Webb, 41 Ga. 417 (holding that a motion to dismiss a writ of error takes precedence over an application for a removal); nor appoint a receiver, Fayette Title & Tr. Co. v. Maryland, P. & W. V. T. & T. Co., 180 Fed. 928; nor assess the damages upon an injunction bond, Byrne v. Lathrop, Shea & Henwood Co., 60 Misc. (N. Y.) 350; nor, it has been held, grant a stay of proceedings. Bell v. Dix, 49 N. Y. 232. See Vose v. Yulee, 64 N. Y. 449; affirming 4 Hun 628; reversed 99 U. S. 539, 25 L. ed. 355. But after the settlement and discontinuance of the suit in the Federal court, the State court enforced the attorney's lien, Oishei v. Met. St. Ry. Co., 117 App. Div. (N. Y.) 110.

10 Buxton v. Pennsylvania Lumber Co., 221 Fed. 718.

11 Mullin v. Blumenthal (Delaware), 39 Atl. 991, *supra*, § 6.

12 Lowitz v. Kimmerle, C. C. A., 221 Fed. 857.

13 Livermore v. Jenks, 11 How. Pr. (N. Y.) 479; Chamberlain v. American Nat. Life & Trust Co., 11 Hun (N. Y.) 370. See Occum Co. v. A. & W. Sprague Mfg. Co., 35 Conn. 496; Winchell v. Coney, 54 Conn. 24, 5 Atl. 354; Thatcher v. Rankin (New York), 2 How Pr. (N. S.) 459. *Contra*, Larson v. Cox, 39 Kansas 631, 18 Pac. 892; Lamblin v. Cox, 40 Kansas 311, 19 Pac. 709; Seth v. Chamberlaine, 41 Md. 196; Lalor v. Dunning, 56 How. Pr. (N. Y.) 209; Henderson v. Cabell, 83 Tex. 541.

14 National S. S. Co. v. Tugman, C. C. A., 82 Fed. 240.

the question of a loss of jurisdiction by a State court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the Federal courts; and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the State court void.[15]

It is usually held that a State court cannot review, by appeal or writ of error, an order granting a removal.[16] No State court has power, by appeal or otherwise, to review an order of the Federal court granting [17] or denying a motion to remand.[18] A refusal by a State court to allow a cause to be removed can, when the Federal court has not remanded the same, usually be reviewed by such State court of appeal as has jurisdiction over the other questions in the cause, upon an appeal from the final decree; but not by a direct appeal from such interlocutory order.[19]

15 Shaft v. Phœnix Mut. Life Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138.

16 Akerly v. Vilas, Fed. Cas. No. 119, 1 Abb. (U. S.) 284 (2 Biss. 110); Ellerman v. New Orleans, M. & T. R. Co., Fed. Cas. No. 4,382 (2 Woods 120); Sunberg v. Babcock, 61 Iowa 601, 16 N. W. 716; Forncrook Mfg. Co. v. Barnum Wire & I. Works, 54 Mich. 552, 20 N. W. 582; Fargo v. McVicker, 55 Barbour 437, 38 How. Pr. (N. Y.) 1; Kendrick's Lessee v. McQuary, 3 Tenn. (Cooke) 479; Durham v. Southern Life Ins. Co., 46 Tex. 182. *Contra*, State ex rel. Coons v. Judge, 23 La. Ann. 29; Stone v. Sargent, 129 Mass. 503; Nevada v. Curler, 4 Nev. 445.

17 Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 536, 542; May v. State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Coeur d'Alene Ry. & Nav. Co. v. Spalding, 6 Idaho 97, 53 Pac. 107; Lewis v. Weidenfeld (Michigan), 72 N. W. 604; Smithson v. Chicago G. W. Ry. Co., 71 Minn. 216, 73 N. W. 853; Fitzgerald v. Fitzgerald & Mallory Const. Co., 44 Neb. 463, 62 N. W. 899; Jifkins v. Sweetzer (Pennsylvania), 33 Leg. Int. 282, 2 Wkly. Notes Cas. 591; Pioneer Sav. & Loan Co. v. Peck (Texas), 49 S. W. 160; Talbott & Sons v. Planters' Oil Co., 12 Tex. Civ. App. 49, 33 S. W. 745; Rio Grande W. Ry. Co. v. Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.

18 Ryan v. Mathews, 64 Iowa 250, 20 N. W. 174.

19 Western Union Tel. Co. v. Griffith, 104 Ga. 56, 30 S. E. 420; Merchants' Despatch Transp. Co. v. Joesting, 89 Ill. 152 (holding that the removal papers must be embodied in the bill of exceptions with an exception to the decision of the court refusing the removal, or else the objection will not be considered); Peirce v. Walters, 164 Ill. 560, 45 N. E. 1068; Nevada v. Curler, 4 Nev. 445; Shelby v. Hoffman, 7 Ohio St. 451; Campbell v. Wallen's Lessee, 8 Tenn. 585, Martin &

If the State court continues to act in a case that has been properly removed, its final judgment may be reversed by a writ of error from the Supreme Court of the United States, after it has been affirmed by the highest court of the State in which a decision in the suit can be had;[20] or the proceedings may be stayed by an injunction of the District Court of the United States;[21] even, it has been held, when the State is the plaintiff;[22] but such a motion will not ordinarily be granted before a motion to remand the cause has been decided, unless the right

Yerger, 266; Texas & P. Ry. Co. v. Davis (Texas), 54 S. W. 381, 55 S. W. 562 (holding that the fact that the defendant, after the denial of his petition for a removal, had successfully defended the case and insisted upon an affirmance of the judgment, did not prevent a reversal).

20 U. S. R. S., § 709; Gordon v. Longest, 16 Peters 97, 10 L. ed. 900; Kanouse v. Martin, 14 How. 23, 14 L. ed. 310; Kanouse v. Martin, 15 How. 198, 14 L. ed. 660; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. ed. 61; Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 536, 542; Missouri, K. & T. Ry. Co. v. Missouri R. R. & Warehouse Com'rs, 183 U. S. 53, 46 L. ed. 78; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078; Cincinnati & T. Ry. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448; State ex rel. Jumel v. Johnson, 29 La. Ann. 399.

21 French v. Hay, 22 Wall. 250, 22 L. ed. 857; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497; Warren v. Ives, Fed. Cas. No. 17,197 (1 Flip. 356); Wagner v. Drake, 31 Fed. 849; Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Abeel v. Culbertson, 56 Fed. 329. *Contra*, Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827 (6 Blatchf. 362); Penrose v. Penrose, Fed. Cas. No. 10,958 (17 Blatchf. 332); Atlantic Coast Line R. Co. v. Daniels, 175 Fed. 30, where it was claimed that there were sham defendants fraudulently joined for the purpose of defeating the jurisdiction. In Illinois Cent. R. R. Co. v. Sheegog, 217 U. S. 599, where, after a motion to remand had been denied, judgment was entered in the State court in favor of the plaintiff and in the Federal court in favor of the defendant, it was held that the Federal court had no power to enjoin the enforcement of the State judgment. Where, after the removal to a Federal court of an action for malicious prosecution on a charge of larceny, the plaintiff instituted in the State court a second action for malicious prosecution on a charge of forgery connected with the same transaction, the State statutes not permitting the consolidation of the two prosecutions; it was held that the Federal court should not grant an injunction against the prosecution of the second suit. Western Union Tel. Co. v. Cooper, 182 Fed. 710.

22 Abeel v. Culbertson, 56 Fed. 329.

of removal is beyond dispute.[23] The Supreme Court of the United States will not grant a writ of prohibition to prevent a State court from proceeding in a suit after its removal.[24] It has been held that no State court will issue a writ of mandamus to compel the State court of first instance to proceed in a cause, which it has unlawfully ordered to be removed;[25] or to allow the removal of a cause, the removal of which it has improperly denied.[26]

According to the preponderance of authority, if the State court proceeds in a cause, notwithstanding an attempted removal, and the case is subsequently remanded because of want of jurisdiction, the intervening proceedings in the State court are valid.[27] The defendant's time to plead is not suspended by the petition for removal if this is defective; and upon a remand, made after the statutory time has expired, judgment

23 Frishman v. Insurance Cos., 41 Fed. 449; Sinclair v. Pierce, 50 Fed. 851.

24 Chesapeake & O. R. Co. v. White, 111 U. S. 134, 28 L. ed. 378.

25 Francisco v. Manhattan Ins. Co., 36 Cal. 283. *Contra,* White v. Holt, 20 W. Va. 792; Kleiber v. McManus, 66 Tex. 48, 17 S. W. 249.

26 People v. Judges of New York Common Pleas, 2 Denio (N. Y.) 197; People v. Judge, 21 Mich. 577; Nevada v. Curler, 4 Nev. 445; Shelby v. Hoffman, 7 Ohio St. 450. See *Ex parte* State Ins. Co., 50 Ala. 464. *Contra,* Brown v. Crippin (Va.), 4 Hen. & Munf. 173.

27 First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co., Fed. Cas. No. 4,803; Johnson v. Wells, Fargo & Co., 91 Fed. 1; Winchell v. Coney, 54 Conn. 24, 5 Atl. 354; Darton v. Sperry, 71 Conn. 339, 11 Atl. 1052; Edgarton v. Webb, 41 Ga. 417; Hunter v. Colquitt, 73 Ga. 44; Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478; Johnson v. Gelston, 3 N. J. Law (2 Penning.) 668; National Union Bank v. Dodge, 42 N. J. Law (13 Vroom.) 316; Hadley v. Dunlap, 10 Ohio St. 1; State v. Port Royal & A. Ry. Co., 45 S. C. 413, 23 S. E. 363; Greenlaw v. Williams, 70 Tenn. (2 Lea) 533; White v. Holt, 20 W. Va. 792. But see Tucker v. Interstate Life Ass'n, 112 N. C. 796, 17 S. E. 532; Bruce v. Gibson, 8 Ohio Dec. 319, 7 Weekly Law Bul. 94; Secligson's Ex'rs v. Texas Transp. Co., 70 Tex. 198, 7 S. W. 708. *Contra,* Parker's Adm'r v. Clarkson, 39 W. Va. 184, 19 S. E. 431; Texas & P. Ry. Co. v. Davis (Texas), 55 S. W. 562; Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60, 63; Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446. See also Pechner v. Phœnix Ins. Co., 65 N. Y. 195; aff'd as Phœnix Ins. Co. v. Pechner, 95 U. S. 185, 24 L. ed. 427.

by default may be entered against him.[28] If a judgment by default has been thereafter entered before the remand, it will not be set aside for want of jurisdiction or irregularity;[29] although, in a proper case, it may be opened on terms.[30] It has been said by a State court concerning the action of the Federal court upon an attempt to remove the cause: "If it shall take cognizance of the cause, no view which we might take of the impropriety of its action would affect it; and if it shall decline to take cognizance of the cause, it will thereby revive from its dormancy in the court of the State and be proceeded with as having been pending there all the time."[31]

The defendant does not waive his right to a removal by following the case in the State court,[32] nor by making a motion for a continuance or adjournment therein,[33] when such State court has claimed still to retain its jurisdiction. Nor by then,[34] or contemporaneously with the petition,[35] finding an answer or other pleading in the State court. Nor by then consenting to plead and try the case at the next term of such court.[36] Nor by consenting to try the case before a referee;[37] nor by defending upon a subsequent trial;[38] nor by argument in opposition to an appeal from an order of removal by the State court

28 Yankause v. Fellenstein, 244 U. S. 127; Kamenicky v. Catteral Printing Co., N. Y. Sup. Ct. Sp. Tm., Bischoff, J., N. Y. L. J. November 22, 1911; in both of these the writer was counsel.

29 Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446.

30 Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446, 450; Kamenicky v. Catteral Printing Co., N. Y. Sup. Ct. Sp. Tm., Bischoff, J., N. Y. L. J. Nov. 22, 1911.

31 Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60, 63. See also Carswell v. Schley, 59 Ga. 17, 22.

32 Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688; Nelson v. Black Diamond Mining Co., 237 Fed. 264.

33 Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168.

34 Avent v. Deep River Lumber Co., 174 Fed. 298.

35 State Improvement-Development Co. v. Leininger, 226 Fed. 884.

36 Waite v. Phœnix Ins. Co., 62 Fed. 769 (where the stipulation was made after the State court had, subsequent to the removal, allowed an amendment of the summons, so as to reduce the sum claimed below the jurisdictional amount).

37 National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87.

38 Insurance Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Richards v. Incorporated Town of Rock Rapids, 31 Fed. 505; State v.

which was reversed.[39] But where the defendant had applied to the judge of the State court for an order of removal, which was denied, and had appealed from such denial to the State Supreme Court, which affirmed this; it was said that such decision must stand until it was reversed by the Supreme Court of the United States.[40] Where, after the petition and bond had been filed, a motion was made in the State court for a removal, which was denied as premature, and the defendant's counsel then asked leave to withdraw his motion for the time being, which was granted; it was held that the removal did not take effect, and that the State court retained jurisdiction, until a subsequent motion was made and granted.[41] It was held that the right to a removal was waived when, contemporaneously with his petition, the party obtained from the State Supreme Court a *certiorari* to remove the record thereto for review.[42]

When a case, subsequent to its removal, has been discontinued or dismissed by the plaintiff,[43] or dismissed without

Sullivan, 50 Fed. 592; McMullen v. Northern Pac. R. Co., 57 Fed. 16; Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; Stix v. Keith, 90 Ala. 121, 7 South. 423; Upham v. Seoville, 40 Ark. 170; Little Rock, M. R. & T. Ry. Co. v. Iredell, 50 Ark. 388, 8 S. W. 21; Herryford v. Ætna Ins. Co., 42 Mo. 148; Erie Ry. Co. v. Stringer, 32 Ohio St. 468; Northern Pac. R. Co. v. McMullen, 86 Wis. 501, 56 N. W. 629. *Contra*, Home Ins. Co. v. Curtis, 32 Mich. 402 (where the defendant failed to call the attention of the court to the filing of the petition and bond); Marckwald v. Oceanic Steam Nav. Co. (New York), 11 Hun 462; First Nat. Bank of Wausau v. Conway, 67 Wis. 210, 30 N. W. 215 (where the defendant, after the denial by the State court of his petition for removal, obtained a change of venue). It has been held that, unless a copy of the petition to the trial court, or the order of removal is presented, which shows a ground therefore, the State court will proceed to trial. Anglo-American Provision Co. v. Evans, 34 Neb. 44, 51 N. W. 310.

[39] Meeke v. Valley T. M. Co., 89 Fed. 209, 211; Garrett v. Bonner, 30 La. Ann. 1305.

[40] Springer v. Howes, 69 Fed. 849, 851; approving 115 N. C. 370, 20 S. E. 469.

[41] Mays v. Newlin, 143 Fed. 574.

[42] Hudson River R. R. & T. Co. v. Day, 54 Fed. 545.

[43] Southern Ry. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732; affirming 59 S. E. 1115; Gassman v. Jarvis, 100 Fed. 146; McIver v. Florida Cent. & P. R. Co., 110 Ga. 223, 36 S. E. 775; Cleveland, C., C. & St. L. Ry. Co. v. Reese, 93 Ill. App. 657; Stephenson's Adm'r v. Illinois Cent. R. Co., 75 S. W. 260, 25 Ky. Law Rep. 442; Krueger v. Chicago & A. Ry. Co., 84 Mo. App. 358; Texas & P. Ry. Co. v. Maddox

prejudice, or some other final disposition thereof made, which is not upon the merits,[44] a new suit may be brought in the State court upon the same cause of action for the same amount,[45] or for a less sum, which is below the jurisdictional amount;[46] but the same case cannot be prosecuted in the State court.[47]

Leave to discontinue may be denied or conditioned by a stipulation that the plaintiff will not bring another suit for the same cause of action against the defendant in any court.[48]

Where a new suit for the same cause of action was begun in the State court after the removal and before the disposition of the former case; it was held that a plea[49] of *lis pendens* should be sustained.

It has been held that, when a criminal prosecution has after its removal been dismissed by the Federal court for want of jurisdiction, the State court has power to declare a forfeiture of a recognizance;[50] but that, when a receiver was appointed by the Federal court after a removal and the case subsequently dismissed for want of jurisdiction, his bond could not be enforced in the State court.[51]

Upon the remand of a case, the State court takes complete jurisdiction thereof.[52] The better practice is to present to the

(Texas), 63 S. W. 134. *Contra,* Baltimore & O. R. Co. v. Fulton, 53 N. E. 265, 59 Ohio St. 575.

44 Swift & Co. v. Hoblawetz (Kansas), 61 Pac. 969. *Contra,* Baltimore & O. R. Co. v. Fulton, 53 N. E. 265, 59 Ohio St. 575.

45 Southern Ry. Co. v. Miller, 217 U. S. 309; affirming 59 S. E. 1115; Gassman v. Jarvis, 100 Fed. 146. *Contra,* Cox v. Railroad Co., 68 Ga. 446; Railroad Co. v. Fulton, 59 Ohio St. 575, 53 N. E. 265.

46 Texas Cotton Products Co. v. Starnes, 128 Fed. 183; affirmed, C. C. A., 133 Fed. 1022; Young v. So. Bell Tel. & Tel. Co., 75 S. C. 326; Hooper v. Atlanta, K. & N. Ry. Co., 106 Tenn. 28, 60 S. W. 607.

47 Stephenson's Adm'r v. Illinois Cent. R. Co., 75 S. W. 260, 25 Ky. Law Rep. 442; Texas & P. Ry. Co. v. Huber (Texas), 95 S. W. 568. *Contra,* Seeligson's Ex'rs v. Texas Transp. Co., 70 Tex. 198, 7 S. W. 708.

48 Palmer v. Delaware, L. & W. R. Co., 222 Fed. 461.

49 Hollingsworth v. Southern Ry. Co., 57 S. C. 453, 35 S. E. 739.

50 Hunter v. Colquitt, 73 Ga. 44.

51 Early v. Beecher, 75 Tenn. (7 Lea) 256. See Doane v. Corbin, 44 Ill. App. 463.

52 Birdseye v. Shaeffer, 37 Fed. 821; writ of error dismissed, Birdseye v. Nickerson, 140 U. S. 672, 11 Sup. Ct. 1017, 35 L. ed. 403; Thacher v. McWilliams, 47 Ga. 306; Germania Fire Ins. Co. v. Francis,

State court a certified copy of the order of the Federal court remanding the cause.[53] The fact that an appeal, which is not accompanied by a *supersedeas,* has been taken from the order of remand, does not prevent the State court from assuming jurisdiction.[54] It has been held that a subsequent order of the Federal court revoking the remand does not divest the State court of jurisdiction.[55]

After a remand, a second removal upon the same ground has been denied, although defects in the petition had been corrected so as to show the jurisdiction.[56]

The State court has power to determine: whether to recognize pleadings that are filed in the Federal court,[57] or testimony,[58] or other proceedings there taken before the remand.[59]

52 Miss. 457, 24 Am. Rep. 674; Jackson v. Alabama Great Southern R. Co., 58 Miss. 648; Johnson v. Gelston, 3 N. J. Law (2 Penning.) 668; Knahtla v. Oregon Short Line & U. N. Ry. Co., 21 Or. 136, 27 Pac. 91; Kleiber v. McManus, 66 Tex. 48, 17 S. W. 249.

53 Sceligson's Ex'rs v. Texas Transp. Co., 70 Tex. 198, 7 S. W. 708.

54 Stommel v. Timbrel, 84 Iowa 336, 51 N. W. 159.

55 Chisholm v. Propeller Tow-Boat Co. of Savannah (South Carolina), 38 S. E. 156. When the Federal court has set aside its order of remand at the term when the same was made, and meanwhile plaintiff had filed a copy of the first order with the State court and obtained a judgment there, which was affirmed on appeal by the Supreme Court of the State; it was held that a motion by the plaintiff, in the Federal court, to strike the cause from its docket would not be decided until the defendant had an opportunity to bring the judgment of the State court before the Supreme Court of the United States for review. Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900.

56 St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; affirming McLean v. St. Paul & C. Ry. Co., Fed. Cas. No. 8,893 (17 Blatchf. 363); Johnston v. Donvan, 30 Fed. 395; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; Frisbie v. Chesapeake & O. R. Co., 59 Fed. 369; Smith v. Travelers' Ins. Co., 73 Fed. 513; Bodley v. Emporia Nat. Bank, 38 Kan. 59, 16 Pac. 88; Nichols v. Stevens, 123 Mo. 96, 27 S. W. 613, 45 Am. St. Rep. 514; affirming 123 Mo. 96, 25 S. W. 578, 45 Am. St. Rep. 514. See **Gerner v. Mosher** (Nebraska), 78 N. W. 384; Michigan Stove Co. v. Waco Hardware Co., 54 S. W. 357, 22 Tex. Civ. App. 293. *Contra,* Freeman v. Butler, 39 Fed. 1.

57 Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695.

58 Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695; Broadway Ins. Co. v. Chicago G. W. Ry. Co., 101 Fed. 507, 510.

59 Doane v. Corbin, 44 Ill. App. 463.

§ 555. Proceedings in Federal court after removal. "The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration of complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."[1]

"When any suit shall be removed from a State court to a District Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."[2]

Except, in cases arising under the Constitution or laws or a treaty of the United States,[3] the Federal court only acquires such jurisdiction over the parties as the State court had.[4] After

§ 555. [1] Jud. Code § 29, 36 St. at L. 1087, re-enacting, 18 St. at L. 470, § 6; 25 St. at L. ch. 433.

[2] Ibid. § 36, re-enacting, 18 St. at L. 470, § 4. Dwyer, J.: "The provisions of sections 4 and 6 of the act of March 3, 1875, point to all such proceedings and orders as have relation to the prosecution and defense of the suit in due course and the ultimate results aimed at in the litigation." Kirk v. Milwaukee Dust-Collector Mfg. Co., 26 Fed. 501, 507.

[3] Kelly v. Virginia Protection Ins. Co., Fed. Cas. No. 7,677 (3 Hughes 449); Goldstein v. City of New Orleans, 38 Fed. 626. It has been held that the Federal court can take no jurisdiction in a suit brought in a State court under the Federal Interstate Commerce law, which has been removed because of a difference of citizenship. Swift v. Philadelphia & R. R. Co., 58 Fed. 858.

[4] Simpkins v. Lake Shore & M. S. R. R., 19 Fed. 802, 21 Blatchf. 554 (holding that, where the nonresidence of the plaintiff was disputed, that question should not be disputed by a motion upon affida-

the removal, the case can be dismissed for a defect in the service of process;[5] even, it has been held, when the time allowed by the State practice for such objection has expired,[6] provided that the objection is duly raised.[7]

The joinder in the petition with another defendant, who has been duly served, is not a submission to the jurisdiction.[8] It is the safer practice to reserve the objection in the petition for a removal.[9]

State decisions in other cases upon the validity of service of process do not bind the Federal courts.[10] Where a motion to set aside the service of process had been previously made and denied in the State court, it was held that the Federal court must follow such decision.[11] Service by attachment,[12] and substituted service, and service by publication,[13] when made or begun [14] in accordance with the State statutes will be respected by the Federal court if the statutes are constitutional.[15]

By a recent amendment to the Judicial Code: "Hereafter, in all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States

vits, but should be reserved until the trial of the action); Goldstein v. City of New Orleans, 38 Fed. 626.

5 Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517; Wabash W. R. v. Brow, 164 U. S. 271, 41 L. ed. 431; Nat. Acc. Ass'n v. Spiro, 164 U. S. 281, 41 L. ed. 435; Remington v. Central Pac. R. R. Co., 198 U. S. 95, 49 L. ed. 959; Mecke v. Valley Town Mineral Co., 81 Fed. 114. But see Nickels v. Pullman Co., 268 Fed. 610.

6 Greenleaf v. National Ass'n, 130 Fed. 209; Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co., 245 Fed. 200.

7 Tex. & Pac. Ry. v. Bigger, 239 U. S. 330.

8 Garvey v. Compania Metalurgica Mexicana, 222 Fed. 732, 736.

9 Tex. & Pac. Ry. v. Bigger, 239 U. S. 330.

10 Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272; Feister v. Hulick, 228 Fed. 821; Vitkus v. Clyde S. S. Co., 232 Fed. 288; Hudson Nav. Co. v. Murray, 236 Fed. 419. See *supra*, § 164.

11 Hoyt v. Ogden Portland Cement Co., 185 Fed. 889.

12 Clark v. Wells, 203 U. S. 164, 171, 27 Sup. Ct. 43, 51 L. ed. 138.

13 Hudson Nav. Co. v. Murray, 236 Fed. 419.

14 Ibid.

15 *Supra*, see § 164d.

court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of said United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in the United States court: Provided, Nothing in this Act shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause in the State court, the same as if process had been served upon him prior to such removal.'' [16]

After removal, the case may be dismissed because the State court has no jurisdiction of the subject matter.[17]

A removal is a waiver of the objection that the suit was brought in the wrong county of the State.[18] A general appearance or the filing of an answer, subsequent to the removal, waives an objection to the service of process,[19] unless that objection has been previously raised; [20] but it has been held that a motion, after the removal, to require plaintiff to give security for costs does not; [21] and that a defendant, after removal, can plead a defense based upon a Federal statute, which the State court could not have entertained.[22]

Where one of two cognate suits has been removed, the remover waived his right to have them consolidated,[23] or to compel the plaintiff to elect between them.[24] It has been held that he also waived his right to object to the splitting and division between them of a single cause of action.[25]

It has been said that the jurisdiction of the Federal court, after a removal, dates back to the time of the original service of process; [26] and that the objection that a defendant, who

16 Act of April 16, 1920, 41 St. at L. —, Comp. St. § 1021a.

17 Philadelphia & Reading Ry. Co. v. Sherman, C. C. A., 230 Fed. 814.

18 Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231, 13 U. S. App. 222, 314.

19 Tex. & Pac. Ry. v. Hill, 237 U. S. 208; Callahan v. Hicks, 90 Fed. 539.

20 Mecke v. Valley Town Mineral Co., 89 Fed. 114; Hoyt v. Ogden Portland Cement Co., 185 Fed. 889.

21 Peterson v. Morris, 98 Fed. 48.

22 Lehigh Val. R. Co. v. Rainey, 99 Fed. 596.

23 Land v. Ferro-Concrete Const. Co., 221 Fed. 433.

24 Ibid.

25 Ibid.

26 Owens v. Ohio Cent. R. Co., 20 Fed. 10.

was properly served with process within the State, was not served within the Federal district cannot be sustained.[27]

The practice after the removal must be substantially in accordance with the modes of procedure followed in the Federal courts in original cases.[28] If the action is at common law, the practice in the State courts will be followed as near as may be, except in cases regulated by a Federal statute.[29] If in equity, the practice will be in accordance with the Federal statutes and equity rules.[30]

A removal is analogous to a change of venue; not to an appeal.[31] Since the statute says, that the copy of the record in the State court "being entered as aforesaid in said District Court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in the said District Court,"[32] it is doubtful whether any proceeding can be taken in the Federal court until the transcript has been filed.[33]

27 Friezen v. Allemania Fire Ins. Co., 30 Fed. 349.

28 Toucey v. Bowen, Fed. Cas. No. 14,107 (1 Biss. 81); Henning v. Western Union Tel. Co., 40 Fed. 658.

29 U. S. R. S., § 914; *supra*, § 453.

30 Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105; Lewis v. Shainwald, 7 Sawyer 403; Boatmen's Sav. Bank v. Wagenspack, 12 Fed. 66 (4 Woods 130); Taylor v. Life Ass'n of America, 13 Fed. 493.

31 Davis v. St. Louis & S. F. Ry. Co., 25 Fed. 786, 787; per Mr. Justice Brewer.

32 25 St. at L. 433; § 3.

33 Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 40 Fed. 185, 186. But see Champlain Const. Co. v. O'Brien, 104 Fed. 930. Where a motion was made before the transcript was filed, it was sustained after such filing was duly made. Frank v. Leopold & Feron Co., 169 Fed. 922. See Mahoney M. Co. v. Bennett, 5 Sawyer 141; Commercial & S. Bank v. Corbett, 5 Sawyer 172; Hartford & C. W. R. Co. v. Montague, 94 Fed. 227. *Contra*, K. C. & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9; Hamilton v. Fowler, 83 Fed. 321. See also Anderson v. Appleton, 32 Fed. 855; Mills v. Newell, 41 Fed. 529; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Coeur d'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280; Delbanco v. Singletary, 40 Fed. 177; Anderson v. Appleton, 32 Fed. 855; Delbanco v. Singletary, 40 Fed. 177; Mills v. Newell, 41 Fed. 529; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773; Ryder v. Bateman, 93 Fed. 16. But see Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Kansas City & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9; Mahoney M. Co. v. Bennett, 5 Sawyer 141; C. & S. Bank v. Corbett, 5 Sawyer 172; Kansas City & T. Ry. Co. v. Interstate L. Co., 36 Fed. 9; North American Transportation &

If the plaintiff refuses to plead in the Federal court when a pleading is required,[34] or to comply with the rules concerning bringing the case on for trial; his case may be dismissed.[35] When the plaintiff proceeds after the removal upon the wrong code of the court, the proper practice is to sustain a demurrer to his pleading, without prejudice to his right to replead on the other side.[36] Where the plaintiff has erroneously elected to proceed in the cause at common law, or in equity, and his only remedy was on the other side of the court, the Circuit Court of Appeals, when reversing for that reason a judgment in his favor, may give him leave to apply below for permission

Trading Co. v. Howells, 121 Fed. 694, 58 C. C. A. 442. An unreported case by Judge Dillon in the Eighth Circuit, cited in Kansas City & T. Ry. Co. v. Interstate L. Co., 36 Fed. 9, 11, holds that depositions *de bene esse* may be taken under the statutes of the United States, immediately after the removal and before the transcript is filed. Matter of Barnesville & M. R. Co., 2 McCrary 216; Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 9; Heideeker v. Red. Star L. S. S. Co., 32 Fed. 706; Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 40 Fed. 185, 186; Bryce v. Southern Ry. Co., 129 Fed. 966. *Contra*, Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co. of Brooklyn, 60 Fed. 929; Phenix Ins. Co. v. Charleston B. Co., 65 Fed. 628; Torrent v. S. K. Martin L. Co., 37 Fed. 727; Dunn v. Duncan, Fed. Cas. No. 4,175, 2 W. N. Cas. (Pa.) 480, 1 Law & Eq. Rep. 402; Amsden v. Norwich U. F. Ins. Soc., 44 Fed. 515; Webster v. Crothers, 1 Dillon 301; Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 9; Judge v. Anderson, 19 Fed. 885; Knoblock v. Southern Ry. Co., 112 Fed. 926.

[34] Abranches v. Schell, Fed. Cas. No. 21 (4 Blatchf. 256).

[35] McMullen v. Northern Pac. R. Co., 57 Fed. 16. In Dawson v. Kinney, 144 Fed. 710, it was held that, where plaintiff refused to proceed, the Federal court could only dismiss the proceedings and remand the cause, and had no power to enter a judgment of a nonsuit and dismissal with costs to the defendant.

[36] Perkins v. Hendryx, 23 Fed. 418, 419; Pilla v. German School Ass'n, 23 Fed. 700; appeal dismissed, 131 U. S. 443, 9 Sup. Ct. 801, 33 L. ed. 216; Bacon v. Felt, 38 Fed. 870. But where, after the final hearing of a suit prosecuted in equity after the removal, the bill was dismissed "without prejudice to any other appropriate remedy for relief, which complainant might be advised to pursue," the decree was affirmed. Union Stock Yards Co. v. Nashville Packing Co., 140 Fed. 701, 702, 706, 72 C. C. A. 195. It has been held: that a suit to enforce a mechanic's lien must, after removal, be tried upon the equity side of the court, although the State practice permitted it to be maintained as an action at law;

to amend and to proceed in equity,[37] or at common law,[38] as the case may be; provided, at least, that the objection was not taken below; but when such objection was duly taken in the court of first instance and there sustained, and the plaintiff refused to amend, a judgment against him was affirmed.[39]

A State statute authorizing the defendant to an action at law to obtain affirmative equitable relief will not be followed after the removal.[40] If such statutory relief is beyond the power of the Federal court, the case will be remanded.[41]

No stipulation of the parties can make a case cognizable on either side of the court, to which it does not properly belong.[42]

A trial at common law without objection is a waiver of any right to have the case proceed on the equity side of the court.[43] It has been held that a failure, within the time required by the State statute, to demand a jury trial before the removal, which delay by the State law amounts to a waiver of the right

Hooven, Owens & Rentschler Co. v. Featherstone, 99 Fed. 180; that a suit upon a contract, to pay only royalties for the use of a patent, must, when brought against the assignee of the patent, who has assumed the contract, be continued upon the equity side; Goodyear Shoe Machinery Co. v. Dancel, C. C. A., 119 Fed. 692 (in which the author was counsel); but that an action by a payee of notes upon a covenant of a vendee of the land, for which they were given in payment made with the vendor to pay the same, must be continued at common law; North Alabama Development Co. v. Orman, 55 Fed. 18, 5 C. C. A. 22; affirming judgment, Orman v. North Alabama Development Co., 53 Fed. 469; and that a suit upon a chose in action by an assignee must, after removal, be continued upon the equity side; Benediet v. Williams, 10 Fed. 208, 20 Blatchf. 276. But see Thompson v. Central Ohio R. R. Co., 6 Wall. 134, 18 L. ed. 765.

37 Dancel v. Goodyear Shoe Machinery Co., 137 Fed. 157; C. C. A., 119 Fed. 692; *certiorari* denied, 202 U. S. 619, 50 L. ed. 1174.

38 Bacon v. Felt, 38 Fed. 870; McConnell v. Provident Life Assur. Soc., 69 Fed. 113, 16 C. C. A. 172 (where the lower court was directed to permit the plaintiff thus to reframe his pleading).

39 Fletcher v. Burt, C. C. A., 126 Fed. 619.

40 Sturges v. Portis Mining Co., 206 Fed. 534.

41 City of Knoxville v. Southern Paving Const. Co., 220 Fed. 236; Williams v. Provident Life & Trust Co., C. C. A., 242 Fed. 417.

42 North Alabama Development Co. v. Orman, 55 Fed. 18, 5 C. C. A. 22; affirming judgment, Orman v. North Alabama Development Co., 53 Fed. 469.

43 Southern Cotton Oil Co. v. Shelton, 220 Fed. 247.

to trial by jury, does not affect the right to trial by jury in the Federal court.[44]

Where a receiver, appointed by a Federal court, removed a suit brought against him in the State court; it was held that the plaintiff was entitled to a trial by jury, if he would have been so entitled in the State court.[45]

After the removal of a criminal prosecution against an officer of the United States, the State prosecuting officer is the proper person to try the case for the plaintiff and the District Attorney of the United States usually appears for the defendant.[46] The time in which an execution can issue, on a judgment in a case brought in a State court and removed to a Federal court, depends on the laws of the United States and not on the State laws.[47]

Where a claim for damages was blended with one for equitable relief, and the latter was not removable because ancillary to a previous proceeding in the State court; it was held that, on a motion to remand, the whole case must be remanded, and that the Federal court could not upon such motion order a repleader and compel the claim for damages to be separately stated, so that it might retain jurisdiction thereof on its common-law side.[48]

Leave to discontinue may be denied or conditioned by a stipulation that the plaintiff will not bring another action for the same cause of action against the defendant in any court.[49]

The decisions of the State court on a demurrer, or otherwise, made in the case before its removal, will ordinarily be followed by the Federal court;[50] not, however, upon the validity of the

[44] Montgomery County v. Cochran, 116 Fed. 985, 1002.

[45] Bryant v. Thompson, 27 Fed. 881; Vany v. Receiver of Toledo, St. L. & K. C. Ry. Co., 67 Fed. 379.

[46] Delaware v. Emerson, 8 Fed. 411.

[47] Nims v. Spurr, 138 Mass. 209.

[48] Ladd v. West, 55 Fed. 353.

[49] Palmer v. Delaware, L. & W. R. Co., 222 Fed. 461.

[50] Duncan v. Gegan, 101 U. S. 810, 25 L. ed. 875; Milligan v. Lalance & G. Mfg. Co., 21 Blatchf. 407; Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; Loomis v. Carrington, 18 Fed. 97; Phelps v. Canada Cent. R. Co., 19 Fed. 801 (20 Blatchf. 450); Davis v. St. Louis & S. F. R. Co., 25 Fed. 786; Bryant v. Thompson, 27 Fed. 881; Cleaver v. Traders' Ins. Co., 40 Fed. 711; Lookout Mountain R. Co. v. Houston, 44 Fed. 449; Denison v. Shawmut Min. Co.,

service of process upon a nonresident defendant.[51] Where a suit had been removed because of a separable controversy; it was held that the Federal court had no jurisdiction to set aside a previous judgment of the State court against a defendant who was a citizen of the same State as the plaintiff.[52] Whether after removal a plea of *lis pendens*, based upon a former suit in the Federal court, should be sustained, was left undecided.[53]

In an action at common law, a defendant is not obliged to reserve or refile any notice, which has been, before the removal, duly served or filed by him, as the case may be, in the State court.[54]

After removal, the Federal court may consolidate the removed cause with one originally brought within its jurisdiction.[55] The consolidation of a case does not prevent its remand.[56]

The removal of a suit in which he is attorney of record and has been retained upon a contingent fee does not authorize a man who has been disbarred by the Federal court from continuing to act therein.[57]

§ 555a. Pleading to a petition of removal. All pleadings to a petition of removal or denials of allegations therein contained must be made in the Federal court.[1]

In the Northern District of Iowa, it is the practice to treat, as a plea to the jurisdiction, denials of allegations of the defendant's petition which are made in a motion to remand;[2] but,

124 Fed. 860; Dodd v. Louisville Bridge Co., 130 Fed. 186. See Wilson v. Smith, 117 Fed. 707, 709. But see Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347.

51 Remington v. Central Pac. R. R. Co., 198 U. S. 95, 49 L. ed. 959; Allmark v. Platte S. S. Co., 76 Fed. 615. *Contra*, Bragdon v. Perkins, Campbell Co., 82 Fed. 338.

52 Youtsey v. Hoffman, 108 Fed. 699, 701.

53 Ahlhauser v. Butler, 50 Fed. 705.

54 Waldman v. Pennsylvania R. Co., 13 Fed. 801; Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 Fed. 631; Waldman v. Pennsylvania R. Co. (New York), 64 How. Prac. 198.

55 Wabash, St. L. & P. Ry. Co. v Central Trust Co., 23 Fed. 513; *supra*, § 472.

56 Colburn v. Hill, C. C. A., 101 Fed. 500.

57 Leonard v. Toledo, St. L. & W. R. Co., 232 Fed. 281.

§ 555a. 1 See § 554, *supra*.

2 McGuire v. Great Northern Ry. Co., 153 Fed. 434, 435; Harrington v. Great Northern Ry. Co., 169 Fed. 714, 716; Evans v. Sioux City Service Co., 206 Fed. 841. See Jones v. Casey-Hedges Co., 213 Fed. 43, E. D. Tenn. S. D.

ordinarily, such a motion unaccompanied by a plea or affidavits is treated as a demurrer to the petition.[3] Allegations of conclusions of law, such as that a specified defendant is only a nominal party, need not, it seems, be specifically denied.[4]

It has been held that the allegations in a petition for a removal cannot be disputed, unless a plea in abatement is filed,[5] which should be supported by the oath of the defendant or his agent;[6] and that is the safer practice.[7] But such a plea will not be decided by technical rules, and is sufficient if it sets out fairly and with sufficient certainty matters of fact, which, if true, negative the jurisdiction of the Federal court.[8] The ordinary rule is that a formal plea is not indispensable, provided a traverse in some form is made by affidavits.[9] A denial

3 Phillips v. Western Terra Cotta Co., 174 Fed. 873; Armstrong v. Kansas City Southern Ry. Co., 192 Fed. 608; Gibson v. Ches. & O. Ry. Co., C. C. A., 215 Fed. 24; Nelson v. Black Diamond Mining Co., 237 Fed. 264.

4 Mayer v. Denver, T. & Ft. W. R. Co., 41 Fed. 723.

5 Filer v. Levy, 17 Fed. 609.

6 Filer v. Levy, 17 Fed. 609; Lacroix v. Lyons, 27 Fed. 403.

7 Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992; Clarkhuff v. Wisconsin, I. & N. R. Co., 26 Fed. 465; Lacroix v. Lyons, 27 Fed. 403; Rumsey v. Call, 28 Fed. 769; McDonald v. Salem C. F. M. Co., 31 Fed. 577; Johnson v. Accident Ins. Co. of N. A., 35 Fed. 374; Imperial Refining Co. v. Wyman, 3 L. R. A. 503, 38 Fed. 574; Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168.

8 Johnson v. Accident Ins. Co., 35 Fed. 374. A plea alleging that the court had no jurisdiction, or, if it had, that it ought not to exercise it, for the reason that the cause could be tried with greater convenience in the State court, was held to be insufficient. Spies v. Chicago & E. I. R. Co., 32 Fed. 713. So was a plea denying defendant's belief in the existence of the prejudice or local influence set forth in the petition. County Court v. Baltimore & O. R. Co., 35 Fed. 161. An averment in a plea, that a party was a citizen of a specified State, was not neutralized by an admission therein that such party resided abroad. Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992; Hoyt v. Wright, 4 Fed. 168 (2 McCrary 222); Filer v. Levy, 17 Fed. 609; Clarkruff v. Wisconsin, I. & N. R. Co., 26 Fed. 465; Lacroix v. Lyons, 27 Fed. 403; Rumsey v. Call, 28 Fed. 769; McDonald v. Salem Capital Flour Mills Co., 31 Fed. 577 (12 Sawyer 492); First Nat. Bank v. Salem Capital Flour Mills Co., 31 Fed. 580 (12 Sawyer 485, 496); Johnson v. Accident Ins. Co. of N. A., 35 Fed. 374; Imperial Refining Co. v. Wyman, 3 L. R. A. 503, 38 Fed. 574; Weaver v. Northern Pac. Ry. Co., 125 Fed. 155.

9 Morris v. Gilmer, 129 U. S. 315. 32 L. ed. 690; Beadleston v. Har-

in the plaintiff's petition to remand has been held to be a sufficient traverse of an allegation in the defendant's petition for removal.[10] It is the practice in the Western District of Kentucky to treat as traversed, without an express denial, allegations in a petition for removal that defendants were joined in fraud of the jurisdiction of the court for the sole purpose of preventing the removal.[11]

It is the custom in some districts to raise the issue by affidavits.[12]

A motion for leave to plead to the petition after a demurrer thereto has been overruled or a motion to remand denied may be refused for laches.[13]

§ 555b. Repleader after removal. If the suit in the State court is in its nature an action at common law, and a pleading was duly served or filed before the removal, no repleader is necessary thereafter.[1] When the suit is in its nature equitable, but the complaint follows the practice authorized by a State statute, it is the better practice for the plaintiff to replead in accordance with the Federal equity rules; although, if his pleading follows the usual form of a bill in equity, that will not be required.[2] When, however, it does not, and the relief

pending, 32 Fed. 644; Anderson v. Appleton, 32 Fed. 855; Curnow v. Phoenix Ins. Co., 44 Fed. 305.

10 Curnow v. Phoenix Ins. Co., 44 Fed. 305; Jones v. Casey-Hedges Co., 213 Fed. 43.

11 Boatner v. American Exp. Co., 122 Fed. 714.

12 Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654; Jones v. Casey-Hedges Co., 213 Fed. 43.

13 Gibson v. Chesapeake & O. Ry. Co., C. C. A., 215 Fed. 24. Where more than five months after a motion to remand had been overruled and the case was at issue and ready for trial on the merits, it was held that a motion for leave to plead to the petition for removal was properly overruled. Hunter v. Illinois Cent. R. Co., C. C. A., 188 Fed. 645.

§ 555b. 1 Dart v. McKinney, Fed. Cas. No. 3,583 (9 Blatchf. 359); Merchant's & Manufacturers' Nat. Bank v. Wheeler, Fed. Cas. No. 9,439 (13 Blatchf. 218); Bills v. New Orleans, St. L. & C. R. Co., Fed. Cas. No. 1,409 (13 Blatchf. 227); *Contra*, Martin v. Kanouse, Fed. Cas. No. 9,162 (1 Blatchf. 149); Brownell v. Gordon, Fed. Cas. No. 2,039 (1 McAll. 207); Whittenton Mfg. Co. v. Memphis & O. R. P. Co., 19 Fed. 273. It has been held that, whether or not a new declaration should be filed, is a question of practice and not a subject for error. Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. ed. 810.

2 Gridley v. Westbrook, 23 How. 503, 16 L. ed. 412; Toucey v. Bowen, Fed. Cas. No. 14,107 (1

cannot be afforded, except on the equity side of the court, a repleader will be ordered.[3]

It has been held: that the Equity Rule concerning a stockholder's bill does not apply to a suit brought in a State court and subsequently removed;[4] that where the State practice permits affirmative relief by an answer without a cross-bill, an answer seeking affirmative relief, filed before a removal, will be sufficient, and a cross-bill need not be filed in the Federal court;[5] and that, in an action at law, a legal counter-claim, which might have been interposed in the State court, may be pleaded in the Court of the United States after the removal.[6]

When the suit in the State court united legal and equitable grounds of relief,[7] or defense,[8] as authorized by the State statute;[9] it was ordered to be recast into two cases after the re-

Biss. 81); Akerly v. Vilas, Fed. Cas. No. 120 (3 Biss. 332); Leo v. Union Pac. Ry. Co., 17 Fed. 273; Phelps v. Elliott, 26 Fed. 881, 883; Durgan v. Redding, 103 Fed. 914; Dancel v. United Shoe Machinery Co., 120 Fed. 839; Dillon on Removal of Causes, Fourth Edition, § 47, p. 76. *Contra*, Boston Belting Co. v. Judson, Fed. Cas. No. 1,674. But see Hodder v. Kentucky & G. E. Ry. Co., 7 Fed. 793; Thornton N. Motley Co. v. Detroit Steel & S. Co., 130 Fed. 396.

3 Whittenton Mfg. Co. v. Memphis & O. R. P. Co., 19 Fed. 273; Perkins v. Hendryx, 23 Fed. 418; Fletcher v. Burt, C. C. A., 126 Fed. 619; Thornton N. Motley Co. v. Detroit Steel & S. Co., 130 Fed. 396.

4 Earle v. Seattle L. S. & E. Ry. Co., 56 Fed. 909; Evans v. Union Pac. Ry. Co., 58 Fed. 497. But see Venner v. Great Northern Ry. Co., 153 Fed. 408, affirmed on question of jurisdiction, 209 U. S. 24, 52 L. ed. 666; Hitchings v. Cobalt Central Mines Co., 189 Fed. 241; *supra*, § 145.

5 Detroit v. Detroit City Ry. Co., 55 Fed. 569, 575.

6 Frank v. Chetwood, Fed. Cas. No. 5,051. See Partridge v. Phoenix Life Ins. Co., 15 Wall. 573, 21 L. ed. 229 (a case of set-off).

7 Hurt v. Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,829 (8 Blatchf. 299); La Mothe Mfg. Co. v. National T. Works Co., 15 Blatchf. 432; Whittenton Mfg. Co. v. Memphis & O. R. Packet Co., 19 Fed. 273; Perkins v. Hendryx, 23 Fed. 418; Pilla v. German School Ass'n, 23 Fed. 700; appeal dismissed, 131 U. S. 443, 9 Sup. Ct. 801, 33 L. ed. 216; Phelps v. Elliott, 26 Fed. 881 (23 Blatchf. 470); Lacroix v. Lyons, 27 Fed. 403; Schneider v. Foote, 27 Fed. 581 (23 Blatchf. 511); City of Knoxville v. Southern Paving Const. Co., 220 Fed. 236.

8 Northern Pac. R. Co. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. ed. 513; Hodder v. Kentucky & G. E. Ry. Co., 7 Fed. 593.

9 Wright v. Kentucky & G. E.

moval. In such cases, a repleader was necessary.[10] Where, after the removal of a bill in equity, a declaration was filed in the Federal court asking relief at law against some, but not all, of the defendants, which was within the allegations of the original complaint; it was held that it should not be stricken from the files, nor should the complainants be compelled to elect whether to proceed at law or in equity.[11] A failure to replead, however, does not make the judgment or decree void.[12]

When, by the repleader, the case is thus divided into an action at law and a suit in equity, neither of them is considered to constitute a new suit; but each is treated as a continuation of that which was removed; and, for a defect in jurisdiction, the whole cause will be remanded instead of dismissed.[13] Where, after the removal of a case with a complaint praying both damages and equitable relief, a bill in equity therein for the equitable relief was filed and heard; it was held that the action at law was not abandoned by the repleader, but remained on the common-law side of the court.[14]

The necessity of a repleader may be raised by a motion for a repleader,[15] or by a demurrer.[16] But, if these grounds of objection are not specified, a demurrer to a complaint, which follows the State practice, will, after a removal, be overruled,

Ry. Co., 117 U. S. 72, 6 Sup. Ct. 697, 29 L. ed. 821; *Re* Foley, 76 Fed. 390; Pettus v. Smith, 117 Fed. 967.

10 Hurt v. Hollingsworth, 100 U. S. 100, 25 L. ed. 569; La Mothe Mfg. Co. v. National Tube Works Co., Fed. Cas. No. 8,033; Lacroix v. Lyons, 27 Fed. 403; Pettus v. Smith, 117 Fed. 967.

11 Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,829, 8 Blatchf. 299. *Cf.* § 368, *supra.*

12 Hatcher v. Hendrie & B. Mfg. & Supply Co., C. C. A., 133 Fed. 267, 272.

13 Utah-Nevada Co. v. De Lamar, 145 Fed. 505. Where, after the removal of an action at law upon an insurance policy, the Federal court sustained a demurrer and granted leave to the plaintiffs to file a bill in equity for a reformation of the contract and continued the action at law pending the proceedings in equity; it was held that this order, although made six months after the loss occurred, was not contrary to the provision of the policy, that no action could be maintained unless brought within such period. Rosenbaum v. Council Bluffs Ins. Co., 37 Fed. 7, 3 L. R. A. 189.

14 Schneider v. Foote, 27 Fed. 581 (23 Blatchf. 511).

15 Whittenton Mfg. Co. v. Memphis & O. R. P. Co., 19 Fed. 273.

16 Benedict v. Williams, 11 Fed. 547; Perkins v. Hendryx, 23 Fed. 418.

when the complaint states in substance facts which entitle the complainant to relief in equity; although it omits the statement of citizenship, and the prayer for relief, which are required by the Federal equity rules.[17]

If no repleader was had, so much of the pleadings as present matters not cognizable on that side of the court to which the case was removed were stricken out or disregarded, without prejudice to its presentation in a new suit.[18]

§ 555c. Amendment of pleadings after removal. The right to amend after a removal is determined by the Federal and not by the State statutes.[1]

After removal, plaintiff may amend his declaration by inserting new counts, for the same cause of action as that contained in the original counts.[2] He may amend so that the citizenship of the party and the value of the matter in dispute shall appear upon the face of the proceedings.[3] It has been held: that he may change the original cause of action into another, such as one assigned by a citizen of the same State as the plaintiff, which could not have been originally brought in the Federal court;[4] that, where the bill as originally filed did not state a case within the jurisdiction of the State court, it could not, subsequent to its removal, be amended;[5] but that, where the plaintiff's original pleading stated a case within the jurisdiction of the State court, and failed to allege facts sufficient to constitute a cause of action, and after a removal the service of the summons was set aside, the Federal court might permit the plaintiff to file an amended petition; and that a new summons might issue under the same.[6] It has been held: that a

17 Dancel v. United Shoe Machinery Co., 120 Fed. 839.

18 No. Pac. R. Co. Paine, 119 U. S. 561, 563, 30 L. ed. 513, La Mothe Mfg. Co. v. Nat. T. Works Co, 15 Blatchf. 432; Perkins v. Hendryx, 23 Fed. 418; Phelps v. Elliott, 26 Fed. 881; Lacroix v. Lyons, 27 Fed. 403.

§ 555c. 1 Salyer v. Consolidation Coal Co., C. C. A., 246 Fed. 794. See *supra*, § 546.

2 West v. Smith, 101 U. S. 263, 25 L. ed. 809.

3 Ostrander v. Blandin, 211 Fed. 733.

4 Green v. Custard, 23 How. 484, 16 L. ed. 471.

5 Adams v. Heckscher, 80 Fed. 742.

6 United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, C. C. A., 145 Fed. 144.

plaintiff cannot, after a removal, so amend his pleading as to change a suit in equity for the cancellation of a contract into an action at law for deceit in procuring such a contract.[7] But that an action at law to recover the arrears of an annuity that had previously accrued may be changed by amendment into a suit in equity to compel specific performance by one who has assumed a contract to pay such annuity, with a decree for the payment of the arrears that accrued prior to its entry, and a direction that the installments subsequently accruing shall also be paid and enforced by periodical judgments at the foot of such decree.[8]

After a petition for a removal has been duly presented, an amendment bringing in new parties,[9] or the intervention of new parties, whose citizenship is the same as that of the plaintiffs,[10] or whose claims are less than the jurisdictional amount,[11] whether such new parties are made plaintiffs,[12] or defendants,[13] or altering the original writ in a proper case,[14] will not defeat the jurisdiction, even though such new parties file cross-bills against others of the defendants and strangers to the suit, whom it is then also necessary to make defendants.[15] It has been held

7 Blalock v. Equitable Life Assur. Soc'y, 73 Fed. 655.

8 Daneel v. Goodyear Shoe Machinery Co., 137 Fed. 157, C. C. A., 119 Fed. 692; *certiorari* denied, 202 U. S. 619, 50 L. ed. 1174.

9 Stewart v. Dunham, 115 U. S. 61, 64, 29 L. ed. 329, 330; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. ed. 888; Probst v. Cowen, 91 Fed. 929. *Contra*, Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,829 (8 Blatchf. 299).

10 Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. ed. 329; Graham v. Boston, H. & E. R. Co., 14 Fed. 753; Clarke v. Eureka County Bank, 116 Fed. 534. But see Ward v. Arredondo, Fed. Cas. No. 17,148 (1 Paine 410).

11 Handley v. Stutz, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. ed. 706; New York Silk Mfg. Co. v. Second Nat. Bank, 10 Fed. 204; National Bank of Commerce v. Allen, 90 Fed. 545; Bidwell v. Huff, 103 Fed. 362; Clarke v. Eureka County Bank, 116 Fed. 534.

12 Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. ed. 329; Graham v. Boston, H. & E. R. Co., 14 Fed. 753. But see Forest Oil Co. v. Crawford, 101 Fed. 849, 42 C. C. A. 54.

13 Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. ed. 888.

14 Stone v. Speare, 175 Fed. 584.

15 Iowa Homestead Co. v. Des Moines Nav. & R. Co., 8 Fed. 97 (3 McCrary 95); Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475. See Jackson & Sharp Co. v. Pearson, 60 Fed. 113.

that, after removal, a cross-bill may be filed setting up matter ancillary to the original suit; although, because the defendant's assignor is a citizen of the same State as complainant, such cross-bill could not have been begun in the Federal court as an original suit.[16]

If, however, the parties added subsequent to the removal were indispensable to the maintenance of the original suit, the case should be remanded after they have been brought in by amendment.[17] Where omitted parties, who were entitled to be heard, applied for leave to intervene, the court made an order requiring the plaintiff to amend his bill and make them defendants on pain of remanding the cause to the State court or dismissing it, as the defendants might elect.[18]

Where the removal was made by one only of the defendants, because of a separable controversy; it was held that, after an amendment dismissing him,[19] or a discontinuance as to him,[20] or an amendment which left nothing in the case that affected his rights;[21] there should be a remand, even though he had previously been allowed by the State court to intervene.[22] A plaintiff, who is a receiver of a State court, is not required to show its authority for such dismissal, before the Federal courts will entertain his motion,[23] nor can the dismissal be prevented by a motion made by the defendant, while it is pending, for leave to file an amended answer pleading a set-off.[24] A reduction of the amount claimed, when made subsequent to the removal, will not justify a remand,[25] unless it is clearly proved that the first claim was intentionally extravagant.

16 Brooks v. Laurent, 98 Fed. 647, 39 C. C. A. 201.

17 Perry v. Clift, 32 Fed. 801.

18 Hunt v. Fisher, 29 Fed. 801, 805.

19 Texas Transportation Co. v. Seeligson, 122 U. S. 519, 30 L. ed. 1150; Youtsey v. Hoffman, 108 Fed. 699; Anderson v. United Realty Co., 222 U. S. 164, 56 L. ed. 144.

20 Texas Transp. Co. v. Seeligson, 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. ed. 1150; Ryan v. Young, Fed. Cas. No. 12,188 (9 Biss. 63); Bacon v. Felt, 38 Fed. 870; Bane v. Keefer, 66 Fed. 610.

21 Iowa Homestead Co. v. Des Moines Nav. & R. R. Co., 8 Fed. 97.

22 Iowa Homestead Co. v. Des Moines Nav. & R. R. Co., 8 Fed. 97.

23 Youtsey v. Hoffman, 108 Fed. 699.

24 Youtsey v. Hoffman, 108 Fed. 699.

25 Kanouse v. Martin, 15 How. 198, 14 L. ed. 660; Wright v. Wells, Fed. Cas. No. 18,101 (Pet. C. C.

An amendment after a motion to remand has been denied is not a submission to the jurisdiction nor a waiver of the right to review the validity of the removal by a writ of error or appeal in the Federal court.[26] When the suit has not been properly removed, no amendment subsequent to the proceedings for the removal can give such court jurisdiction nor affect the jurisdiction of the State court.[27]

Amendments to petitions of removal are previously explained.[28]

§ 555d. Effect of removal upon previous proceedings in the State court. All orders, attachments, sequestrations, bonds, undertakings, security, and other proceedings, given or taken in the State court before the removal, remain in force until they are set aside, dissolved or modified by the Federal court.[1] The Federal court has the same jurisdiction to modify or set aside orders or rulings previously made therein that the State court would have had, if the cause had not been removed.[2] It has been held at Circuit, that, after a removal, a sheriff cannot amend his return, previously made to the State court;[3] but that the record of the State court showing the time of filing the peti-

220); Ladd v. Tudor, Fed. Cas. No. 7,975 (3 Woodb. & M. 326); Roberts v. Nelson, Fed. Cas. No. 11,907, 8 Blatchf. 74 (40 How. Prac. 387); McGinnity v. White, Fed. Cas. No. 8,802 (3 Dill. 350); Zinkeisen v. Hufschmidt, Fed. Cas. No. 18,214; Maine v. Gilman, 11 Fed. 214; Waite v. Phoenix Ins. Co., 62 Fed. 769; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438; Peterson v. Chicago, M. & St. P. Ry. Co., 108 Fed. 561; Cumberland Gap Building & Loan Ass'n v. Wells (Georgia), 25 S. E. 246; Louisville & N. R. Co. v. Roehling, 11 Ill. App. (11 Bradw.) 264; Chicago, R. I. & P. Ry. Co. v. Stone & Bronnenberg (Kansas), 79 Pac. 655; Geiger v. Union Mut. Life Ins. Co. (New York), 1 City Ct. R. 237. *Contra*, Spiers v. Halsted, 74 N. C. 620.

[26] Guaranty Trust Co. v. McCabe, C. C. A., 250 Fed. 699.

[27] Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

[28] See § 546, *supra*.

§ 555d. [1] New England Screw Co. v. Bliven, Fed. Cas. No. 10,156 (3 Blatchf. 240); Clarke v. Chase, Fed. Cas. No. 2,845 (Brunner Col. Cas. 638); Barney v. Globe Bank, Fed. Cas. No. 1,031 (15 Blatchf. 107); 18 St. at L., ch. 137, p. 470; quoted *supra;* Carpenter v. New York & N. H. R. Co. (New York), 11 How. Prac. 481; Martin v. Thompson (South Carolina), 3 McCord 167.

[2] Buxton v. Pennsylvania Lumber Co., 221 Fed. 718.

[3] Tallman v. Baltimore & O. R. Co., 45 Fed. 156. *Contra*, Richmond v. Brookings, 48 Fed. 241.

tion and bond may be proved, by the testimony of witnesses, to be erroneous.[4] After removal, the Federal court may hear and decide a motion that was pending undecided in the State court before the petition was filed.[5]

Where a motion is pending at the time of the removal, it is transferred with the record to the Federal court to be there determined.[6] Where, before a petition and bond for the removal of a cause from a State court was passed upon by that court, a motion was made therein by defendant, which was brought on for hearing in the Federal court; it was held that, by seeking an adjournment of the hearing in the latter court without objecting to the irregularity of the hearing, plaintiff waived such irregularity.[7] When a motion has been denied by the State court, leave to renew it should be obtained before making it in the Federal court.[8] Ordinarily, when the State court has acted within its jurisdiction, such leave will not be granted unless such a showing is made as would justify an appeal or a rehearing under the State practice.[9] When, at the time of a removal, a motion was pending to resettle an order previously made, the Federal court entertained the application but refused to review the decision upon which that order had been entered.[10] Upon a motion to dismiss, made before the removal, when the defendant had acquired the right to a dismissal under the State practice; it was held that the motion should be granted, although the practice of the Federal court would not

4 Stephens v. St. Louis & S. F. R. Co., 47 Fed. 530.

5 Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, holding that an oral opinion of a State judge sustaining a motion, when no order had been entered upon the same, was not an adjudication which bound the Federal court.

6 Bryce v. Southern Ry. Co., 129 Fed. 966.

7 Kinne v. Lant, 68 Fed. 436.

8 Carrington v. Florida R. Co., Fed. Cas. No. 2,448 (9 Blatchf. 468); New Orleans, M. & C. R. Co. v New Orleans, 14 Fed. 373; Loomis v. Carrington, 18 Fed. 97; Bryant v. Thompson, 27 Fed. 881; Allmark v. Platte S. S. Co., 76 Fed. 615; Denison v. Shawmut Min. Co., 124 Fed. 860; Guernsey v. Cross, 153 Fed. 827. See Remington v. Central Pac. R. R. Co., 198 U. S. 95, 99, 49 L. ed. 959, 963; Carrington v. Florida R. Co., 9 Blatchf. 468.

9 Allmark v. Platte S. S. Co., 76 Fed. 615; Denison v. Shawmut Min. Co., 124 Fed. 860.

10 Milligan v. Lalance & G. Mfg. Co., 17 Fed. 465, 21 Blatchf. 407 (an order of a general term of the State court upon an appeal).

have justified the dismissal.[11] The Federal court may vacate an order, previously made by the State court, denying a motion to set aside service of process.[12] A removal operates as an abandonment of an appeal from an interlocutory order not appealable in the Federal courts.[13]

§ 555e. Effect of removal upon attachments in the State court. An attachment levied upon the property of a non-resident under process of the State court, in accordance with the statutes of the State, will be upheld and enforced by the Federal court after removal, although the Federal court had no jurisdiction to levy such an attachment originally.[1] In such a case the Federal court may serve process upon the non-resident by publication, in accordance with the State statute or a publication. In case of his failure to appear, however, no personal judgment can be entered against him; but the judgment entered can be enforced only against the property attached.[2] Where a suit in equity had been begun by a writ of foreign attachment in a State court; it was held, after a removal, that the State practice should be followed, which authorized a rule directing the plaintiffs to show cause of action and why the attachment should not be dissolved.[3] The Federal court may authorize its marshal to take, into his custody, property held by the sheriff under a writ of the State court issued before the removal.[4] But where the

11 Sutro v. Simpson, 14 Fed. 370, 4 McCrary, 276 (for failure to give security for costs).

12 Remington v. Central Pac. R. R. Co., 198 U. S. 95, 49 L. ed. 959. *Contra,* Brooks v. Farwell, 4 Fed. 166 (2 McCrary 220); Allmark v. Platte S. S. Co., 76 Fed. 615; Guernsey v. Cross, 153 Fed. 827.

13 Freeman v. Butler, 39 Fed. 1. *Contra,* Williams Mower & Reaper Co. v. Raynor, Fed. Cas. No. 17,748 (7 Biss. 245).

§ 555e. 1 Clark v. Wells, 203 U. S. 164, 51 L. ed. 138; Crocker Nat. Bank v. Pengenstecher, 44 Fed. 705; Vermilya v. Brown, 65 Fed. 149; *supra,* § 470. See Purdy v. Wallace Muller & Co., 81 Fed. 513.

2 Clark v. Wells, 203 U. S. 164.

3 Commonwealth Trust Co. v. Frick, 120 Fed. 688.

4 Friedman v. Israel, 26 Fed. 801. In a replevin suit, Mr. Justice Nelson suggested that the property held by the State sheriff might be sold under the direction of the Federal court and the proceeds deposited in its registry. Dennistown v. Draper, 5 Blatchf. 336, Fed. Cas. No. 3,804. It has been held that where the plaintiff succeeds in such a case, the fees for the attachment should be equally divided between the sheriff and the marshal. Duryee v. International Mach. & Eng. Co., D. C., S. D. N. Y., January, 1912.

removal cause was a suit in equity to enjoin the enforcement of, and to set aside, a judgment in a suit in the State court that had not been removed, in which the sheriff held the proceeds of attached property; it was held that the Federal court had no jurisdiction over the fund in the hands of the sheriff.[5] It has been held that, after removal, the Federal court may set aside an attachment upon the ground that the State court had no power to grant the same.[6] But when the State court had, upon a hearing, sustained the validity of the attachment or garnishment of a judgment of a Federal court; the Court to which the case was removed, declined to review the propriety of such order; but suggested that the Federal court, whose judgment was thus garnished, might properly disregard the writ.[7] Where the State attachment law provided that, before the defendant's appearance, all creditors who applied to be made parties should share *pro rata* in the fund, and that, after such appearance, all other creditors should be deprived of a share in the fund; it was held that, after the removal of the attachment suit to the Federal court, the latter had no power to strike out the defendant's appearance in order to let in the other creditors.[8] The sureties upon a delivery bond or a forthcoming bond remain liable, notwithstanding the removal.[9]

§ 555f. Effect of removal upon injunctions previously granted. An injunction granted by the State court before the removal remains in force thereafter, until it has been dissolved.[1] Where a motion to continue the injunction or to make the same perpetual has been granted by the State court before the removal, the Federal court will ordinarily follow that decision.[2]

The Federal court after removal may continue an injunction previously granted by a State court, which a court of the United

5 Smith v. Schwed, 9 Fed. 483.

6 Corbitt v. Farmers' Bank, 114 Fed. 602.

7 Loomis v. Carrington, 18 Fed. 97.

8 Second Nat. Bank v. New York Silk Mfg. Co., Fed. Cas. No. 12,601a.

9 Ramsey v. Coolbaugh, 13 Iowa 164; State v. Peck, 32 W. Va. 606, 9 S. E. 919.

§ 555f. 1 Smith v. Schwed, 6 Fed. 455 (2 McCrary 441); Fogg v. Fisk, 19 Fed. 235.

2 Carrington v. Florida R. Co., Fed. Cas. No. 2,448 (9 Blatchf. 468); New Orleans, M. & C. R. Co. v. New Orleans, 14 Fed. 373.

States could not have previously granted.[3] A Federal court may make an order continuing an injunction granted by a State court before the removal, although the State court had no power to make the same.[4]

The Federal court may dissolve an injunction granted by a State court in a case which has since been removed.[5] It will not do so because the will was not verified according to the practice in the Federal court;[6] nor because the plaintiff, after the removal, fails to prosecute the application to continue the injunction upon the day fixed by the State court, which occurs before the transcript is filed in the District Court of the United States.[7] A motion to dissolve the injunction may be made and heard upon due notice to the plaintiff at any time after the record has been filed in the Federal court;[8] and even, it seems to have been held, before that time.[9] It has been held that the hearing of a motion to dissolve such an injunction should not be postponed because of a motion to remand, based upon a defect in the form or amount of the removal bond.[10] An original motion for an injunction on the face of the bill may be heard in the Federal court when noticed after the removal; although the papers are not in accordance with the State practice.[11]

§ 555g. Effect of removal upon receivers previously appointed. A receiver appointed before the removal of the case remains in possession until himself removed, and he may be required to account in the Federal court.[1]

The Federal court may remove or discharge a receiver appointed by the State court before the removal.[2] It has been held

3 Perry v. Sharpe, 8 Fed. 15; Hunt v. Fischer, 29 Fed. 801; Eureka & K. R. Co. v. California & N. Ry. Co., 103 Fed. 897.

4 Hower v. Weiss M. & El. Co., 56 Fed. 356.

5 Sharp v. Whiteside, 19 Fed. 156; State of Arkansas v. Kansas & T. Coal Co., 96 Fed. 353.

6 Smith v. Schwed, 6 Fed. 455 (2 McCrary 441).

7 Hamilton v. Fowler, 83 Fed. 321.

8 Texas & St. L. Ry. Co. v. Rust, 17 Fed. 275 (5 McCrary 348).

9 Champlain Const. Co. v. O'Brien, 104 Fed. 930.

10 Coburn v. Cedar Val. Land & Cattle Co., 25 Fed. 791.

11 McLeod v. Duncan, Fed. Cas. No. 8,898 (5 McLean 342).

§ 555g. 1 Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Mack v. Jones, 31 Fed. 189, 196.

2 Texas & St. L. Ry. Co. v. Rust, 17 Fed. 275.

that, where a motion to discharge a receiver has been denied by the State court, the Federal court will not review the same.[3]

Where a receiver appointed by a Federal court removed a suit brought against him in the State court; it was held that the plaintiff was entitled to a trial by jury, if he would have been so entitled in the State court.[4]

§ 555h. Effect of removal upon depositions and examinations in the State court. It has been held that the Federal court cannot compel a witness to sign a deposition, which has been taken from his testimony in shorthand previous to the removal;[1] nor compel the defendant to file answers to interrogatories annexed to the petition, in accordance with the Iowa statute.[2] It seems that an order of the State court for the examination of a party under section 870 of the New York Code of Civil Procedure, after issue and before trial, must be vacated by the Federal court after removal.[3] Where depositions taken to be used in an action in a State court that had been dismissed were admissible as evidence under the statute of the State in another suit subsequently brought, and such second suit was removed; it was held that such depositions were admissible in the Federal court.[4] Depositions taken subsequent to the removal before a referee previously appointed are no part of the record in the Federal court.[5]

§ 555i. Effect of removal upon contempt proceedings. It has been held: that the Federal court cannot punish a party for his previous violation of an order of the State court.[1] Where

[3] Bryant v. Thompson, 27 Fed. 881.

[4] Bryant v. Thompson, 27 Fed. 881; Vany v. Receiver of Toledo, St. L. & K. C. Ry. Co., 67 Fed. 379.

§ 555h. [1] Arnold v. Kearney, 29 Fed. 820.

[2] Pierce v. Union Pac. Ry. Co., 47 Fed. 709.

[3] *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117. Where, before the removal of a cause from the State to the Federal court, a reference was made to take the deposition of a witness according to the State practice, to be used on a motion in the suit, it was held that the plaintiff must proceed with such reference after the removal of the cause. Bills v. New Orleans, St. L. & C. R. Co., Fed. Cas. No. 1,409 (13 Blatchf. 227).

[4] Graveville v. Minneapolis & St. L. R. Co., 16 Fed. 435 (3 McCrary 385).

[5] Miller v. Tobin, 18 Fed. 609 (9 Sawy. 401).

§ 555i. [1] Kirk v. Milwaukee D.

an order had been made directing the defendant to show cause why he should not be punished for a disobedience to an order of the State court, the proceeding thereupon was remanded, although jurisdiction of the original suit was maintained.[2] Where an order in contempt proceedings had been appealed to the State Supreme Court before the removal, the Federal court held proceedings for the enforcement of such order in abeyance until the disposition of such appeal.[3]

§ 555j. Injunctions to stay proceedings in a State court after a removal. If the plaintiff threatens to proceed in the State court after a removal,[1] or if he refuses to file his pleadings so that a transcript can be obtained,[2] he may be enjoined from taking any further steps therein, even, it has been held, when the State is the plaintiff.[3] The relief will not be denied on the ground that complainant had an adequate remedy at law in the State court, by moving to set aside the order of the State court

C. Mfg. Co., 26 Fed. 501. But see Williams M. & R. Co. v. Raynor, 7 Biss. 245, Fed. Cas. No. 17,748.

2 Voorhees v. Albright, Fed. Cas. No. 16,999.

3 Williams Mower & Reaper Co. v. Raynor, Fed. Cas. No. 17,748 (7 Biss. 245).

§ 555j. 1 French v. Hay, 22 Wall. 250, 22 L. ed. 857; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497; Madisonville Traction Co. v. St. Barnard Min. Co., 196 U. S. 239; Warren v. Ives, Fed. Cas. No. 17,197 (1 Flip. 356); Wagner v. Drake, 31 Fed. 849; Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Abeel v. Culbertson, 56 Fed. 329; Williston v. Raymond, 213 Fed. 527; Alabama G. S. Ry. Co. v. American Cotton Oil Co., C. C. A., 229 Fed. 11; McCabe v. Guaranty Trust Co., C. C. A., 243 Fed. 845. *Contra*, Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827, 6 Blatchf. 362; Penrose v. Penrose, Fed. Cas. No. 10,958 (17 Blatchf. 332); Atlantic Coast Line R. Co. v. Daniels, 175 Fed. 302, where it was claimed that there were sham defendants fraudulently joined for the purpose of defeating the jurisdiction. Where, after the removal to a Federal court of an action for malicious prosecution on a charge of larceny, the plaintiff instituted in the State court a second action for malicious prosecution on a charge of forgery connected with the same transaction, the State statutes not permitting the consolidation of the two prosecutions; it was held that the Federal court should not grant an injunction against the prosecution of the second suit. Western Union Tel. Co. v. Cooper, 182 Fed. 710.

2 Abeel v. Culbertson, 56 Fed. 329; Miller v. Soule, 221 Fed. 493; Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881.

3 Abeel v. Culbertson, 56 Fed. 329.

denying the petition to remove, and appealing to the Supreme Court of the State from an adverse ruling thereon.[4]

Such a motion will not ordinarily be granted before a motion to remand the cause has been decided, unless the right of removal is beyond dispute.[5] An injunction was refused where, although a petition for removal with a bond had been filed in the State court, no action had been taken upon them and no copy of the record had been filed in the Federal court,[6] and where the petition had been filed with the clerk of the State court in vacation, but not presented to that court.[7]

Where, after a motion to remand had been denied, judgment was entered in the State court in favor of the plaintiff and in the Federal court in favor of the defendant, it was held that the Federal court had no power to enjoin the enforcement of the State judgment.[8] Where the Federal court after an attempted removal has refused to assume jurisdiction upon the ground that the case was not removable, the decision cannot be reviewed by a bill in equity to enjoin the State court from further proceedings.[9] When the removed case was brought at common law, the injunction is usually granted upon an original bill, which is considered to be ancillary in its nature, and which is filed in the District Court of the United States.[10] In such a suit the propriety of an order denying a motion to remand cannot be reviewed.[11] It has been held that a Court of the United States may compel, by a mandamus, a State court to allow a removal.[12]

4 Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

5 Frishman v. Insurance Co's., 41 Fed. 449; Sinclair v. Pierce, 50 Fed. 851.

6 Coeur d'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280. See Missouri, K. & T. Ry. Co. v. Scott, 13 Fed. 793.

7 Coker v. Monaghan Mills, 110 Fed. 803.

8 Illinois Cent. R. R. Co. v. Sheegog, 217 U. S. 599.

9 Pacific Live Stock Co. v. Lewis, 217 Fed. 95.

10 Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. ed. 462; Mutual Life Ins. Co. v. Langley, 145 Fed. 415; Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. 908.

11 Missouri, K. & T. Ry. Co. v. Chappell, 206 Fed. 688; McCabe v. Guaranty Trust Co., 243 Fed. 845.

12 Spraggins v. County Court of Humphries, 1 Cooke (Tenn.) 160, Fed. Cas. No. 13,246. But see § 457, *supra*.

§ 556. Remand. "If, in any suit commenced in a District Court, or removed from a State court to a District Court of the United States, it shall appear to the satisfaction of said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."[1]

The suit may be remanded at the motion of the plaintiff when neither he nor the defendant resides in the district;[2] but not it has been held by the defendant on this ground when there exists the requisite diversity of citizenship.[3] A case which was properly removed cannot be remanded by consent.[4] A remand for want of jurisdiction, whether because there is a want of the requisite difference of citizenship,[5] or because no Federal question is involved,[6] or because the value of the matter in dispute is less than two thousand dollars,[7] may be made at the motion of either party; even by the party who removed the case.

The objection that the case was not removed within the statutory time cannot be raised by the party who made the removal.[8] The court of first instance,[9] or the court of

§ 556. [1] Jud. Code, § 36, re-enacting, 18 St. at L. 472, ch. 137, § 5.

[2] *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264.

[3] De Valle Da Costa v. Southern Pac. Co., 160 Fed. 216; Clark v. Southern Pac. Co., 175 Fed. 122; Sagara v. Chicago, R. I. & P. Ry. Co., 189 Fed. 220; H. J. Deeker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224. See *supra*, § 537h.

[4] Lawton v. Blitch, 30 Fed. 641.

[5] Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462; *infra*, § 556a. *Contra*, Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; Davies v. Lathrop, 13 Fed. 565 (21 Blatchf. 164); Tootle v. Coleman, 57 L. R. A. 120, 107 Fed. 41, 45, 46 C. C. A. 132.

[6] Ferguson v. Ross, 38 Fed. 161, 3 L. R. A. 322; Wabash Railroad Co. v. Barbour, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102.

[7] Lazensky v. Supreme Lodge Knights of Honor, 32 Fed. 417.

[8] Ayres v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. ed. 1093.

[9] Johnson v. Johnson, 13 Fed. 193; Teas v. Allbright, 13 Fed. 406; In-

review,[10] may remand a cause of its own motion for want of jurisdiction. It has been held that the court of first instance may, of its own motion, remand a case because it was removed too late.[11]

It is doubtful whether a motion to remand a cause can be made until the transcript has been filed.[12] Thereafter, a motion to remand a cause for want of jurisdiction may be made at any time.[13] A suit may be remanded after it has been consolidated with another, of which the court has jurisdiction.[14] A motion to remand for want of jurisdiction may be made after verdict,[15] or after judgment;[16] or the judgment may be reversed and a remand ordered upon an appeal or writ of error by the party who removed the cause.[17]

diana v. Tolleston Club of Chicago, 53 Fed. 18.

10 Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646; Yellow Aster Min. & Mill. Co. v. Crane Co., C. C A., 150 Fed. 580 (there being a difference of citizenship, but neither party being a resident of the district).

11 Keeney v. Roberts, 39 Fed. 629 (12 Sawy. 39).

12 *Supra*, § 553. When the transcript is filed before the return day, a motion to remand may be made immediately. Anderson v. Appleton, 32 Fed. 855; Thompson v. Chicago, St. P. & K. C. Ry. Co., 60 Fed. 773. *Contra*, Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 9. Where the term was changed by statute, too late to permit the holding of a term at the substituted time, it was held that the motion to remand might be made at a special term after the transcript was filed. Kansas City & T. R. Co. v. Interstate Lumber Co., 37 Fed. 3.

13 Jackson v. Allen, 132 U. S. 27, 33 L. ed. 249; Kain v. Texas Pac. R. Co., Fed. Cas. No. 7,596; Lazensky v. Knights of Honor, 32 Fed. 417; Bronson v. St. Croix L. Co., 35 Fed. 634; Southworth v. Reid, 36 Fed. 451; Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102; Indiana v. Lake Erie & W. Ry. Co., 85 Fed. 1; Broadway Ins. Co. v. Chicago G. W. Ry. Co., 101 Fed. 507; Parkinson v. Barr, 105 Fed. 81. But see Hervey v. Illinois Midland Ry. Co., 3 Fed. 707.

14 Colburn v. Hill, C. C. A., 101 Fed. 500.

15 Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161; Mulcahey v. Lake Erie & W. R. Co., 69 Fed. 172.

16 Lazensky v. Knights of Honor, 32 Fed. 417; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102. But see Mastin v. Chicago, R. I. & P. Ry. Co., 123 Fed. 827.

17 Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102.

Where the record or bill of exceptions shows that at the time of judgment there existed the requisite diversity of citizenship and the value of the matter in dispute, there will be no reversal because of the residence of any of the parties,[18] nor because of defects in the petition of removal;[19] nor because of the improper dismissal as to a party whose presence might have defeated the jurisdiction;[20] nor because the jurisdictional amount would have been insufficient had no counterclaim been interposed;[21] provided that none of these questions were raised below. The method of getting the case before the court cannot operate to deprive it of jurisdiction.[22] The manner of the appearance of the parties is immaterial.[23] Where the record showed a difference of citizenship; it was held that the objection that there was no sufficent proof of prejudice or local influence could not be made after testimony upon the issues had been taken.[24]

It has been held: that, when a case involving several questions has been removed, because one of them arises under the Constitution or laws of the United States, after an amendment,[25] or a decision of the court disposing of the Federal question, there should be a remand;[26] but that a Federal question, which is not frivolous, cannot be decided upon a motion to remand.[27] A subsequent change of citizenship,[28] or the consolidation of a foreign with a domestic corporation, will not defeat the jurisdiction.[29]

18 Klink v. Chicago, R. I. & P. Ry. Co., C. C. A., 219 Fed. 457.

19 La Belle Box Co. v. Stricklin, C. C. A., 218 Fed. 529; Parker Washington Co. v. Cramer, C. C. A., 201 Fed. 878.

20 Toledo, St. L. & W. R. Co. v. Perenchio, C. C. A., 205 Fed. 472.

21 Mackay v. Uinta Dev. Co., 229 U. S. 173.

22 Ibid.

23 Toledo, St. L. & W. R. Co. v. Perenchio, C. C. A., 205 Fed. 472.

24 Neale v. Foster, 31 Fed. 53 (12 Sawy. 424).

25 Fischer v. Star Co., 227 Fed. 955.

26 Hamblin v. Chicago, B. & Q. R. Co., 43 Fed. 401.

27 Lowry v. Chicago, B. & Q. R. Co., 46 Fed. 83.

28 Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. ed. 1081, 19 S. Ct. 817, 75 Fed. 433, 22 C. C. A. 378; Tug River Coal & Salt Co. v. Brigel, 86 Fed. 818; Haraeovic v. Standard Oil Co., 105 Fed. 785; Collins v. Ashland, 112 Fed. 175.

29 Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. ed. 1081, 19 S. Ct. 817.

When the right of a removal depends upon the contention that one of the defendants is a formal, or is not a necessary party,[30] or that there is a separable controversy,[31] or that the suit arises under the Constitution or laws or a treaty of the United States,[32] or the right depends upon the nature of the suit,[33] the allegations in the complaint are conclusive, unless subsequent proceedings in the Federal court show that the removal was improper.[34] Where the right of removal depends upon a difference of citizenship and the residence of the parties, the allegations in the complaint concerning citizenship and residence are not conclusive;[35] even if they relate to the sovereignty under which a party was incorporated.[36]

On a motion to remand, the court will not inquire as to the truth of allegations of facts other than citizenship or residence, which are contained in the pleadings;[37] nor into the sufficiency of the allegations therein, so as to decide whether the plaintiff's

30 Mayer v. Denver, T. & Ft. W. R. Co., 41 Fed. 723; Bryce v. Southern Ry. Co., 122 Fed. 709; Duncan v. St. Louis, I. M. & S. Ry. Co., 22 So. 924, 49 La. Ann. 1700. See Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232. Where the averments of the complaint were so ambiguous as to make it doubtful whether certain defendants were necessary parties, and there were indications of a design to obstruct a removal by their joinder; such averments were rigidly scrutinized; the whole record, including the plaintiff's affidavits therein, were examined; and it appearing probable that these defendants were not necessary parties, the motion for a remand was denied, without prejudice to its subsequent renewal should it afterwards appear to be necessary. New York v. New Jersey Transportation Co., 24 Fed. 817.

31 Long v. Buford, 24 Fed. 241. See Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Cella v. Brown, C. C. A., 144 Fed. 742.

32 Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. ed. 656; Jones v. Oceanic Steam Nav. Co., Fed. Cas. No. 7,485 (11 Blatchf. 406); Arkansas v. Choctaw & M. R. Co., 134 Fed. 106; *supra*, § 24. See New Castle v. Postal Telegraph-Cable Co., 152 Fed. 572; Echols v. Smith (Kentucky), 42 S. W. 538. But see State ex rel. Tillman v. Coosaw Min. Co., 45 Fed. 804, 808, 809.

33 Anderson v. Appleton, 32 Fed. 855.

34 See §§ 540, 543, *supra*.

35 Rumsey v. Call, 28 Fed. 769; Egerton v. Starin, 91 Fed. 932. But see Stephenson's Adm'r v. Illinois Cent. R. Co., 75 S. W. 260, 25 Ky. Law Rep. 442.

36 Greer v. Texas & P. Ry. Co. (Texas), 42 S. W. 1038.

37 Marshall v. Holmes, 141 U. S. 589, 591, 35 L. ed. 870, 871; Hax v. Caspar, 31 Fed. 499; Carlisle v.

pleading contains a good cause of action, or the answer a good defense,[38] except when it is claimed that a Federal question is involved, when the court will determine whether a Federal question, which is not frivolous, is actually raised.[39] It has been held that the question whether there is a misjoinder of causes of action in the complaint is not one for consideration upon a motion for remand.[40]

It has been held that a cause will not be remanded because there was a defect in the form of the signature to the bond;[41] nor for a defect in the form of the bond;[42] nor because the sureties on the bond are insufficient;[43] nor for mere irregularities in the removal.[44] Where the bond did not show the residence, nor the sufficiency, of the surety, and the petition stated that the petitioners "have made and herewith file a bond with good and sufficient security," it was held that this statement must be accepted by the Federal court as true, until the contrary was shown; although it did not appear that the State court had either accepted or refused the surety.[45]

The Federal court has discretionary power to grant a motion to remand a cause because the transcript was not filed in

Sunset Tel. & Tel. Co., 116 Fed. 896; Shane v. Butte Electric Ry. Co., 150 Fed. 801 (where the court refused to inquire into the truth of the allegation that the defendants were jointly engaged in the operation of a car).

38 Marshall v. Holmes, 141 U. S. 589, 591, 35 L. ed. 870, 871; Hax v. Caspar, 31 Fed. 499; Broadway Ins. Co. v. Chicago G. W. Ry. Co., 101 Fed. 507; M'Guire v. Great Northern Ry. Co., 153 Fed. 434.

39 Starin v. New York, 115 U. S. 248, 29 L. ed. 388; Southern Pac. R. R. Co. v. California, 118 U. S. 109, 112, 30 L. ed. 103, 104; Wood v. Mathews, Fed. Cas. No. 17,955 (2 Blatchf. 370); Kessinger v. Vannatta, 27 Fed. 890; Lowry v. Chicago, B. & Q. R. Co., 46 Fed. 83; Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832. But see Nashville v. Cooper, 6 Wall. 247, 18 L. ed. 851.

40 Fogarty v. Southern Pac. Co., 123 Fed. 973.

41 Kain v. Texas Pac. R. Co., Fed. Cas. No. 7,596; Chambers v. McDougal, 42 Fed. 694. See § 547, *supra*.

42 Baker v. Peterson, Fed. Cas. No. 776 (4 Dill. 562, note); Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods 683).

43 Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods 683); Van Allen v. Atchison, C. & P. R. Co., 3 Fed. 545 (1 McCrary 598); Chambers v. McDougal, 42 Fed. 694.

44 Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339 (9 Sawy. 348).

45 Probst v. Cowen, 91 Fed. 929.

time.[46] It may deny a motion for a remand upon that ground, if the defendant gives a reasonable excuse for his delay and offers to file the transcript at once.[47] A defect in the transcript is no ground for a remand. The remedy for such a defect is a writ of *certiorari* for a diminution of the record.[48]

Where the complaint shows the value of the matter in dispute, it ordinarily cannot be contradicted,[49] unless the petition charges a fraudulent understatement, which is not denied by the plaintiff[50] or is conclusively proved by the defendant;[51] but where the recovery of a specific thing, as in ejectment or replevin, is sought,[52] or an injunction is prayed,[53] it seems that the question

46 St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; Bright v. Milwaukee & St. P. R. Co., Fed. Cas. No. 1,877 (14 Blatchf. 214); Jackson v. Mutual Life Ins. Co., Fed. Cas. No. 7,141 (3 Woods 413); McLean v. St. Paul & C. Ry. Co., Fed. Cas. No. 8,892 (16 Blatchf. 309); affirmed, St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; Kidder v. Featteau, 2 Fed. 616 (1 McCrary 323); Woolridge v. McKenna, 8 Fed. 650; Hall v. Brooks, 14 Fed. 113 (21 Blatchf. 167); McGregor v. McGillis, 30 Fed. 388.

47 Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; St. Paul & C. Ry. Co. v. McLean, 108 U. S. 212, 216, 27 L. ed. 703, 704; Bright v. Milwaukee & St. P. R. Co., 14 Blatchf. 214; Kidder v. Featteau, 2 Fed. 616 (1 McCrary 323); Woolridge v. McKenna, 8 Fed. 650; Hall v. Brooks, 14 Fed. 113 (21 Blatchf. 167); Winchell v. Coney, 27 Fed. 482; Rowell v. Hill, 28 Fed. 433; McGregor v. McGillis, 30 Fed. 388; Lucker v. Phœnix Assur. Co., 66 Fed. 161.

48 Dennis v. Alachua County, Fed. Cas. No. 3,791 (3 Woods 633); Cook v. Whitney, Fed. Cas. No. 3,166 (3 Woods 715). See § 553, *supra*.

49 Smith v. Western Union Tel. Co., 79 Fed. 132. But see Building & Loan Ass'n of Dakota v. Cunningham (Texas), 47 S. W. 714. Upon a proceeding to condemn a right of way, where the party seeking the condemnation alleged that the interest of the removing party in the land was of merely nominal value, and the owner, in his petition for a removal, averred that the matter in controversy far exceeded $2,000 in value; it was held that the averments in the petition for the removal should control. Postal Tel. Cable Co. v. Southern Ry. Co., 88 Fed. 803.

50 See *supra*, § 547a; *infra*, § 556b.

51 Swann v. Mutual Reserve Fund Life Ass'n, 116 Fed. 232 (where the fact that plaintiff claimed less than the amount, to which he was entitled, was, in the absence of a fraud, held insufficient to justify a removal); Martin v. City Water Co., 197 Fed. 462.

52 Corbin v. Pike, 37 Iowa 637.

53 Langdon v. Hillside Coal & Iron Co., 41 Fed. 609; New Castle v.

depends upon the evidence submitted, irrespective of fraud,[54] the burden of proof being upon the defendant.[55] The quality of the testimony offered, and not merely the number of the witnesses, will determine the decision.[56]

Where the complaint does not show the value of the matter in dispute, an averment concerning this in the petition for removal will, unless contradicted, be conclusive upon a motion to remand.[57]

The authorities are not harmonious as to whether a motion to remand should be denied when the record shows a case for a removal upon a different ground from that alleged in the petition.[58] It has been said that, when the jurisdiction of the Federal court is doubtful, the cause should be remanded.[59]

Western Union Telegraph Co., 152 Fed. 569.

54 Corbin v. Pike, 37 Iowa 637.

55 Davies v. Wells, 134 Fed. 139; New Castle v. Western Union Tel. Co., 152 Fed. 569.

56 Corbin v. Pike, 37 Iowa 637.

57 Langdon v. Hillside Coal & Iron Co., 41 Fed. 609; Mull v. Parrott Bros. Co., 218 Fed. 713; Port of Seattle v. Oregon & W. R. Co., 242 Fed. 986; Woodall v. Clark, 254 Fed. 526. See Chesbrough v. Woodworth, C. C. A., 251 Fed. 881. As to the effect of a waiver in the complaint see Collins v. Twin Falls North Side Land & Water Co., 204 Fed. 134; Harley v. Firemen's Ins. Co., 245 Fed. 471, and *supra*, § 6.

58 See § 545, *supra*.

59 Heath v. Austin, Fed. Cas. No. 6,305 (12 Blatchf. 320); Deakin v. Lea, Fed. Cas. No. 3,695 (11 Biss. 27); Evans v. Faxon, 10 Fed. 312 (11 Biss. 175); Wolff v. Archibald, 14 Fed. 369 (4 McCrary 581); Levy v. Laclede Bank, 18 Fed. 193; State v. Bradley, 26 Fed. 289; Kessinger v. Vannata, 27 Fed. 890 (holding that where the question, whether a State statute was unconstitutional, was doubtful the case should be remanded); Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 812; Blue Bird Min. Co. v. Largey, 49 Fed. 289; Largey v. Blue Bird Min. Co., 49 Fed. 292; Hutcheson v. Bigbee, 56 Fed. 329; Johnson v. Wells, F. & Co., 91 Fed. 1; Plant v. Harrison, 101 Fed. 307; McKown v. Kansas & T. Coal Co., 105 Fed. 657; Nash v. McNamara, 145 Fed. 541; Mathe v. McNamara, 145 Fed. 541; Mathews Slate Co. v. Mathews, 148 Fed. 490 (holding that the question whether a State statute could not be enforced in the Federal court was so doubtful that the cause should be remanded); Wrightsville Hardware Co. v. Hardware & W. Mfg. Co., 180 Fed. 586; Kamenicky v. Catterall Printing Co., 188 Fed. 400, in which the author was counsel; Jackson v. Hooper, 188 Fed. 509; Drainage Dist. No. 19 v. Chicago, M. & St. P. Ry. Co., 198 Fed. 253; Strother v. Union Pac. R Co., 220 Fed. 731; *Re* Mississippi River Power Co., 247 Fed. 194; Orr v. Baltimore & O. R. R. Co., 242

The motion should be decided upon the record as it stood when the petition for a removal was filed.[60] An amended pleading filed in the Federal court [61] or a pleading filed in the State court subsequent to the removal [62] cannot be considered. The decision upon a motion to remand must be based upon facts appearing on the record.

Suspicions are insufficient to justify the order.[63] Upon granting a motion to remand, the court has no power to dismiss the bill,[64] nor to set aside service of process [65] but can merely remand the cause to the State court.

It has been held that the fact that the Federal court, upon a motion to remand, had no power to decide a motion made by a nonresident to quash the service of process upon a resident de-

Fed. 608; Ostrom v. Edison, 244 Fed. 228, 229; Harley v. Firemen's Fund Ins. Co., 245 Fed. 471. For cases of estoppel of the defendant, see Mazieka v. North & Judd Mfg. Co., 176 Fed. 747; Baldwin v. Pacific Power & Light Co., 199 Fed. 291. *Contra,* Heath v. Austin, Fed. Cas. No. 6,305 (12 Blatchf. 320); Concord Coal Co. v. Haley, 76 Fed. 882.

60 Bernheim v. Louisville Property Co., 221 Fed. 273.

61 Ibid.

62 *Infra,* § 554, *supra,* § 6.

63 Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438. *Contra,* Cassidy v. Atlanta & C. A. L. Ry. Co., 109 Fed. 673 (where, after a removal by a nonresident defendant, the plaintiff entered a nonsuit as to him, leaving the only defendant a resident of the same State with the plaintiff, and then moved to remand the cause; it was held that the order should be for a dismissal and not for a remand).

64 Richmond v. Brookings, 48 Fed. 241; Thacker Coal & Coke Co. v. Norfolk & Western Ry. Co., 171 Fed. 271. *Contra,* Merchants' Nat. Bank v. Brown, 17 Fed. 161 (4 Woods 263); Cassidy v. Atlanta & C. A. L. Ry. Co., 109 Fed. 673, where plaintiff entered a nonsuit as to the nonresident defendant and moved to remand; but the Federal court denied his motion and dismissed the whole case. Lawrence v. Southern Pac. Co., 180 Fed. 822; where, it appearing that there was an indispensable party, whose joinder would defeat the Federal jurisdiction, the court dismissed the case, although the result of it was that the court could not maintain the suit in any forum. In Baum v. Longwell, 200 Fed. 450, the bill did not state a case of Federal jurisdiction, but the defendant filed a cross-bill setting forth such a cause of action. The court sustained a demurrer to the bill for want of jurisdiction, but retained the case for hearing upon the cross-bill, which, it appeared, could dispose of the entire controversy between the parties.

65 Bryan v. Barriger, 251 Fed. 328.

fendant did not preclude a consideration of the question, whether such resident was in court or not at the time limited for the filing of the petition for the removal.[66]

Where a case was removed by an officer of the United States, upon the ground that it was brought because of an act done under the revenue laws, and that did not appear upon the pleadings, it was held that the question would not be determined upon a motion for remand, but would be postponed until the trial.[67]

A motion to remand will not be granted because the Federal courts enforce a different rule of damages from that which prevails in the State tribunals;[68] nor because of the effect upon the general proceedings for widening the streets of a city in case of a decision of the Federal court against the right to widen streets on the land of a railroad company, or upon the amount of the value of the property of such corporation or of the assessments for benefits, which should be made against the same;[69] nor because the evidence taken in the Federal court will not be admissible in the State court;[70] nor, it was held, under the Act of 1875, because the defendant had given a bond in the State probate court, which might have affected the jurisdiction of the Federal court to entertain the suit originally.[71]

It has been held: that where there has been a removal of a suit seeking relief which the Federal court has no power to grant;[72] or of a case of which such court could not acquire jurisdiction,[73] or where all the property of a foreign corporation has been placed in the custody of receivers appointed by the State courts, so that any judgment recovered in the Federal court must be referred to the State court for payment; the case should be remanded.[74]

66 Diday v. New York, P. & O. R. Co., 107 Fed. 565.

67 Dennistoun v. Draper, Fed. Cas. No. 3,804 (5 Blatchf. 336).

68 Free v. Western Union Tel. Co., 122 Fed. 309.

69 Union Pac. R. Co. v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319.

70 Birdseye v. Shaeffer, 37 Fed. 821; writ of error dismissed, Birdseye v. Nickerson, 140 U. S. 672, 11 Sup. Ct. 1017, 35 L. ed. 403.

71 Filer v. Levy, 17 Fed. 609.

72 City of Knoxville v. Southern Paving Const. Co., 220 Fed. 236; Williams v. Provident Life & Trust Co., C. C. A., 242 Fed. 417. But see Closser v. Strawn, 227 Fed. 139.

73 Nickels v. Pullman Co., 268 Fed. 545.

74 Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831.

It has been held that, where the complaint sets out several causes of action, one of which is removable because of a difference of citizenship, and the others are assigned claims over which the Federal court would have had no original jurisdiction, the whole case can be removed.[75] Where the plaintiff prayed for an injunction and for damages, the injunctive relief being ancillary to a suit previously pending in the State court; it was held that, although the claim for damages might have been separately removable, the court, upon a motion to remand, had no power to order the pleadings recast into two suits, in law and equity; but that the whole must be remanded.[76] Where, before the removal, a rule had been issued directing the defendant to show cause why he should not be attached for contempt of an injunction in the suit, the Federal court remanded the contempt proceedings, but kept jurisdiction of the principal suit.[77]

§ 556a. Waiver of right to a remand. There can be no waiver of the right to a remand because the record of evidence fails to show the requisite diversity of citizenship,[1] or that the suit arises under the Constitution or laws of the United States,[2] or that the value of the matter in dispute is less than two thousand dollars.[3]

When a defendant, who had removed the case because of difference of citizenship between the plaintiff and all of the defendants but one, whom he alleged to be a nominal party, opposed a motion to remand by contending that he was the real party plaintiff and that the only actual controversy was between himself and the other defendants, who were citizens of different States,[4] and where the State court had decided, upon his application for a removal, that there was no separate controversy which gave him the right thereto, it was held that he

75 Sharkey v. Port B. Mill Co., 92 Fed. 426; s. c., C. C. A., 102 Fed. 259; Hoge v. Canton Ins. Office, 103 Fed. 513; §§ 537g, 541, *supra*.

76 Ladd v. West, 55 Fed. 353.

77 Voorhees v. Albright, Fed. Cas. 16,999.

§ 556a. 1 Mansfield C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, see *supra*, §§ 546, 556.

2 Ferguson v. Ross, 38 Fed. 161, 3 L. R. A. 322; Wabash R. R. Co. v. Barbour, C. C. A., 73 Fed. 513.

3 Lazensky v. Supreme Lodge Knights of Honor, 32 Fed. 417. See *supra*, § 556.

4 Mayer v. Denver, T. & Ft. W. R. Co., 41 Fed. 723.

could not contend for a contrary decision upon the same point in the Federal court upon a motion by plaintiff to remand the cause.[5] Where a party had procured a removal upon an averment that the amount in controversy was over $2,000, exclusive of interests and costs. It has been held that he could not suggest to the Circuit Court of Appeals that there was no jurisdiction below, because the judgment finally rendered was less than the jurisdictional amount.[6]

It has been held that there can be no waiver of the objection that the suit arises under the Employer's Liability Law;[7] but where the defendant had insisted till the close of the trial that the case did not so arise but arose under the State statutes it was not allowed to make such objection for the first time upon its writ of error.[8]

It has been held that the objection to the jurisdiction, because neither party is a resident of the district, is waived by a general appearance by the plaintiff in the Federal court before his motion to remand.[9] Such a waiver is made by the service of a subsequent pleading,[10] or any other proceeding taken by him,[11] such as, stipulating for a continuance;[12] making up the issues;[13] taking out a commission;[14] noticing a demurrer for argument;[15] setting the case down for hearing;[16] consenting to the filing of a pleading by the defendant out of time.[17] It has been held that the entry of a special appearance for the purpose of

5 Beadleston v. Harpending, 32 Fed. 644. See *supra*, § 541.

6 Eustis v. Henrietta, 74 Fed. 577, 20 C. C. A. 537, 41 U. S. App. 182.

7 Mitchell v. Southern Ry. Co., 247 Fed. 819; Deuel v. Chicago, B. & Q. R. Co., 253 Fed. 857.

8 Illinois Cent. R. Co. v. Egan, C. C. A., 203 Fed. 937.

9 Philadelphia & Boston Face Brick Co. v. Warford, 123 Fed. 843; Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed. 938; *supra*, § 61.

10 Matter of Moore, 209 U. S. 490, 52 Fed. 904; Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. ed. 984; Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 158 Fed. 211; Hagerla v. Mississippi River Power Co., 202 Fed. 776.

11 Matter of Moore, 209 U. S. 490, 52 L. ed. 904.

12 Ibid.

13 Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. ed. 984.

14 Clark v. Southern Pac. Co., 175 Fed. 122.

15 Enders v. Supreme Lodge, 176 Fed. 832.

16 Hagerla v. Mississippi River Power Co., 202 Fed. 776.

17 Moyer v. Chicago, M. & St. P. Ry. Co., 168 Fed. 105.

moving to retire a case from the docket does not waive the plaintiff's right to a remand for any cause.[18]

Where one of two defendants, sued upon a joint and several obligation, removed the case, and the plaintiff, without protest, proceeded to trial and took judgment against him; it was held that this was a consent to a severance of the joint, into two several actions, and that a remand should not be ordered.[19]

The waiver may be made by an infant through his guardian *ad litem*.[20]

The removal of the case waives any objection by the defendant that he was sued in the improper district,[21] provided that service of the summons was properly made upon him.[22] He cannot, by filing a general appearance, improve his position.[23]

A motion to remand because the petition for the removal was filed too late is waived by laches;[24] such as the delay of a year without excuse;[25] and probably by taking any subsequent proceeding in the cause after the filing of the transcript, such as

18 Higson v. North River Ins. Co., 184 Fed. 165.

19 Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., C. C. A., 80 Fed. 766.

20 Matter of Moore, 209 U. S. 490, 52 L. ed. 904. But see Woolridge v. McKenna, 8 Fed. 650.

21 De Valle Da Costa v. Southern Pac. Co., 160 Fed. 216; Clark v. Southern Pac. Co., 175 Fed. 122; Sagara v. Chicago, R. I. & P. Ry. Co., 189 Fed. 220; H. J. Decker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224.

22 Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517. See §§ 170, 554, 555, *supra*.

23 Tierney v. Helvetia Swiss Fire Ins. Co., 163 Fed. 82.

24 French v. Hay, 22 Wall. 238, 22 L. ed. 854; Miller v. Kent, 18 Fed. 561 (20 Blatchf. 508); Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Wyly v. Richmond & D. R. Co., 63 Fed. 487; Guarantee Co. of North Dakota v. Hanway, C. C. A., 104 Fed. 369, 44 C. C. A. 312. See Hervey v. Illinois Midland Ry. Co., 3 Fed. 707. Where the plaintiff, in ignorance of his right to remand the case because the petition for a removal was made too late, filed an answer in the Federal court; he was permitted to withdraw this and move to remand, it appearing that he had acted in good faith. Collins v. Stott, 76 Fed. 613.

25 Miller v. Kent, 18 Fed. 561 (20 Blatchf. 508); Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Wyly v. Richmond & D. R. Co., 63 Fed. 487. It was held that a delay of fifteen months by the plaintiff did not waive his right to remand a cause because of the defendant's failure to file the transcript, although the plaintiff himself produced the same for filing at the time that he made such motion. McGregor v. McGillis, 30 Fed. 388.

a consent to a transfer of the cause to the equity docket and its reference to a special master to be considered as an intervention in a previous suit in equity;[26] or a demand for trial;[27] or a trial.[28] Such an objection cannot be taken by either party for the first time upon an appeal.[29] Defects in the petition[30] or in the bond[31] or in the other proceedings may be waived when the record or evidence shows the jurisdictional facts.

§ 556b. Evidence upon motion to remand. It has been said, that, in the absence of a general rule of court upon the subject, proper practice requires that when issue is joined upon the averments of fact in a removal petition, application should be made to the court, as a preliminary matter, to fix the procedure to be followed in determining such issues of fact, whether by affidavit, oral testimony, depositions, or otherwise.[1] If the court has reason to doubt the existence of the jurisdictional facts, it has the right to examine the parties upon that question[2] or to direct a plea in abatement to be filed and heard,[3] or that testimony,[4] or depositions be taken upon the point.[5]

When any allegation in the petition is denied, the burden or proof rests on the petitioner.[6] This rule applies where the re-

26 Wyly v. Richmond & D. R. Co., 63 Fed. 487.

27 Baltimore & O. R. Co. v. Ford, 35 Fed. 170.

28 Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 C. C. A. 312.

29 Knight v. International & G. N. Ry. Co., C. C. A., 61 Fed. 87.

30 White v. Chase, C. C. A., 201 Fed. 896; *supra*, § 545.

31 Hervey v. Illinois Midland Ry. Co., 3 Fed. 707; Grow v. Wiman, 3 N. Y. St. Rep. 281; Probst v. Cowen, 91 Fed. 929. *Supra*, § 547.

§ 556b. 1 Jones v. Casey-Hedges Co., 213 Fed. 43, 48 E. D. Tenn., S. D., per Sanford, J., citing Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760, 765; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654, 659; and by analogy Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. ed. 682; McEldowney v. Card, 193 Fed. 475, 484.

2 Martin v. N. Y., N. H. & H. R. Co., 241 Fed. 696.

3 Gribble v. Pioneer Press Co., 15 Fed. 689.

4 Harrington v. Great Northern Ry. Co., 169 Fed. 714, 716.

5 McGuire v. Great Northern Ry. Co., 153 Fed. 434, 435; Harrington v. Great Northern Ry. Co., 169 Fed. 714, 716.

6 Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. ed. 992; Health v. Austin, Fed. Cas. No. 6,305 (12 Blatchf. 320); Copeland v. Memphis & C. R. Co., Fed. Cas. No. 3,209 (3 Woods 651); Davies v. Wells, 134 Fed. 139; New Castle v. Western Union Tel. Co., 152 Fed. 569.

moval is based upon the ground of a fraudulent joinder of defendants.[7]

If the issue is not tried upon oral testimony, affidavits,[8] or depositions,[9] by both parties may then be considered; and a verified petition of removal will prevail against an unverified denial.[10] Statements in affidavits or other papers, or proceedings by either party, may be offered in evidence by the other, as admissions for or against the motion to remand.[11] An erroneous description of the plaintiff's citizenship, in a pleading or other proceeding in the State court, will not estop him from proving the truth in support of a motion to remand.[12]

When the permanent residence and citizenship of a party, at a date shortly before the beginning of the suit, is proved; the presumption is that the same continue until there is proof of a change.[13] Proof of residence in a place is presumptive evidence of citizenship there,[14] and will countervail a denial of citizenship made for want of knowledge, information or belief.[15] It seems that where defendant alleges a change of complainant's citizenship or residence, he must show both residence in the new locality and the intention to remain there.[16] An official passport, certifying to the naturalization of the defendant as a citizen of a certain country, when accompanied by his affidavit, is *prima*

7 Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760; Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004; Foster v. Coos Bay Gas & El. Co., 185 Fed. 979. See *supra*, § 547a.

8 Weeker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. ed. 430, 9 Ann. Cas. 757; Smith v. Crosby Lumber Co., 46 Fed. 819; Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654; City of Seattle v. Great Northern Ry. Co., 239 Fed. 1009.

9 McGuire v. Great Northern Ry. Co., 153 Fed. 434, 435; Harrington v. Great Northern Ry. Co., 169 Fed. 714, 716.

10 Heath v. Austin, Fed. Cas. No. 6,305, 12 Blatchf. 320.

11 Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 6 Sup. Ct. 632, 29 L. ed. 837. See Reynolds v. Adden, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. ed. 360.

12 Egerton v. Starin, 91 Fed. 932. See Reynolds v. Adden, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. ed. 360.

13 Heath v. Austin, Fed. Cas. No. 6,305 (1 Blatchf. 320); Collins v. City of Ashland, 112 Fed. 175.

14 Blair v. Silver Peak Mines, 93 Fed. 332; denying rehearing, 84 Fed. 737; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76; Collins v. City of Ashland, 112 Fed. 175.

15 Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76.

16 Gaddie v. Mann, 147 Fed. 955.

facie evidence that he has complied with the statutes regulating naturalization there.[17]

It has been held that a positive averment on oath, by the counsel for the removing party, that the State judge, under a rule providing that the special term is always open when the judge is present, was holding a special term of his court when the petition was presented to him is sufficient to show that the court was then in session, although such judge, on the presentation of the papers, made an order to show cause, which was in form an order of the court.[18] When the time of the proceedings for the removal is in question, pleadings in the State court, although they have been taken out of the record by stipulation, may be used upon a motion to remand, in order to show what had been done in the State court before the application for removal and to prove that such application was made too late.[19] An answer filed in the State court after the petition and bond had been presented was disregarded.[20]

Affidavits or other evidence as to matters which have occurred since the removal cannot be considered except to show laches, waiver or estoppel.[21] It has been said: that the court will take judicial notice of the fact that one of the parties is a receiver appointed by it;[22] that it will take judicial notice of the State statutes, but not of the rules of the State courts;[23] and that, when the allegations of the complaint do not clearly show that the cause arises under the Constitution or laws of the United States, the court may take judicial notice of a State statute, which is not therein mentioned, to which reference is made in the petition for removal.[24] Evidence upon prejudice and local influence, and the rules of decision upon the same, have been previously discussed.[25]

17 Maloy v. Duden, 25 Fed. 673.

18 La Page v. Day, 74 Fed. 977.

19 Wilkinson v. Delaware, L. & W. R. Co., 23 Fed. 562.

20 Phillips v. Western Terra Cotta Co., 174 Fed. 873.

21 West Side R. Co. v. California Pac. R. Co., 202 Fed. 331.

22 Pitkin v. Cowen, 91 Fed. 599, 600.

23 Randall v. New England Order of Protection, 118 Fed. 782. See § 329, *supra*.

24 State v. Coosaw Min. Co., 45 Fed. 804; decree affirmed, Coosaw Min. Co. v. State, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. ed. 537.

25 *Supra*, § 549.

§ 556c. Costs upon remand. Ordinarily, when a motion to remand is granted, costs should be imposed upon the removing party.[1] Where the case had been removed by one only of two defendants, the other objecting to the removal, and it was subsequently remanded by agreement to the State court, where a verdict was given for plaintiff against both; it was held that the costs in the Federal court should be taxed against the defendant who had removed the case, but not against the one who had objected thereto.[2] Where the remand was made after a verdict against the removing party, no costs were imposed.[3] When a judgment or decree is reversed for want of jurisdiction, costs are usually imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.[4] Judgment for such costs is entered in the District Court of the United States.[5]

The costs imposed upon a remand are: the docket fee of twenty dollars; and such taxable disbursements as have been incurred in the Federal court;[6] but not disbursements incurred in the State court after the petition for removal was filed;[7] except the fees paid the State clerk for certifying to the transcript. In the absence of a stipulation in the bond to that

§ 556c. 1 Josslyn v. Phillips, 27 Fed. 481. For many years a different rule prevailed in the Southern District of New York.

2 Whilt v. Chester Traction Co., 7 Pa. Dist. R. 693.

3 Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161.

4 Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435; Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623; King Bridge Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623; Peninsular I. Co. v. Stone, 121 U. S. 631, 30 L. ed. 1020; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. ed. 602; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. ed. 804; Walker v. Collins, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. 738.

5 Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; reversing decree, Corbin v. Boies, 34 Fed. 692; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. ed. 602.

6 Josslyn v. Phillips, 27 Fed. 481.

7 Young v. Merchants' Ins. Co., 29 Fed. 273.

effect, the court cannot, in its order of remand, direct the entry of judgment against the surety without a separate suit, upon which he is entitled to a hearing.[8]

§ 556d. Order of remand. A formal order remanding the case is customary and is the regular practice.[1] It seems, however, that such an order is not indispensable, at least where the record does not show a removable case and the State court enters an order dismissing the petition.[2]

The better practice is to annex to the order of remand the proceedings in the case in the Federal court, or a copy thereof; leaving to the State court the determination of the effect of the steps taken during the pendency of the suit in the court of the United States.[3]

§ 556e. Second motion to remand. After a motion to remand has been once denied, a second motion may be granted, when founded upon facts which have since occurred.[1] Thus, a second motion duly made may be granted, when the first was denied as premature.[2] Where, after overruling a motion to remand a cause removed because it arose under the laws of the United States, the question arising under those laws had been disposed of by demurrer; it was held that there was no longer any Federal question in the case, and a second motion to remand was granted.[3] After a motion to remand based upon the face of the record had been denied, a second motion because of the alleged collusive joinder of a party was entertained.[4] An order denying a motion to remand may grant leave to renew the same, when the facts are more fully presented.[5] It has been held that the court, of its own motion, may remand a case, although a previous motion to remand upon the same ground has been

8 Colburn v. Hill, C. C. A., 103 Fed. 340.

§ 556d. 1 Seeligson's Ex'rs v. Texas Transp. Co., 70 Tex. 198, 7 S. W. 708. *Supra*, § 554.

2 Patten v. Cilley (N. H.), 42 Atl. Rep. 47.

3 Brown v. Fletcher, C. C. A., 206 Fed. 461.

§ 556e. 1 Kansas City & T. Ry. Co. v. Interstate Lumber Co., 37 Fed. 3; Hamblin v. Chicago, B. & Q. R. Co., 43 Fed. 401.

2 Kansas City & T. Ry. Co. v. Interstate Lumber Co., 37 Fed. 3.

3 Hamblin v. Chicago, B. & Q. R. Co., 43 Fed. 401.

4 Pennsylvania R. Co. v. Allegheny Valley R. Co., 25 Fed. 113.

5 New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817; Goodnow v. Litchfield, 47 Fed. 753.

denied.[6] It has been held that, since the court's jurisdiction is always open to consideration after a motion to remand a case has been denied, it may be granted upon the same facts by the same or another judge.[7] After a motion to remand has been granted, when cases subsequently arise that justify the removal, which is again made, a second motion to remand will be denied.[8]

§ 557. Review of order of remand. The Judicial Code of March 3rd, 1887, provides that "no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."[1]

The Supreme Court of the United States cannot review immediately, either by appeal or writ of error, an order of a District Court,[2] or of a Circuit Court of Appeals,[3] remanding a cause. The fact that the remand is made upon a decision overruling a demurrer does not give a right to a review by the Supreme Court.[4] The Supreme Court of the United States can-

6 Weldon v. Fritzlen, 128 Fed. 608, 611; reversed upon another point, C. C. A., 135 Fed. 650; reversal affirmed without passing on this point, Fritzlen v. Boatmen's Bank, 212 U. S. 364, 366, 53 L. ed. 551, 554.

7 Weldon v. Fritzlen, 128 Fed. 608, 611; reversed on another point, C. C. A., 135 Fed. 650; reversal affirmed without passing on this point, Fritzlen v. Boatmen's Bank, 212 U. S. 364, 366, 52 L. ed. 551, 554; Gaugler v. Chicago, M. & P. S. Ry. Co., 197 Fed. 79, where the second judge granted leave to renew the motion. Phillips v. Western Terra Cotta Co., 174 Fed. 873.

8 Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 L. ed. 551.

§ 557. 1 Jud. Code, § 28, reenacting 36 St. at L. 1087; Chicago, St. Paul & M. & O. Ry. Co. v. Roberts, 141 U. S. 690, 35 L. ed. 905.

2 Morey v. Lockhart, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. ed. 68; Richmond & D. R. Co. v. Thouron, 134 U. S. 45, 10 Sup. Ct. 517, 33 L. ed. 871; Gurnee v. Patrick County, 137 U. S. 141, 11 Sup. Ct. 34, 34 L. ed. 601; Texas Land & Cattle Co. v. Scott, 137 U. S. 436, 11 Sup. Ct. 140, 34 L. ed. 730; Birdseye v. Schaeffer, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. ed. 402; Chicago, St. P., M. & O. R. Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123, 35 L. ed. 905; Joy v. Adelbert College of Western Reserve University, 146 U. S. 355, 13 Sup. Ct. 186, 36 L. ed. 1003; Illinois Cent. R. Co. v. Brown, 156 U. S. 386, 15 Sup. Ct. 656, 39 L. ed. 461; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. ed. 536; Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 42 L. ed. 673, 18 S. Ct. 264.

3 German Nat. Bank v. Speckert, 181 U. S. 405, 45 L. ed. 926.

4 Gurnee v. Patrick County, 137 U. S. 141, 11 Sup. Ct. 34, 34 L. ed. 601; Birdseye v. Schaeffer, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. ed. 402.

not, by a writ of error to the final judgment of a State court, review an order remanding the cause, which was made by a Federal court.[5]

Under a previous statute, it was said that the question whether the defendant had a reasonable excuse for his delay in filing the transcript rested in the discretion of the court to which the case was removed and would not be reviewed by appeal or writ of error, unless it clearly appeared that there was an abuse of such discretion.[6] An order remanding a cause cannot be reviewed by an application for the writ of mandamus,[7] or of prohibition;[8] nor by a bill in equity for an injunction.[9]

The Circuit Court of Appeals cannot review an order remanding a cause.[10] It has been held by a State court that, after a Court of the United States has entered an order remanding a cause, it cannot set the same aside and recover jurisdiction of the case.[11] When the Federal court had set aside its order or remand at the term when the same was made, and meanwhile plaintiff had filed a copy of the first order in the State court and obtained a judgment there, which was affirmed on appeal by the Supreme Court of the State; it was held that a motion by the plaintiff in the Federal court, to strike the cause from its docket, would not be received until the defendant had had an opportunity to bring the judgment of the State court before the Supreme Court of the United States for review.[12]

§ 557a. Review of proceedings of the State courts when the right of removal has been denied. When a case has been re-

5 Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536; McLaughlin Brothers v. Hallowell, 228 U. S. 278, 286; Yankaus v. Feltenstein, 224 U. S. 127, 133.

6 McLean v. St. Paul & C. C. Co., Fed. Cas. No. 8,892 (16 Blatchf. 309); affirmed St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703.

7 *Ex parte* Hoard, 105 U. S. 578, 26 L. ed. 1176; *Re* Sherman, 124 U. S. 364, 8 Sup. Ct. 505, 31 L. ed. 423; *Re* Pennsylvania Co., 137 U. S. 451, 34 L. ed. 738.

8 Chesapeake & O. R. Co. v. White, 111 U. S. 134, 28 L. ed. 378.

9 Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 447.

10 *Re* Coe, 49 Fed. 481, 1 C. C. A. 326, 5 U. S. App. 6; Cole v. Garland, 107 Fed. 759, 46 C. C. A. 626.

11 Chisolm v. Propeller Tow-Boat Co. of Savannah, 59 Sup. C. 549, 38 S. E. 156.

12 Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900.

manded to the State court, the Supreme Court of the United States cannot upon writ of error or appeal reverse the judgment because the suit should have been retained in the Federal court.[1] The same rule prevails when the State court has entered judgment before a remand subsequently granted and the District Court of the United States has assumed no jurisdiction except to stay the proceedings pending the decision upon the application for remand.[2] If the State court proceeds to judgment in a cause, notwithstanding an application for removal, and there has been no remand by the Federal court, such decision of the State court can be reviewed by the Supreme Court upon writ of error to the highest court of the State, in which a decision upon the question could have been had.[3] The subsequent appearance in the State court by the defendant and his defense to the suit does not waive his right to avail himself of such an error;[4] but if he seeks affirmative relief in the State court, he makes such a waiver.[5] Where the petition for the removal was reserved for the decision of the State Supreme Court, which dismissed it and remanded the cause to the Inferior court for further proceedings according to law, it was held that the Supreme Court of the United States could not review this decision until the termination of the proceedings.[6] In the absence from the transcript of the petition for the removal, it will be presumed that it was defective.[7]

§ 557a. [1] Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, 580-583; McLaughlin Brothers v. Hallowell, 228 U. S. 278, 286.

[2] Yankaus v. Feltenstein, 244 U. S. 127, 133, in which the author was counsel.

[3] U. S. R. S., § 709; Gordon v. Longest, 16 Peters 97, 10 L. ed. 900; Kanouse v. Martin, 14 How. 23, 14 L. ed. 310, 15 How. 198, 14 L. ed. 660; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. ed. 61; Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 539, 542; Missouri, K. & T. Ry. Co. v. Missouri R. R. & Warehouse Com'rs, 183 U. S. 53, 46 L. ed. 78; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078; Cincinnati & T. Ry. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448; State ex rel. Jumel v. Johnson, 29 La. Ann. 399.

[4] Insurance Co. v. Dunn, 19 Wallace 214, 22 L. ed. 68; Removal Cases, 100 U. S. 457, 25 L. ed. 593.

[5] Texas & Pac. Ry. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946.

[6] Kimball v. Evans, 93 U. S. 320, 23 L. ed. 920.

[7] Bush v. Kentucky, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354.

Where a State court has refused to allow the removal of a cause, on the ground that the defendant has failed to prove diverse citizenship of the parties, and has proceeded with it to a final decision on writ of error to the State court although the case is not within the letter of Rule 32, which provides that, where a writ of error or an appeal is brought under the Act of March 3, 1875, it may be advanced on motion and heard under the rules applicable to motions to dismiss.[8] The fact that the State court refused to dismiss the complaint as against a resident defendant and that there was a verdict against him shows that an assignment of error because of a refusal to permit the case to be removed is frivolous.[9] A defendant who makes an application for a removal cannot assign, for error, the refusal of the State court to permit a removal of the application of other defendants.[10] Where, in a suit pending before it, a State court dissolved an injunction against proceedings to sell mortgaged premises under a foreclosure already had, and after such dissolution, the effect of which was to leave in force a final decree of sale, an alien defendant petitioned for removal into the United States Court under the Act of July 27, 1866, and the State court refused to grant that petition, the defendant not excepting, and the case was not afterwards taken to the State Supreme Court, upon an appeal from such decree of dissolution; held that the Supreme Court of the United States had no jurisdiction to review such decree. U. S. R. S., § 709.[11]

§ 558. Review of order denying remand. An order denying a motion to remand can be reviewed by the Supreme Court of the United States;[1] or, it seems by the Circuit Court of Appeals;[2] upon writ of error to, or appeal from, the final judg-

8 Burlington, C. R. & N. Ry. Co. v. Dunn, 121 U. S. 182, 7 Sup. Ct. 1114, 30 L. ed. 885.

9 Deming v. Carlisle Packing Co., 226 U. S. 102, 57 L. ed. —.

10 Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; Danville Banking & Trust Co. v. Parks, 88 Ill. 170.

11 U. S. R. S., § 709. Fashnacht v. Frank, 23 Wall. 416, 23 L. ed. 81.

§ 558. 1 Edrington v. Jefferson, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. ed. 594; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. ed. 804; Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. 264.

2 Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646; Wabash R. Co. v. Barbour, 73 Fed.

ment or decree, as the case may be. It cannot, however, be reviewed by an immediate appeal or writ of error, since it is not a final order.[3]

If a review by the Supreme Court of the United States is desired, a certificate of jurisdiction should be obtained at the time of the entry of final judgment or decree.[4]

Unless the transcript or record shows the jurisdiction, either by the petition for the removal or by statements in the pleadings or evidence, the Appellate Court will reverse the judgment and order a remand.[5] It has been said that the petition for removal is an essential part of the record to enable the court to determine its own jurisdiction, without which it will not proceed to a final adjudication.[6]

In case of an erroneous removal of a criminal prosecution, and a refusal to remand the same, the State may obtain a writ of mandamus to compel the remand of the prosecution and the

513, 19 C. C. A. 546, 43 U. S. App. 102.

3 Bender v. Pennsylvania Co., 148 U. S. 502, 13 Sup. Ct. 640, 37 L. ed. 537; Patten v. Cilley, 50 Fed. 337, 1 C. C. A. 522, 5 U. S. App. 9; Harding v. Corn Products Mfg. Co., C. C. A., 198 Fed. 628, where the order denied the motion that awarded costs and directed execution to issue therefor against the complainant.

4 Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. 264; *infra*, § 688.

5 Hancock v. Holbrook, 112 U. S. 299, 5 Sup. Ct. 115, 28 L. ed. 714; reversing decree 9 Fed. 353 (4 Woods 52); Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. ed. 132; Hegler v. Faulkner, 127 U. S. 482, 8 Sup. Ct. 1203, 32 L. ed. 210; Crehore v. Ohio & M. Ry. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. ed. 144; Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; Southwestern Telegraph & Telephone Co. v. Robinson, C. C. A., 48 Fed. 769, 1 C. C. A. 91, 2 U. S. App. 148; Juillard v. Barr, C. C. A., 177 Fed. 921. See Bush v. Kentucky, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354. Where, upon a foreclosure suit, the appeal was from an order confirming the sale, but not from the decree directing the sale, and this decree did not affirmatively disclose a want of jurisdiction; the Supreme Court of the United States did not examine the record prior to the decree of sale to see whether the case was properly removed. Turner v. Farmers' Loan & Trust Co., 106 U. S. 552, 1 Sup. Ct. 519, 27 L. ed. 273. When the right to a remand depends upon the evidence it will not be reviewed upon appeal, unless such evidence is contained in the record. Wirgman v. Persons, C. C. A., 126 Fed. 449.

6 Larned v. Jenkins, C. C. A., 109 Fed. 100, 48 C. C. A. 252.

restoration of the custody of the accused,[7] and may also appeal to the Supreme Court from an order of the Federal court granting the writ of *habeas corpus*.[8] In a case not within the original jurisdiction of the Supreme Court, it is very doubtful whether an order denying a motion to remand a case may be reviewed by the writ of mandamus or prohibition.[9]

The District Court may review its own order denying a motion to remand, under the same circumstances that it can review any other order granted by it.[10] Where there is no fraud or collusion, a District Court of the United States cannot declare void, in a collateral action, a judgment of a District Court or of a Circuit Court of Appeals, in a case removed from a State court; although the record fails to show facts necessary to warrant the removal.[11] Where the right of removal depended upon the existence of a separate controversy between parties whose difference of citizenship was not disputed, it was held that a decree dismissing a bill against one defendant, which was entered after a motion to remand had been improperly denied, could not be set aside at a subsequent term, although a decree in favor of the remaining defendant had been reversed because the remand should have been granted.[12] Where, after an attempted removal, the State court retained jurisdiction, tried the case and entered a judgment in favor of plaintiff, which was affirmed by the Supreme Court of the United States; it was held that a previous judgment of the Federal court, in favor of the defendant, was not void, but that defendant was estopped from using the same as the basis of a suit to enjoin the enforcement of the judgment of the State court.[13] Where the petition to remove was defective, it was held that the entry of a dis-

7 Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 33.

8 Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633.

9 See *ex parte* Harding, 219 U. S. 363, 55 L. ed. 252; *Re* Pollitz, 206 U. S. 323, 51 L. ed. 1081; *Ex parte* Roe, 234 U. S. 70; *supra*, § 457c.

10 *Supra*, §§ 443, 444.

11 Dexter, Horton & Co. v. Sayward, 84 Fed. 296; Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695.

12 *Re* Metropolitan Tr. Co., 218 U. S. 312, 54 L. ed. 1051.

13 Illinois Cent. R. Co. v. Sheegog, 177 Fed. 756; affirmed 217 U. S. 599, 54 L. ed. 897.

continuance by the plaintiff in the Federal court, after his motion to remand had been overruled, did not dismiss the action which remained pending in the State court.[14]

§ 559. Proceedings after remand. After the remand the Federal court can take no further proceedings in the case,[1] except perhaps to set aside such order at the same term.[2] It cannot confirm a sale previously made.[3] The State court then alone has the power to determine what shall be done with the pleadings filed[4] and testimony taken during the pendency of the suit in the Federal court.[5] Where plaintiff procures the remand of a cause to the State court on a showing by affidavit that the amount of his claim is less than $3,000, he is bound by this limitation on the amount of his claim in the future proceedings therein.[6]

14 Nichols v. Chesapeake & O. Ry. Co., C. C. A., 195 Fed. 913.

§ 559. 1 Colburn v. Hill, C. C. A., 103 Fed. 340.

2 See *supra*, § 481a.

3 Colburn v. Hill, C. C. A., 103 Fed. 340.

4 Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695.

5 Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695; Broadway Ins. Co. v. Chicago & G. W. Ry. Co., 101 Fed. 507, 510.

6 Mull v. Parrott Bros. Co., 218 Fed. 713.

CHAPTER XXXIII.

ADMIRALTY AND SEIZURES.

§ 560. Admiralty jurisdiction. In general. The Federal Constitution ordains that the judicial power shall extend "to all Cases of Admiralty and maritime Jurisdiction."[1] The Judicial Code provides that the District Courts of the United States shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty or maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."[2]

By the Admiralty Rules, "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."[3]

The Federal courts, when sitting in admiralty, enforce the general law of admiralty which was recognized when the Constitution was adopted, in so far as this has not been modified by Congress, and with certain exceptions required by the extensive inland navigation in the United States.[4] This jurisdiction cannot be restricted by State legislation,[5] although new liens or causes of action created by State statutes were formerly enforced by courts of admiralty when they applied to maritime contracts,[6] or transactions[7] and the local rules and regulations concerning the use of harbors are usually followed.[8] Such of the restrictions

§ 560. [1] Article III, § 2.

[2] § 24, subd. 3, 36 St. at L. 1087.

[3] Adm. Rule 44.

[4] See Schuede v. Zenith S. S. Co., 216 Fed. 566.

[5] The Thielbek, C. C. A., 241 Fed. 209; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

[6] McKay v. Gulf Refining Co., C. C. A., 176 Fed. 93.

[7] Sherlock v. Alling, 93 U. S. 99, 104, 23 L. ed. 819; City of Norwalk, 55 Fed. 98, 103, 105, 106; *infra*, §§ 560a, 560b.

[8] The Barge No. 4, 248 Fed. 823.

upon the powers of the English Court of Admiralty as were due to the size of the island of Great Britain,[9] and to the jealousy of the English courts of common law[10] have not been recognized. The maritime usages of foreign countries are not obligatory upon the courts of the United States except in so far as they are consonant with the rules recognized in English and American jurisprudence.[11]

The jurisdiction now exercised by courts of admiralty was originally divided between two courts held by the same judge. The court of admiralty, which was designated as the instance court, which had jurisdiction over ordinary maritime causes and the prize court, to hold each of which, the judge was authorized by a separate commission.[12] The distinction has no proper application to admiralty courts in the United States where the powers of both instance and prize courts are conferred without distinction.[13]

Admiralty jurisdiction includes only maritime causes, or such as arise out of commerce and navigation upon the high seas or the navigable waters of the United States.[14] In the courts of the United States, admiralty jurisdiction includes matters arising out of commerce and navigation upon the Great Lakes[15] and navigable rivers[16] of the United States and even upon the State canals.[17] Courts of admiralty have jurisdiction of petitory

9 Genesee Chief v. Fitzhugh, 12 Howard 443, 13 L. ed. 1058.

10 Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58; Northern Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221.

11 The Kongsli, 252 Fed. 267.

12 Douglass 614; Percival v. Hickey, 18 Johns. (N. Y.) 257, 265, 271, 9 Am. Dec. 210.

13 3 Kent's Commentaries, 355, 378. See Glass v. The Betsy, 3 Dallas (U. S.) 6, 16, 1 L. ed. 485; The Emulous, 1 Gall. 563, 574, 8 Fed. Cas. No. 4,479; 22 Cyc. 1371. The instance side of the court is specifically mentioned in the Act of Feb. 16, 1875, 18 St. at L. 315, 4 Fed. St. Ann. 557. See Adm.Rules 22.

14 American Ins. Co. v. 356 Bales of Cotton, 1 Peters, 511, 7 L. ed. 243; The City of Panama v. Phelps, 101 U. S. 453, 25 L. ed. 1061; *Ex parte* Cooper, 143 U. S. 472, 36 L. ed. 232. For cases where there is a conflict between the jurisdiction of a court of admiralty and that of other courts, State or Federal, see *supra*, §§ 58, 59, 270.

15 Genesee Chief v. Fitzhugh, 12 Howard, 443, 13 L. ed. 1058.

16 Jackson v. The Steamboat, 20 How. 296, 15 L. ed. 909; The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Eagle v. Fraser, 8 Wall. 15, 19 L. ed. 365; *Ex parte* Garnet, 141 U. S. 1, 35 L. ed. 631. See Williams v. Molther, 189 Fed. 700.

17 *Ex parte* Boyer, 109 U. S. 629,

suits or causes of property, as well as of mere possessory suits.[18] The jurisdiction of a court of admiralty to enforce contribution is not lost by the recovery of a judgment at common law against one of the parties by a person whom they have jointly injured.[19] A court of admiralty is not deprived of jurisdiction of a suit to recover possession of a vessel duly licensed and enrolled, under the navigation laws of the United States, by the appearance of officers of the State claiming to hold the boat under process issued by a State court for violation of a State fishery law, where the constitutionality of such law is seriously attacked by the libelant, since such appearance does not render the suit one against the State, within the meaning of the Eleventh Amendment, and the question is one which it is competent for the libelant to raise and for the court to determine.[20]

It has been held that the jurisdiction of admiralty extends over a barge[21] or scow[22] which has no means of propulsion and can only be moved by towing, a bath-house built on boats and designed for transportation,[23] a chuncker,[24] a dredge and its scows,[25] a floating elevator,[26] a ferry boat,[27] and a

27 L. ed. 1056; The Delaware, 161 U. S. 459, 40 L. ed. 771.

18 New England Ins. Co. v. The Sarah Ann, 13 Peters, 387, 10 L. ed. 213; Ward v. Peck, 18 How. 267, 15 L. ed. 383.

19 The Ira M. Hedges, 218 U. S. 264, 54 L. ed. 1039.

20 The W. J. Hingston, 144 Fed. 560.

21 *Ex parte* Easton, 95 U. S. 68, 24 L. ed. 373; Wood v. Canal Boat Wilmington, 5 Hughes (U. S.) 205, 48 Fed. 566; The City of Pittsburgh, 45 Fed. 699; Disbrow v. The Walsh Brothers, 36 Fed. 607; Haslett v. The Enterprise, 11 Fed. Cas. No. 6,197, 19 Int. Rev. Rec. 108; The Coal Boat D. C. Salisbury, Ole. Adm. 71, 7 Fed. Cas. No. 3,694. But see Jones v. The Coal Barges, 3 Wall. Jr. 53, 13 Fed. Cas. No. 7,458; Wood v. Two Barges, 46 Fed. 204.

22 Endner v. Greco, 3 Fed. 411; Woodruff v. One Covered Scow, 30 Fed. 269.

23 The Public Bath No. 13, 61 Fed. 692; The Steam-Tug M. R. Brazos, 10 Ben. 435, 17 Fed. Cas. No. 9,898.

24 Winslow v. Floating Steam Pump, 30 Fed. Cas. No. 17,880, 2 N. J. L. J. 124.

25 The Starbuck, 61 Fed. 502; The Atlantic, 53 Fed. 607; Aitcheson v. The Endless Chain Dredge, 40 Fed. 253; The Pioneer, 30 Fed. 206; The Alabama, 22 Fed. 449 (following The Floating Elevator Hezekiah Baldwin, 8 Ben. 556, 12 Fed. Cas. No. 6,449).

26 The Floating Elevator Hezekiah Baldwin, 8 Ben. 556, 12 Fed. Cas. No. 6,449.

27 U. S. v. Burlington, etc., Ferry Co., 21 Fed. 331; Murray v. The Ferry-Boat F. B. Nimick, 2 Fed.

raft.[28] Admiralty has no jurisdiction over a claim for damages caused by a vessel to a building on land,[29] nor to a bridge or dock, which, although in navigable waters, is connected with the shore and immediately concerns commerce upon land.[30] A court of admiralty will ordinarily not enforce a lien against a bridge,[31] nor against a dry dock,[32] even though it is a float,[33] nor against a marine pump resting on piles, although capable of floating,[34] nor against a pile-driver which can be propelled with a wheel about the harbor,[35] nor even, it has been held, against a steamboat stripped of motive power which is used as a hotel.[36] The holder of a maritime claim does not by taking a bond and mortgage as security for the payment thereof lose his right to sue in admiralty for its enforcement.[37]

Where a suit is within the jurisdiction of the District Court of the United States, the objection that it is not within the admiralty jurisdiction is ordinarily waived by an answer which does not raise such objection.[38]

86; The Steamboat Cheeseman v. Two Ferry-boats, 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633; The Gate City, 5 Biss. (U. S.) 200, 10 Fed. Cas. No. 5,267; The St. Louis, 48 Fed. 312.

28 Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 596; The F. & P. M. No. 2, 33 Fed. 511; A Raft of Timber, 4 Woods (U. S.) 197, 15 Fed. 555; Fifty Thousand Feet of Timber, 2 Lowell (U. S.) 64, 9 Fed. Cas. No. 4,783; A Raft of Spars, Abb. Adm. 485, 20 Fed. Cas. No. 11,529. *Contra*, A Raft of Cypress Logs, 1 Flip. (U. S.) 543, 20 Fed. Cas. No. 11,527; Tome v. Four Cribs of Lumber, Taney (U. S.) 533, 24 Fed. Cas. No. 14,083; Gastrel v. A Cypress Raft, 2 Woods (U. S.) 213, 10 Fed. Cas. No. 5,266. See, The W. H. Clark, 5 Biss. 308, Fed. Cas. 17,482; Thackeray v. The Farmer, Glip 524; Fed. Cas. 13,852; Jones v. The Coal Barges, 3 Wall. Jr. 53; Fed. Cas. 7,458; and *infra*, § 593a.

29 Johnson v. Chicago & Pac. Elevated Co., 119 U. S. 388, 30 L. ed. 447

30 Cleveland Terminal & Valley R. R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 52 L. ed. 508; Duluth & S. Bridge Co. v. Steamer "Troy," 208 U. S. 321, 52 L. ed. 512, 28 S. Ct. 416.

31 The Rock Island Bridge, 6 Wall. 213, 18 L. ed. 753.

32 Cope v. Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501; s. c., below, 10 Fed. 142.

33 Snyder v. A Floating Dry-Dock, 22 Fed. 685. See *infra*, § 593a.

34 The Big Jim, 61 Fed. 503.

35 Pile Driver E. O. A., 69 Fed. 1005.

36 The Steamboat Hendrick Hudson, 3 Ben. 419, 11 Fed. Cas. 6,355.

37 Robins Dry Dock & Repair Co. v. Chesbrough, C. C. A., 216 Fed. 121.

38 U. S. v. James W. Elwell & Co., C. C. A., 250 Fed. 941. A libel to collect a penalty under the

§ 560a. Contracts enforceable in admiralty. A court of admiralty has jurisdiction over all maritime contracts.[1] Every contract is within the jurisdiction of the court of admiralty when it has reference to maritime service or a maritime transaction;[2] although made on land,[3] and even in some cases when to be performed on land.[4] The English rule in this respect is not followed.[5] Admiralty has jurisdiction over a claim for repairs of a vessel while upon a dry dock[6] or when it has been hauled up by ways upon the land,[7] or for salvage of a boat saved from fire while in a dry dock.[8]

The following contracts, amongst others, are enforceable in admiralty: contracts for salvage,[9] even when only partially performed and the work was stopped by the owner[10] and even when the salvage contract is attacked for fraud or mistake;[11] for pilotage;[12] for marine insurance;[13] for transportation of passengers on navigable waters;[14] for injury to a passenger at the suit of the passenger or her husband,[15] for the sale or hire

Harter Act. See The Susquehanna, C. C. A., 267 Fed. 811.

§ 560a. [1] North Pacific S. S. Co. v. Hall Bros. Marine Railway & Shipbuilding Co., 249 U. S. 169, 39 Sup. Ct., 221.

[2] People's Ferry Co. v. Beers, 20 How., 393, 401; Phila., W. & B. R. Co. v. Phila., etc., Steam Towboat Co., 23 How., 209, 215; Insurance Co. v. Dunham, 11 Wall. 1, 26; The Eclipse, 135 U. S. 599, 608; North Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221.

[3] Zeane v. The President, 4 Wash. 453; Fed. Cas. 18,201.

[4] North Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221.

[5] Ibid.

[6] The Robert W. Parsons, 191 U. S. 17, 33, 34.

[7] North Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct., 221; Wortman v. Griffith, 3 Blatchf. 528; Fed. Cas. 18,057.

[8] The Steamship Jefferson, 215 U. S. 130.

[9] Peisch v. Ware, 4 Cranch, 347, 2 L. ed. 643; Houseman v. The North Carolina, 15 Peters, 40, 10 L. ed. 653; *infra*, § 590.

[10] Sea Ins. Co. v. About Five Hundred Tons of Steel Rails, 191 Fed. 250.

[11] The Stanley H. Miner, 172 Fed. 486.

[12] Hobart v. Drogan, 10 Peters, 108, 9 L. ed. 363; *Re* McNiel, 13 Wall. 236, 20 L. ed. 624; *Re* Hagar, 104 U. S. 520, 26 L. ed. 816.

[13] New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 20 L. ed. 90.

[14] The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; The Kensington, 183 U. S. 263, in which the author was counsel.

[15] Reed v. Weule, C. C. A., 176 Fed. 660.

of a chronometer,[16] of affreightment for the transportation of goods on navigable waters[17] and bills of lading when enforced by the consignor or consignee,[18] charter parties;[19] contracts of employment of sailors or other persons engaged in navigation,[20] including a bartender on a passenger boat.[21] Admiralty has also jurisdiction to enforce bonds of bottomry[22] and respondentia[23] to collect general average,[24] wharfage,[25] and other maritime liens, including one for the sale or hire.[26] Admiralty has jurisdiction of a libel for the licitation or sale of a vessel not engaged in navigation and the partition of the proceeds between the owners thereof, when there is an irreconcilable disagreement as to its use,[27] at least when the ownership is equally divided, and to allow one part owner to employ the boat against the other's wishes upon filing a bond for the protection of the latter.[28] When a majority owner threatened a sale an injunction

16 N. Y. & Long Branch Steamboat Co. v. Johnson, C. C. A., 195 Fed. 740.

17 N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465.

18 McKinlay v. Morrish, 21 How. 343, 16 L. ed. 100.

19 The Harriman, 9 Wall. 161, 19 L. ed. 629; Morewood v. Enequist, 23 How. 491, 16 L. ed. 516.

20 The St. Jago de Cuba, 9 Wheaton, 409, 6 L. ed. 122; The Thomas Jefferson, 10 Wheaton, 428, 6 L. ed. 358; Sheppard v. Taylor, 5 Peters, 675, 8 L. ed. 269; Oliver v. Alexander, 6 Peters, 143, 8 L. ed. 349.

21 The J. S. Warden, 175 Fed. 314. Former cases held that the court would not take jurisdiction of a libel to collect the amount due for the services of a musician, Trainor v. Superior, Gilpin, 514, or barber for passengers, Thackarey v. Farmer of Salem, Gilpin, 524, upon a boat, nor for a watchman or shipkeeper, Gurney v. Crockett, Abb. Adm. 490.

22 O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 24 L. ed. 469.

23 Conrad v. Atlantic Ins. Co., 1 Peters, 386, 7 L. ed. 189; Maitland v. The Atlantic, Newb. Adm. 514, 16 Fed. Cas. 8,980.

24 *Re* 4885 Bags of Linseed, 1 Black, 108, 17 L. ed. 35.

25 *Re* Easton, 95 U. S. 68, 24 L. ed. 373.

26 Bulkley v. Naumkeag Steam Cotton Co., 24 How. 386, 16 L. ed. 599; The Grapeshot, 9 Wall. 129, 19 L. ed. 651; The Guy, 9 Wall. 758, 19 L. ed. 710.

27 Skrine v. The Hope, Bee 2; Stevens v. The Sandwich, 1 Peters Adm. 233; Willings v. Blight, 2 Peters, Adm. 288; Coyne v. Caples, 8 Fed. 638; The Emma B., 140 Fed. 770; Story on Partnership, §§ 435, 436; Benedict's Admiralty, 3rd ed., § 274. See Steam-boat Orleans v. Phoebus, 11 Peters, 175.

28 Tunno v. The Betsina, Fed. Cas. 14,236; The Emma B, 140 Fed. 770; The Olga, 254 Fed. 439, 440; Benedict on Admiralty, 3rd ed., § 274.

was granted against this, unless a bond were given, that the minority owner should receive his share of the proceeds.[29]

§ 560b. Liens enforceable in admiralty. All maritime liens are enforceable in admiralty.[1] Maritime liens arise out of maritime contracts,[2] or maritime torts.[3] They do not depend upon possession.[4]

Prior to the Act of June 23, 1910,[5] there was no maritime lien upon a domestic vessel for supplies furnished in her home port.[6] When a state statute created a lien for a debt incurred for such supply, it would be enforced by the court of admiralty.[7] The Ship Mortgage Act of June 5, 1920, repeals the Act of June 23, 1910,[8] supersedes the provisions of State statutes upon the subject[9] and provides as follows: "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of the vessel, or of a person authorized by the owner shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."[10] The statute

29 The Olga, 254 Fed. 439.

§ 560b. 1 The Rupert City, 213 Fed. 263, and cases cited.

2 Ibid. See *supra*, § 560a.

3 The Siren, 7 Wall. 152, 19 L. ed. 129; The Kongsli, 252 Fed. 267; The City of Philadelphia, 263 Fed. 234.

4 The Bold Buccleugh, 7 Moore P. C. 267; The John G. Stevens, 170 U. S. 113, 115, 18 Sup. Ct., 545, 42 L. ed. 969.

5 36 St. at L. 604; 1 Fed. St. Ann. Supp. 352, ch. 373, 36 St. at L. 604. See The Edna, 185 Fed. 206; The Princess, 185 Fed. 218.

6 The Edna, 185 Fed. 206, 209.

7 McKay v. Gulf Refining Co., C. C. A., 176 Fed. 93.

8 41 St. at L. 988, 1006, ch. 250, § 30, subsect. X, Comp. St., § 8146¼rr.

9 Ibid. Subsect. T, Comp. St., § 8146¼q.

10 Ibid. Subsect. P, Comp. St., § 8146¼ooo. Other material provisions of this statute are as follows:

"(a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

(b) Such collector of customs shall record bills of sale, convey-

creates a presumption that the parties intended to contract upon

ances, and mortgages, delivered to him, in the order of their reception, in books to be kept for that purpose and indexed to show—

(1) The name of the vessel;

(2) The names of the parties to the sale, conveyance, or mortgage;

(3) The time and date of reception of the instrument;

(4) The interest in the vessel so sold, conveyed, or mortgaged; and

(5) The amount and date of maturity of the mortgage.'' 41 St. at L. 988, 1000, ch. 250, § 30, subsec. C, Comp. St. § 8146¼kk.

''(a) A valid mortgage which, at the time it is made, includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition here, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, if—

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this section called a 'preferred mortgage' as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such

property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage.''

''The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.''

''The mortgagor (1) shall, upon request of the mortgagee, disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage, or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor, and (2), without the consent of the mortgagee, shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, and any contractual obligation creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect to the vessel.''

''(a) The collector of customs of the port of documentation shall, upon the request of any person, record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation, and amount of the lien, and the name and address of the person. Any person who has caused notice of his claim of lien to be so recorded shall, upon a discharge in whole or in part of the indebtedness, forthwith file with the collector of customs a certificate of such discharge. The collector of customs shall thereupon record the certificate.

(b) The mortgagor, upon a dis-

charge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made.''

''(a) No bill of sale, conveyance, or mortgage shall be recorded unless it states the interest of the grantor or mortgagor in the vessel and the interest so sold, conveyed, or mortgaged.

(b) No bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge thereof, shall be recorded unless previously acknowledged before a notary public or other officer authorized by a law of the United States, or of a State, Territory, District, or possession thereof, to take acknowledgment of deeds.

(c) In case of a change in the port of documentation of a vessel of the United States, no bill of sale, conveyance, or mortgage shall be recorded at the new port of documentation unless there is furnished to the collector of customs of such port, together with the copy of the bill of sale, conveyance, or mortgage to be recorded, a certified copy of the record of the vessel at the former port of documentation furnished by the collector of such port. The collector of customs at the new port of documentation is authorized and directed to record such certified copy.

(d) A preferred mortgage may bear such rate of interest as is agreed by the parties thereto.''

''Each collector of customs shall permit records made under the provisions of this section to be inspected during office hours, under such reasonable regulations as the collector may establish. Upon the request of any person the collector of customs shall furnish him from the records of the collector's office (1) a certificate setting forth the names of the owners of any vessel, the interest held by each owner, and the material facts as to any bill of sale or conveyance of, any mortgage covering, or any lien or other incumbrance upon, a specified vessel, (2) a certified copy of any bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge in respect to such vessel, or (3) a certified copy as required by subdivision (c) of subsection H. The collector of customs shall collect a fee for any bill of sale, conveyance, or mortgage recorded, or any certificate or certified copy furnished, by him, in the amount of 20 cents a folio with a minimum charge of $1.00. All such fees shall be covered into the Treasury of the United States as miscellaneous receipts.'' 41 St. at L. 988, 1002, ch. 250, § 30, subsec. I, Comp. St. § 8146¼mm.

''(a) If the master of the vessel willfully fails to exhibit the documents of the vessel or the copy of any preferred mortgage thereof, as required by subsection E, the board of local inspectors of vessels having jurisdiction of the license

of the master, may suspend or cancel such license, subject to the provisions of 'An Act to provide for appeals from decision of boards of local inspectors of vessels and for other purposes,' approved June 10, 1918.

(b) A mortgagor who, with intent to defraud, violates any provision of subsection F, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than 2 years, or both. The mortgaged indebtedness shall thereupon become immediately due and payable at the election of the mortgagee.

(c) If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss by reason of the failure of the collector of customs, or any officer, employé, or agent thereof, properly to perform any duty required of the collector under the provisions of this section, the collector of customs shall be liable to such person for damages in the amount of such loss. If any such person is caused any such loss by reason of the failure of the mortgagor, or master of the mortgaged vessel, or any officer, employé, or agent thereof, to comply with any provision of subsection E or F or to file an affidavit as required by subdivision (a) of subsection D, correct in each particular thereof, the mortgagor shall be liable to such person for damages in the amount of such loss. The district courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several States, Territories, Districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. Such suit shall be begun by personal service upon the defendant within the limits of the district. Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional amount for costs of the action and a reasonable counsel's fee, to be fixed by the court.'' 41 St. at L. 988, 1003, ch. 250, § 30, subsec. J, Comp. St. § 8146¼mmm.

''A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in subsection G, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this subsection, shall not constitute a jurisdic-

tional defect; but the libellant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subdivision (e) of subsection J." 41 St. at L. 988, 1003, ch. 250, § 30, subsec. K, Comp. St. § 8146¼n.

"In any suit in rem in admiralty for the enforcement of the preferred mortgage lien, the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshal may be authorized and directed by the court to take possession of the mortgaged vessel notwithstanding the fact that the vessel is in the possession or under the control of any person claiming a possessory common-law lien." 41 St. at L. 988, 1004, ch. 250, § 30, subsec. L, Comp. St. § 8146¼nn.

"(a) When used hereinafter in this section, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preëxisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court." 41 St. at L. 988, 1004, ch. 250, § 30, subsec. M, Comp. St. § 8146¼nnn.

"(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this section, bring suit in personam in admiralty in a District court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This section shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels." 41 St. at L. 988, 1004, ch. 250, § 30, subsec. N, Comp. St. § 8146¼o.

"(a) The documents of a vessel of the United States covered by a preferred mortgage may not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of

the United States or any foreign country) without the approval of the board. The board shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forefiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure, or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a District court of the United States in any suit in rem in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all prëexisting claims thereon; but the court shall, upon the request of the mortgagee, the libellant, or any intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the board. Any assignment in violation of any provision of this section shall be void.

(e) No vessel of the United States shall be sold by order of a District court of the United States in any suit in rem in admiralty to any person not a citizen of the United States.'' 41 St. at L. 988, 1004, ch. 250, § 30, subsec. O, Comp. St. § 8146¼oo.

''The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.'' 41 St. at L. 988, 1005, ch. 250, § 30, subsec. Q, Comp. St. § 8146¼p.

''The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.'' 41 St. at L. 988, 1005, ch. 250, § 30, subsec. R, Comp. St. § 8146¼pp.

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this section shall not be construed to affect the rules of law now existing in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortages, other than preferred mortgages, upon vessels of the United States." 41 St. at L. 988, 1005, ch. 250, § 30, subsec. S, Comp. St. § 8146¼ppp.

"This section shall supersede the provisions of all State statutes conferring liens on vessels, in so far as such statutes purport to create right of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries." 41 St. at L. 988, 1006, ch. 250, § 30, subsec. T, Comp. St. § 8146¼q.

"This section shall not apply (1) to any existing mortgage, or (2) to any mortgage hereafter placed on any vessel now under an existing mortgage, so long as such existing mortgage remains undischarged." 41 St. at L. 988, 1007, ch. 250, § 30, subsec. U, Comp. St. § 8146¼qq.

"The Secretary of Commerce is authorized and directed to furnish collectors of customs with all necessary books and records, and with certificates of registry and of enrollment and license in such form as provides for the making of all indorsements thereon required by this section." 41 St. at L. 988, 1006, ch. 250, § 30, subsec. V, Comp. St. § 8146¼qqq.

"The Secretary of Commerce is authorized to make such regulations in respect to the recording and indorsing of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this section. 43 St. at L. 988, 1006, ch. 250, § 30, subsec. W, Comp. St. § 8146¼r.

"Sections 4192 to 4196, inclusive, of the Revised Statutes of the United States, as amended, and the Act entitled 'An Act relating to liens on vessels for repairs, supplies, or other necessaries,' approved June 23, 1910, are repealed. This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reënactment of such repealed law, and any right or obligation based upon any provision of such law and accruing prior to such repeal, may be prosecuted in the same manner and to the same effect as if this Act had not been passed." 41 St. at L. 988, 1006, ch. 250, § 30, subsec. X, Comp. St. § 8146¼rr.

"In the judgment of Congress, articles or provisions in treaties or conventions to which the United States is a party, which restrict the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and in vessels of the United States, and which also restrict the right of the United States to impose discriminatory tonnage dues on foreign ves-

the credit of the vessel,[11] which is destroyed only by affirmative proof of an agreement that the owner or another shall be exclusively liable for payment,[12] and not by evidence that an officer of the vessel agreed that either he or the owner would pay the bill.[13] The statute creates a lien for repairs to an appurtenance of the vessel such as a smaller boat.[14]

It authorizes a lien for coal supplied upon an order of the master,[15] or of an engineer who had ordered coal previously supplied,[16] or for raising a sunken boat in her own port,[17] or for furnishing stevedores,[18] or for loading or discharging cargo,[19] or

sels of the United States entering the United States should be terminated, and the President is hereby authorized and directed within ninety days after this Act becomes law to give notice to the several Governments, respectively, parties to such treaties or conventions, that so much thereof as imposes any such restriction on the United States will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions.'' 41 St. at L. 988, ch. 250, § 34, Comp. St. § 8146¼rrr.

''The power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.'' 41 St. at L. 988, ch. 250, § 35, Comp. St. § 8146¼s.

''If any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby.'' 41 St. at L. 988, ch. 250, § 36, Comp. St. § 8146¼ss.

''When used in this Act, unless the context otherwise requires, the terms 'person,' 'vessel,' 'documented under the laws of the United States,' and 'citizen of the United States' shall have the meaning assigned to them by sections 1 and 2 of the 'Shipping Act, 1916,' as amended by this Act; the term 'board' means the United States Shipping Board; and the term 'alien' means any person not a citizen of the United States.'' 41 St. at L. 988, ch. 250, § 37, Comp. St. § 8146¼sss.

''This Act may be cited as the Merchant Marine Act, 1920.'' 41 St. at L. 988, ch. 250, § 39, Comp. St. § 8146¼t.

11 Ely v. Murrary, C. C. A., 200 Fed. 369; The Rupert City, 213 Fed. 263, 268.

12 The Bronx, C. C. A., 246 Fed. 809.

13 Ibid.

14 The Geisha, 200 Fed. 865.

15 The Castor, 267 Fed. 608.

16 The Eastern, 257 Fed. 874.

17 The Convoy, 257 Fed. 843.

18 The Rupert City, 213 Fed. 263.

19 The George T. Kemp, 2 Lowell 477; Fed. Cas. 5,341; Florez v. The Scotia, 35 Fed. 916; The Mattie

for the cost of delivering supplies,[20] or for wharfage furnished a vessel undergoing repairs;[21] but there is no lien for other wharfage unless the services are rendered to a vessel then engaged in navigation or as a preparation for continued navigation.[22] Similar language in the Act of 1910 gave admiralty jurisdiction of a libel to recover damages for a breach of contract to have a marine railway ready in such a condition as promptly to place a vessel in a position where repairs could be made.[23] It did not support a libel *in rem* against a vessel for breaking a contract to remove her cargo, the performance of which had not begun.[24] Nor for breach of a contract for a charter.[25] Nor for the reconstruction of a vessel.[26] Nor for the services of architects employed to make plans for and to superintend a reconstruction.[27] Before the Act of 1910 admiralty had no jurisdiction to enforce a shipbuilding contract,[28] nor a contract for the supply of engines, timber and other material in her construction;[29] nor, before the Act of 1920, to foreclose or otherwise enforce an ordinary mortgage upon a boat.[30] It has been held that the master has no lien upon the ship for wages;[31] that there is no lien for the services of a watchman in the ship's port[32] or of a broker;[33]

May, 45 Fed. 899; The Seguranca, 58 Fed. 908; The Rupert City, 213 Fed. 263, 267.

20 The Rupert City, 213 Fed. 263, 270.

21 The Geisha, 200 Fed. 865; The Andrew J. Smith, 263 Fed. 1004.

22 Ibid.

23 The Alliance, 236 Fed. 361.

24 The Rancagua, C. C. A., 256 Fed. 843. A lien was allowed for material for repairs delivered along side of the vessel when their use was prevented by an attachment of a boat. The Geisha, 200 Fed. 865.

25 Corsica Transit Co. v. W. S. Moore Grain Co., C. C. A., 253 Fed. 689.

26 The Susquehanna, C. C. A., 267 Fed. 811.

27 Ibid.

28 Roach v. Chapman, 22 How. 129, 16 L. ed. 294; Graham & M. Transp. Co. v. Craig Shipbuilding Co., 203 U. S. 577, 27 Sup. Ct., 777, 51 L. ed. 325.

29 Roach v. Chapman, 22 How. 129, 16 L. ed. 294.

30 Bogart v. The John Jay, 17 How. 399, 15 L. ed. 95; Shuchardt v. Babbage, 19 How. 239, 15 L. ed. 625.

31 The Orleans v. Phoebus, 11 Peters 175, 9 L. ed. 677; the Imogene M. Terry, 19 Fed. 463; The Bethulia, 200 Fed. 876. Held otherwise where such a lien was given by the law of the flag although the employment was in the United States. The Rupert City, 213 Fed. 263, 271. But see The J. L. Pendergast, 32 Fed. 415, reversing 29 Fed. 127.

32 The Sinaloa, 209 Fed. 287.

33 The Joseph Cunard, Fed. Cas. 7,535; The Thames, 10 Fed. 848;

nor, it has been held for the rent of a seine purse.[34] Nor for the price of articles sold to the owner of several boats and not specifically ordered for any one of these.[35] The agent and part owner of a vessel has been allowed a lien for advances made to pay bills for necessary repairs and supplies which were specifically made upon the credit of the boat.[36] Lienors may sue the owner *in personam* to recover their proportion of insurance money when the vessel has been burned.[37]

The lien may be assigned.[38] The lien may be lost by a voluntary surrender of possession without its assertion.[39] But not by taking notes for part of the amount due in order that the lienor may raise money for temporary use until the owner can arrange for payment.[40] Nor by rendering a bill to the owner.[41] Nor by relying upon the retention thereof without objection as an account stated.[42]

Before the Act of 1910 it was held that a court of admiralty had no jurisdiction of a contract for repairs to a vessel, made on land, where the owners were represented there by a consignee who had funds,[43] nor for the lease of a wharf,[44] nor for the storage of sails,[45] or storage of cargo,[46] nor with a passenger agent and freight agent whose office was on land,[47] nor to reimburse the libelant for money advanced to pay railroad

The Crystal Stream, 25 Fed. 575; The Humboldt, 86 Fed. 351; The Retriever, 93 Fed. 480; The Rupert City, 213 Fed. 263, 273.

34 The Geisha, 200 Fed. 865.

35 Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1; The Bethulia, 200 Fed. 876.

36 The Puritan, 258 Fed. 271.

37 Henslee v. West Kentucky Coal Co., C. C. A., 241 Fed. 609.

38 The Emma L. Coyne, Fed. Cas. No. 4,466; The Sarah J. Weed, Fed. Cas. No. 12,350; The Rupert City, 213 Fed. 263, 266.

39 *Re* 9,889 Bags of Malt, C. C. A., 262 Fed. 946.

40 The Gurnet, 235 Fed. 595.

41 The Hattie Thomas, C. C. A., 262 Fed. 943.

42 Ibid.

43 Pritchard v. Schooner Lady Horatia, Bee Adm. 167, Fed. Cas. 11,438.

44 Upper Steamboat Co. v. Blake, 2 Appeal Cases (D. C.) 51. But see The Clifford v. U. S., 34 Ct. Cl. 223.

45 Hubbard v. Roach, 2 Fed. 393, 9 Bliss 375.

46 The Richard Winslow, C. C. A., 71 Fed. 426, 18 C. C. A., 344, 34 U. S. App. 542; s. c., below, 67 Fed. 259; The Pulaski, 33 Fed. 383.

47 The Humbolt, 86 Fed. 351. See Richard v. Hogarth, 94 Fed. 684; The Bark Joseph Cunard, Ole. A. D. M. 120, 13 Fed. Cas. 7,535; The Ole Oleson, 20 Fed. 394.

charges,[48] nor for the sale of cargo after landing,[49] nor for services in purchasing a vessel and in traveling upon her while looking after the owner's interest, but with no connection with the navigation,[50] nor for advertising a vessel,[51] nor for the procurement of insurance;[52] nor for the recovery of money paid for maritime services under a contract, fraudulent because made between two corporations by an officer common to both.[53] It has been held that a court of admiralty cannot take a vessel from the possession of a mortgagee under a mortgage which is fraudulent;[54] nor to enforce a claim which has been adjusted by arbitration,[55] nor to enforce a contract for the sale of a ship under a trust agreement,[56] nor to give a remedy for the breach of a covenant in a contract of partnership.[57] Admiralty has no jurisdiction of an accounting between partners in a ship,[58] or between part owners thereof,[59] nor, in general, of a complicated accounting.[60] The effect of proceedings in bankruptcy upon the jurisdiction of a court of admiralty is previously discussed.[61]

§ 560c. Jurisdiction of admiralty over torts. A court of admiralty has jurisdiction over torts committed upon navigable

48 Pacific Coast S. S. Co. v. Ferguson, C. C. A., 76 Fed. 993, 22 C. C. A., 671, 44 U. S. App. 708; Pacific Coast Steamship Co. v. Moore, 70 Fed. 870.

49 Waterbury v. Myrick, 1 Blatchf. & H. A. D. M. 34, 29 Fed. Cas. 17,253.

50 Doolittle v. Knobeloch, 39 Fed. 40.

51 Richard v. Hogarth, 94 Fed. 684.

52 Andrews v. Essex F. & M. Ins. Co., 3 Mason 6, 1 Fed. Cas. 374; Marquardt v. French, 53 Fed. 603; The City of Clarksville, 94 Fed. 201.

53 United Transp. & L. Co. v. N. Y. & Baltimore Transp. Line, C. C. A., 185 Fed. 386.

54 The Hekys, 173 Fed. 928.

55 Toledo S. S. Co. v. Zenith Transp. Co., C. C. A., 184 Fed. 391.

56 The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. ed. 269.

57 Vandewater v. Mills, 19 How. 82, 15 L. ed. 554; Ward v. Thompson, 22 How. 330, 16 L. ed. 249; Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co., C. C. A., 151 Fed. 440. A bond given by the charterer of a vessel to secure his performance of the conditions of the charter party, which neither requires nor authorizes the surety to perform such contract in case of the default of the principal, but merely to respond in damages for its breach, is not a maritime contract, and an action thereon is not within the admiralty jurisdiction.

58 Ward v. Thompson, 22 How. 330, 16 L. ed. 249.

59 The Orleans v. Phoebus, 11 Peters, 175, 9 L. ed. 677.

60 Grant v. Poillon, 20 How. 162, 15 L. ed. 871. See Minturn v. Maynard, 17 How. 477, 15 L. ed. 235.

61 *Supra*, § 60c.

waters at least when the subject matter is maritime.[1] The English limitation which excluded torts committed within the limits of a county, *infra corpus comitatus*,[2] is not followed in the United States.[3] The jurisdiction does not depend upon the commission of the wrong on board a boat; but upon its commission upon the high seas or other navigable waters.[4] "A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance."[5]

To constitute a maritime tort it is not indispensable that there must be either an injury to a boat or an injury by the negligence of a boat or her owners or mariners.[6] A court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect, and produces injury to the person or property of another in navigable waters. In such a case it is unimportant where the breach of duty occurred, or where the physical injury was completed.[7] Admiralty has jurisdiction of a suit *in personam* by a laborer against a stevedore who has employed him to recover for injuries sustained through the latter's negligence while engaged in loading a vessel lying at the dock in navigable waters[8] and of an injury caused by the fall of a workman upon a wharf, while leaving a boat upon which he was employed, the cause being the insecure fastening of the ladder to the boat's side.[9]

A court of admiralty has no jurisdiction where, although the

§ 560c. [1] Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58.

[2] 4 Coke Inst. 134.

[3] Waring v. Clarke, 5 How. 441, 457, 458; The Magnolia, 20 How. 296; The Propeller Commerce, 1 Black. 574; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59.

[4] The Plymouth, 3 Wall. 20, 335.

[5] Ibid. But a vessel was charged with damages for negligence which caused injuries to workmen engaged in repairs upon a dry dock. The Anglo-Patagonian, C. C. A., 235 Fed. 92; Buttner v. Adams, C. C. A., 236 Fed. 105.

[6] Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61, per Hughes, J.

[7] The Strabo, 90 Fed. 110, 113, per Thomas, J., whose whole opinion deserves a careful examination.

[8] Atlantic Transport Co. v. Imbrovek, 234 U. S. 52; overruling The Saint David, 209 Fed. 985; The Bee, 216 Fed. 709, where, however, the laboring stevedore while working on the dock was struck by something falling from a boat which he was unloading.

[9] The Strabo, 90 Fed. 110, aff'd C. C. A., 98 Fed. 998; *contra*, The H. S. Pickands, 42 Fed. 239, where the negligence was the removal of

active cause of the injury originates upon navigable waters, the tort is consummated on land.[10] It has no jurisdiction of a proceeding to recover damages caused to a navigable vessel by a bridge,[11] nor for an injury to a bridge [12] or building,[13] nor for damages to a derrick engaged in the construction of a light house,[14] nor to a marine railway,[15] nor to a wharf,[16] or other structure on land. It makes no difference whether a structure is solid or floating, realty or personalty, firmly fixed to the land beneath the water or otherwise, unless it is placed upon or under navigable waters.[17] In the latter case the injury falls within the jurisdiction of admiralty.[18] A court of admiralty has no jurisdiction of an action for damages caused to buildings upon land by fire which originated on a vessel in navigable waters.[19]

A court of admiralty has jurisdiction to recover damages to a vessel caused by a pier,[20] log-boom [21] or by piles [22] built in navigable waters, or to recover damages caused by a vessel to a

the end of the ladder from a cleat which held it on a wharf.

10 The Plymouth, 3 Wall. 20, 18 L. ed. 125; The John C. Sweeney, 55 Fed. 540; Price v. The Belle of the Coast, 66 Fed. 62; Gordon v. Drake, 159 Northwestern Reporter, 340.

11 The Rock Island Bridge, 6 Wall. 213, holding that a libel *in rem* will not lie against the bridge. Possibly a libel *in personam* against the owner in such a case might be sustained. The Arkansas, 17 Fed. 383, 386.

12 Cleveland T. & U. R. R. Co. v. Cleveland, C. C. A., 208 U. S. 316; Martin v. West, 222 U. S. 191; The Neil Cochran, Brown Adm. 162, 14 Fed. Cas. 7,996; The Savannah, 21 Fed. Cas. 12,384; Milwaukee v. The Curtis, 37 Fed. 305; The John C. Sweeney, 55 Fed. 540.

13 The Plymouth, 3 Wall. 20, 18 L. ed. 125; Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. ed. 447; *supra*, § 560.

14 The Schooner Maud Webster, 8 Benedict 547, 16 Fed. Cas. 9,302.

15 The Professor Morse, 23 Fed. 803.

16 Cleveland T. & U. R. R. Co. v. Cleveland S. S. Co., 208 U. S. 316; The C. Accame, 20 Fed. 642; Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 Fed. 845; The Haxby, 95 Fed. 170, s. c., 94 Fed. 1016. But see The Ottawa, Brown Adm. 356, 18 Fed. Cas. 10,616; New York City v. Highland, 6 Ben. (U. S.) 289, 18 Fed. Cas. 10,196.

17 The Arkansas, 5 McCrary, 364, 17 Fed. 383, 386.

18 Railroad Co. v. Steam-Tow Co., 23 How. 209; Atlee v. Packet Co., 21 Wall. 389.

19 The Plymouth, 3 Wall. 20, 18 L. ed. 125.

20 Atlee v. Packet Co., 21 Wall. 389.

21 Ibid. But see The Brig, City of Erie v. Canfield, 27 Mich. 479.

22 Railroad Co. v. Steam-Tow Co., 23 How. 209.

beacon in navigable waters[23] even when the construction of the latter is not complete,[24] or to a submarine cable.[25] A suit by a vessel against her pilot to charge him with responsibility for her anchorage in an unlawful place is within the admiralty jurisdiction.[26] Admiralty has no jurisdiction over a tort arising from the issue or negotiation of a bill of lading.[27]

It has not yet been decided whether in order to give admiralty jurisdiction the tort must be maritime in its nature.[28] It has been questioned whether admiralty would entertain a suit for a libel or slander on board a ship by one passenger against another.[29] "If one of several landsmen bathing in the sea, should assault, or imprison, or rob another, it has not been held here that admiralty would have jurisdiction of the action for the tort.[30]

§ 560d. Jurisdiction of admiralty over claims for negligence. It has been said that in a suit in admiralty for a personal injury or other tort the place of the injury, *locus injuriæ*, is the test of jurisdiction.[1] Where the maritime law and the State law are in conflict, the former governs[2] even when the suit is brought in the State court,[3] or on the common law side of the Federal court.[4] It has been held that where the injury in its nature is not maritime, the liability of the ship will be governed by the law of the place where it occurred rather than by that of the vessel's home port.[5]

By the Act of March 4, 1915, "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with

23 The Blackheath, 195 U. S. 361.

24 The Raithmoor, 241 U. S. 166.

25 U. S. v. North German Lloyd, 239 Fed. 587; The Toledo, 242 Fed. 168.

26 Strathleven Steamship Co. v. Baulch, C. C. A., 244 Fed. 412.

27 William A. Wiggins & Co. v. Anglo-Algerian S. S. Co., 242 Fed. 568.

28 Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61.

29 Benedict on Admiralty, 4th ed., § 231.

30 Benedict on Admiralty, 3rd ed., § 308, citing *inter al* The Voland, 1 W. Rob. 387.

§ 560d. 1 Hamburg-Amerikanische Packetfahrt A. G. v. Gye, C. C. A., 207 Fed. 247. See *supra*, § 560c.

2 The C. S. Holmes, 212 Fed. 525; Schuede v. Zenith S. S. Co., 216 Fed. 566.

3 Schuede v. Zenith S. S. Co., 216 Fed. 566.

4 Berg v. Philadelphia & R. Ry. Co., 266 Fed. 591.

5 The Bee, 216 Fed. 709.

those under their authority."[6] It has been held that the phrase "those under their authority" is limited to seamen and does not include a longshoreman.[7] Before the enactment it was held: "1. That the vessel and her owner are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or appurtenant to the ship."[8] 3. "That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.[9] 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."[10] It has been held further: that neither the vessel nor the owner is liable to a seaman for the negligence of the master or other officer in respect to the details of navigation.[11]

6 Ch. 153, § 20, 38 Lt. at L. 1185, Comp. St. 8337a.

7 The Hoquiam, C. C. A., 253 Fed. 627.

8 Citing Scarf v. Metcalf, 107 N. Y. 211.

9 Criticised in Harv. L. Rev. XVIII, 294. See The Ticeline, 208 Fed. 670.

10 Mr. Justice Brown, in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. ed. 760. See the Charles H. Klinck, 172 Fed. 1019.

11 The C. S. Holmes, 212 Fed. 525. The following verdicts and awards have been sustained, some of them in admiralty. $36,000 to which a verdict for a greater amount was reduced, for a loss of eyesight by a miner 50 years of age who earned $900 a year. Yurkonis v. Delaware, L. & W. R. Co., 213 Fed. 537. $15,000 to which a verdict of $19,100 was reduced for breaking the pelvic gurdle dislocation of bones causing anaesthesia and atrophy in the legs and injury to internal organs caused to a miner of 19. Tomljanovich v. Victor American Fuel Co., 227 Fed. 951. $15,000 for compound comminuted fracture of ankle of left leg. Engler v. Western Union Tel. Co., 69 Fed. 185; aff'd Western Union Tel. Co. v. Engler, C. C. A., 75 Fed. 102. See Mitchell v. Broadway & S. A. R. Co., 70 Hun. (N. Y.) 387, 24 N. Y. Suppl. 32; Galveston, H. & S. A. Ry. Co. v. Porfert, 72 Texas, 344, 10 S. W. 207. $11,000 to a woman 35 years of age who had been practically crippled for life. Chi-

cago & S. H. S. S. Co. v. Lynch, C. C. A., 201 Fed. 70. $10,000 for loss of eyes and other injuries. Rillston v. Mather, 44 Fed. 743; aff'd Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464. $10,000 for loss of leg by girl five years of age. Smith v. Pittsburgh & W. Ry. Co., 90 Fed. 783, 788. $10,000 for paralysis of right side. Osborne v. City of Detroit, 32 Fed. 36. See Terney v. Syracuse, B. N. Y. R. R. Co., 85 Hun. (N. Y.) 146; Coxhead v. Johnson, 20 App. Div. (N. Y.) 605; Furman v. Brooklyn Heights R. R. Co., 25 App. Div. (N. Y.) 133; Sawalsky v. Pennsylvania R. R. Co., 39 App. Div. (N. Y.) 661. $8,000 for loss of leg. Shumacher v. St. Louis & S. F. R. Co., 39 Fed. 174. $8,000 for loss by railroad brakeman of one foot and four toes on the other. Wood v. Louisville & N. R. Co., 88 Fed. 44. $7,500 for the loss of a right eye. Korzib v. Netherlands-American Steam Nav. Co., 175 Fed. 998. $7,500 for paralysis. Cleveland, C. C. & St. L. R. Co. v. Brown, C. C. A., 56 Fed. 804, 6 C. C. A. 142. $7,000 to a riveter of 40 earning from $20 to $25 a week who had suffered a fracture, dislocation, and partial paralysis which prevented him from resuming his occupation. The Anglo-Patagonian, 228 Fed. 1014. $6,000 for compound fracture, which resulted in shortening of right leg about three inches and leaving it permanently stiff. The Anchoria, 113 Fed. 982. $6,500 for fracture of ankle and rupture. The Mineola, 44 Fed. 143. $5,500 for paralysis of legs. Taylor v. Pennsylvania Co., 50 Fed. 755. See The Anglo-Patagonian, 228 Fed. 1014. $5,000 for permanent injury and suffering while in the water after a collision. The Raleigh, 41 Fed. 527. $5,000 for fracture of skull and collar bone, necessitating two operations of trepanning and threatening paralysis. The Para, 56 Fed. 241; aff'd Steel v. McNeil, C. C. A., 60 Fed. 105, 8 C. C. A. 512. $5,000 for destroying the hearing of one ear, impairing muscular sense and rendering shipwright of 48, earning $94 to $96 a month, incapable of doing any but light work. The Pioneer, 78 Fed. 600. $5,000 (to which verdict for $10,000 was reduced) to servant on boarding-car, who had broken leg, dislocated arm and injury to back, shoulder and side. Missouri Pac. R. Co. v. Texas & P. Ry. Co., 41 Fed. 311. $4,800 to a longshoreman of 52 who had suffered a fracture which had shortened an inch and a half and limited the motion of his thigh. See M'Donough v. International Nav. Co., 249 Fed. 248; Latchtimacker v. Jacksonville Towing & Wrecking Co., 181 Fed. 276. $4,500 for torture inflicted as a punishment for insolent language, which arrested the circulation of blood in the hands, caused the skin and flesh to blister and decay, and so affected the cords as to cause the fingers to remain permanently bent. Bolden v. Jensen, 70 Fed. 505. $4,500 for practical paralysis and permanent disability of left arm of dressmaker. Missouri Pac. R. Co. v. Texas & P. Ry. Co., 41 Fed. 316. See The Dredge No. 15, 264 Fed. 135. $4,000 for injury causing amputation of leg below knee. Wm. Johnson & Co. v. Johansen, C. C. A., 86 Fed. 886, 30 C. C. A. 675; *certiorari* denied 170 U. S. 706, 42 L. ed. 1218, 18 S. Ct. 943. $4,000 for loss of hand. See City of Portsmouth, 125 Fed. 264; The Anglo-Patagonian,

§ 560e. Jurisdiction of admiralty over death claims. By the Act of March 30, 1920, "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."[1] Otherwise it seems that where

228 Fed. 1014; The Santa Barbara, 255 Fed. 231. $3,000 for loss of leg. The Iroquois, 113 Fed. 964. $1,500 for fracture of left hip and arm. The A. Heaton, 43 Fed. 592. See The Granville R. Bacon, C. C. A., 229 Fed. 715; Hartman v. Toyo Kisen Kaisha S. S. Co., 244 Fed. 567.

§ 560e. [1] Ch. III, 41 St. at L. 537, Comp. St., § 1251½.

"§ 2. The recovery in such suit shall be a fair and just compensation or the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the hurt in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." Comp. St., § 1251½a.

"§ 3. Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been a reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered." Comp. St., § 1251½b.

"§ 4. Whenever a right of action is granted by the law of any foreign country on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding." Comp. St., § 1251½c.

"§ 6. In suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly." Comp. St., § 1251½e.

"§ 7. The provision of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great

a death results from a maritime tort, the right to recover in admiralty depends upon the statute of the State where the injury occurred. Where the State statute gave a lien upon the vessel for such an injury it was enforced in admiralty under a libel *in rem*.[2] Where the State statute authorizes an action against the individual responsible; but creates no lien: admiralty will entertain a libel *in personam* for such relief;[3] even when the death occurs on shore as the result of a maritime tort.[4]

Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.'' Comp. St., § 1251½f.

''§ 8. This act shall not affect pending suits, actions or proceedings.'' Comp. St., § 1251½g.

As to the previous law see The Hamilton, 207 U. S. 398, 52 L. ed. 264; La Bourgogne, 210 U. S. 95, 52 L. ed. 973, where the vessel belonged to France. The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358; The Alaska, 130 U. S. 201, 9 S. Ct. 461, 32 L. ed. 923; The Corsair, 145 U. S. 335, 36 L. ed. 727 (Louisiana); The Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. ed. 751 (Louisiana); The Nora, 181 Fed. 845 (Florida). Monongahela River Consol. Coal & Coke Co. v. Schinnerer, C. C. A., 196 Fed. 375; The Starr, W. D. Washington, S. D., 209 Fed. 882; Rainey v. New York & P. S. S. Co., C. C. A., 216 Fed. 449; The Transfer No. 12, 221 Fed. 409; Bjolstad v. Pacific Coast S. S. Co., N. D. California, First Div., 244 Fed. 634; The Sagamore, C. C. A., 247 Fed. 743; Western Fuel Co. v. Garcia, C. C. A., 255 Fed. 817.

[2] Aurora Shipping Co. v. Boyce, C. C. A., 191 Fed. 960; The Alaska, 225 Fed. 645.

[3] Gretschmann v. Fix, 189 Fed. 716; The Chiswick, C. C. A., 231 Fed. 452. See The Hamilton, 207 U. S. 398, 52 L. ed. 264.

[4] The Church, C. C. A., 231 Fed. 452. The following verdicts and awards have been approved at common law and in admiralty respectively: $12,000, railroad engineer, 45 years of age, earning from $125 to $175 a month, leaving widow of 38, but no children. Vreeland v. Michigan Cent. R. Co., 189 Fed. 495. $12,000, division manager of insurance company, 34 years of age, salary $2,000 a year, unmarried, leaving widowed mother, to whose support he contributed and also brothers, sisters, nephews and nieces. Stockton v. Pennsylvania R. Co., 182 Fed. 282. $10,000 said to be enough (a verdict of $17,000 being set aside), architect's clerk, 30 years of age, whose services were worth from $4,000 to $7,000 a year, unmarried, living with both parents and working for his father, who paid nothing for his services except about $500 a year for his personal expenses, he having agreed with his father to allow that arrangement to continue until the father had paid off his own debts. Scofield v. Pennsylvania Co., 149 Fed. 601. $10,000 held not inadequate in admiralty, dairy farmer, 32 years of

§ 560f. Effect of State Workmen's Compensation laws upon admiralty. The Act of October 6, 1917, amends the saving clauses of the sections of the Judicial Code granting admiralty

age, earning from $1,500 to $2,100 a year, leaving widow and two children. The Oceanic, 61 Fed. 338; aff'd Occidental & O. S. S. Co. v. Smith, C. C. A., 74 Fed. 261, 20 C. C. A. 419. $9,000, member of switching crew on railroad, 29 years of age, earning from $75 to $78 a month, leaving widow. Voelker v. Chicago, M. & St. P. Ry. Co., 116 Fed. 867. $7,500, locomotive engineer, 25 years of age, earning from $100 to $130 a month, unmarried, leaving mother, whom he supported. Baker v. Phila. & R. Ry. Co., 149 Fed. 882; aff'd Phila. & R. R. Co. v. Baker, C. C. A., 155 Fed. 407, 84 C. C. A. 86. $7,500, negro master and owner of launch, 45 years old, married, father of a large family in good health, earning $3 a day whose honesty and character were unusually good. The Barge No. 4, 248 Fed. 823. $7,000, shipmaster, 35 years of age, wages $100 a month, leaving widow and two children. *Re* Humboldt Lumber Manuf'rs Ass'n, 60 Fed. 428; aff'd Humboldt Lumber Manuf'rs' Ass'n v. Christopherson, C. C. A., 73 Fed. 239, 19 C. C. A. 481, 46 L.R.A. 264. It has been held that an award of $7,000 is not excessive for the death of the captain of a launch earning about $900 a year, who left a wife and five children and who was 37 years of age; nor for the death of the engineer, 25 years of age, earning about $900 a year, who left a wife and one child. The Prudence, 191 Fed. 993. $7,000, laborer, 30 years of age, earning about $400 a year, leaving widow and children. Harkins v. Pullman Palace Car Co., 52 Fed. 724. $6,000 (to which verdict of $17,545 was reduced), man 29 years of age suffering from lung trouble, had spent several thousand dollars of his wife's estate and left only $250 for his widow and five children, before marriage taught school, and after marriage hauled and stacked lumber in a sawmill, worked on a farm, and was brakeman on a railroad when he died. Duke v. St. Louis & S. F. R. Co., 172 Fed. 684. $6,000 (to which verdict of $10,000 was reduced), stonemason, 47 years of age, earning $6 to $6.50 a day, had bad habits, sobriety doubtful, but gave most of his earnings to his family, left widow and children. Felt v. Puget Sound El. Ry., 175 Fed. 477. See The O'Brien Brothers, 253 Fed. 855. $5,000, cook on schooner, 39 years of age, earning $50 a month, leaving widow and three children. *Re* Humboldt Lumber Manuf'rs' Ass'n, 60 Fed. 428; aff'd Humboldt Lumber Manuf'rs' Ass'n v. Christopherson, C. C. A., 73 Fed. 239, 19 C. C. A. 481, 46 L.R.A. 264. $5,000, in admiralty, passenger 52 years of age, no evidence of his average earnings, left widow and seven children. Hall v. North Pacific Coast R. Co., 134 Fed. 309. See The O'Brien Brothers, 253 Fed. 855. $5,000 for the death of a boy of nineteen who had attended the normal, had almost finished the high school, and had been invited to teach at a salary from $85 to $90 a month; who had been educated under an agreement with his parents that he would

jurisdiction so that each reads as follows: "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and

repay what he advanced. Southwestern Gas & Electric Co. v. Thomas, C. C. A., 249 Fed. 325. $4,500, negro, 29 years of age, married, the father of three small children, who worked steadily at his trade and earned $2.50 a day. The Barge No. 4, 248 Fed. 823. $4,000, trackman, 66 years of age, earning $300 a year, leaving widow. Kountz v. Toledo, St. L. & W. R. Co., 189 Fed. 494. $4,000, sailor, 26 years of age, paying out of his earnings about $300 a year to his wife and children. Nickerson v. Bigelow, 62 Fed. 900. $3,500, bargemaster, 61 years of age, leaving widow. Egan v. Southern Towing Co., 189 Fed. 543. $2,500 (to which verdict for $3,500 was reduced), common laborer, 27 years of age, earning $1.50 a day, unmarried, left father 65 years of age, to whom he sent from $20 to $25 a month. Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438. $2,500, deckhand, 38 years of age, leaving three minor children. Cheatham v. Red River Line, 56 Fed. 248; reversed on other grounds, Red River Line v. Cheatham, C. C. A., 60 Fed. 517, 9 C. C. A. 124. $2,500, healthy boy, five years of age, leaving parents. Ross v. Texas & Pac. Ry. Co., 44 Fed. 44. $1,600, sailor, 18 years of age, earning $15, which was about to be advanced to $20, a month, unmarried, leaving several minor brothers and sisters in part dependent upon him for support. The Charlotte, 124 Fed. 989. $1,500 (to which verdict of $5,000 was reduced), woman, 23 years of age, domestic servant, unmarried, leaving father of 52 years of age, to whom she sent about $3 a month. Lindstrom v. International Nav. Co., 117 Fed. 170. $1,500, stevedore's man, 50 years of age, paid 50 cents an hour when he worked, leaving widow and four children. Boden v. Demwolf, 56 Fed. 846. $1,500, real estate and employment broker, 34 years of age, earning about $100 a month, bad habits, left widow and three children. Ladd v. Foster, 31 Fed. 827. $1,500, negro nurse, about sixteen years old, earning $2.00 a week. The Barge No. 4, 248 Fed. 823. $1,200, colored farm laborer, 23 years of age, earning about $25 a month, left widow but no children. The Elizabeth, 114 Fed. 757. $1,000, girl, 4½ years of age, in good health, leaving mother. The Oceanic, 61 Fed. 338, 364; aff'd Occidental & O. S. S. Co. v. Smith, C. C. A., 74 Fed. 261, 20 C. C. A. 419. $900, colored cabinboy, 15 years of age, earning $10 a month, leaving a father of 51 years of age. The Charlotte, 124 Fed. 989. $500, seowman, unmarried leaving two sisters, self-supporting, to whom he had promised to supply money for their return to Norway to live upon a farm owned by him. The O. L. Hallenbeck, 119 Fed. 468; aff'd C. C. A., 135 Fed. 1022, 68 C. C. A. 676. $500, bargeman, over 21 years of age, leaving a mother, for whose support he was not legally responsible. Eagan v. Southern Towing Co., 189 Fed. 543. $350, to which an award of $3,500 was reduced, for mental and physical suffering of seaman who remained in water one hour before he was drowned. The

remedies under the Workmen's Compensation Law of any State." [1] It has been held by a divided court that so much thereof as related to workmen's compensation laws is unconstitutional.[2] According to the decision of the District Courts where a laborer has accepted compensation under a State statute of this character he cannot recover in admiralty for the same injury; [3] but a libel in admiralty filed by a laborer to recover for an injury received in the course of his employment need not aver that he has received no compensation under the statute of the State.[4]

§ 560g. Concurrent jurisdiction of State courts over maritime matters. By the Judicial Code, the jurisdiction of the District Courts of the United States is exclusive in "all civil causes of admiralty and maritime jurisdiction, saving suitors in all cases the right of a common-law remedy, where the common law is competent to give it, and to claimants the rights and remedies under the workman's compensation law of any State." [1] The invalidity of the clause concerning workman's compensation law is previously explained.[2] By the Act of June 5, 1920, "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law

Robert Graham Dun, C. C. A., 70 Fed. 270, 17 C. C. A. 90; modifying and affirming 63 Fed. 167.

The following verdict was held to be excessive: $1,750, bridge carpenter, earning about $2 a day, unmarried and childless, leaving a sister in Denmark, to whom he occasionally sent some money. Sorensen v. Northern Pac. R. Co., 45 Fed. 407.

§ 560f. [1] 40 St. at L. 395, Comp. St., §§ 991, 1233.

[2] Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 524, 61 L. ed. —; Higgins v. Anglo-Algerian S. S. Co., C. C. A., 248 Fed. 386; Barrett v. Macomber & Nickerson Co., 253 Fed. 205.

[3] The Fred E. Sander, 212 Fed. 545.

[4] Hogan v. Buja, 262 Fed. 224.

§ 560g. [1] Jud. Code, § 256 Cl. 3, as amended by Act of October 6, 1917, ch. 97, 40 St. at L. 395.

[2] Knickerbocker Ice Co. v. Stewart, 53 U. S. 149, *supra*, § 560f.

with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."[3] Actions in the State courts upon contracts[4] or torts[5] of a maritime nature are governed by the maritime law and not by the laws of the States where the suits are brought or such contracts made. The State statute of frauds does not apply to a maritime contract,[6] such as a contract for the employment of the master of a vessel to sail upon the high seas.[7] The State courts have jurisdiction of actions *in personam* upon maritime torts.[8] In an action *in personam* a State court has jurisdiction to issue an auxiliary writ of attachment against the vessel, whether or not the contract in suit is of a maritime nature.[9]

§ 560h. Limitation of jurisdiction of admiralty by residence. The jurisdiction in admiralty of a District Court of the United States is not affected by the residence of parties, provided that the respondent can be served with process within the district, either personally, or in the case of a foreign or alien corporation by service upon its agent duly authorized to represent it there for such purpose,[1] or by attachment or garnishment of a debt or property there located;[2] or when a libel *in rem* is filed by seizure of the property.[3] Such a court may libel a vessel within its jurisdiction upon a claim for damages caused by a tort, such as a collision, committed upon the high seas, although the ship, the libelant, and the tort feasors are aliens,[4] when it occurred

3 Ch. —, § 33, Comp. St., § 8337a.

4 Union Fish Co. v. Erickson, 248 U. S. 308.

5 Schuede v. Zenith S. S. Co., 216 Fed. 566.

6 Union Fish Co. v. Erickson, 248 U. S. 308.

7 Ibid.

8 Schuede v. Zenith S. S. Co., 216 Fed. 566.

9 Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303.

§ 560h. 1 *Re* Louisville Underwriters, 134 U. S. 488; Slocum v. Western Assured Co., 42 Fed. 235; *supra*, §§ 61-61b, *supra*, §§ 61-67a.

2 Robins Dry Dock & Repair Co. v. Chesbrough, C. C. A., 216 Fed. 121. *Infra*, §§ 567a, 567b.

3 The Noddleburn, 28 Fed. 855; s. c., 30 Fed. 142.

4 The Noddleburn, 28 Fed. 855; s. c., 30 Fed. 142. See The Troop, 118 Fed. 769; Pouppirt v. Elder

within a league of a foreign coast.[5] Such a court entertained jurisdiction of a suit by an American citizen residing in another district to recover upon a policy or marine insurance executed in a foreign country by a foreign corporation.[6] Such a court refused to take jurisdiction of a controversy between an alien corporation and a corporation incorporated in another district of the United States when the cause of action arose in the latter district.[7] A court of admiralty may in its discretion refuse to take jurisdiction of a controversy between two aliens.[8]

§ 560i. Jurisdiction over controversies between foreigners. Courts of admiralty have the power to take jurisdiction of controversies between foreigners and the claims of foreigners against foreign vessels.[1] They usually do so in cases of collision,[2] salvage [3] and bottomry.[4] When the cause of action arises beyond their territorial jurisdiction on a ship carrying a foreign flag [5]

Dempster Shipping, 122 Fed. 983; The Kaiser Wilhelm Der Grosse, 175 Fed. 215.

5 The Kaiser Wilhelm Der Grosse, 17 Fed. 215. Such a liability was enforced when the law of a foreign country gave no maritime lien in such a case. The Kongsli, 252 Fed. 267. Where a suit *in personam*, accompanied by an attachment, was pending in the foreign country because of a collision in a harbor there, a protective seizure at the request of the master had been there made and the boat released upon the giving of a letter of indemnity; but when a tort was committed upon a citizen of the United States upon a foreign ship in the harbor of another country it was held that the liability should be determined by the law of the latter country. The Cuzco, 225 Fed. 169.

6 Slocum v. Western Assur. Co., 42 Fed. 235, where the policy contained a stipulation that any suit thereupon should be brought in the place of the domicile of the corporation.

7 Neptune Steam Nav. Co. v. Sullivan Timber Co., 37 Fed. 159. See The Vestris, 252 Fed. 201.

8 Watts, Watts & Co. v. Unione Austriaca Di Navagazione, 224 Fed. 188; The Kaiser Wilhelm II, 230 Fed. 717; Aktieselskabet K. F. V. Rederiaktiebolaget Atlanten, 232 Fed. 403; Cunard S. S. Co. v. Smith, C. C. A., 255 Fed. 846.

§ 560i. 1 The Two Friends, 1 Ch. Rob. 271, 278; Mason v. The Blaireau, 2 Cranch 240; The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. ed. 152.

2 The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. ed. 152.

3 The Two Friends, 1 Ch. Rob. 271, 278; Mason v. The Blaireau, 2 Cranch 240. But see One Hundred and Ninety-four Shawls, 1 Abb. Adm. 317.

4 The Jerusalem, 2 Gall. 191.

5 See The Belgenland, 114 U. S. 355, 365, 5 Sup. Ct. 860, 29 L. ed. 152.

or within a foreign territorial jurisdiction [6] and is one, the determination of which involves a consideration of the local law of such place, the court of admiralty may decline the jurisdiction. The court of admiralty may in its discretion refuse to take jurisdiction of a suit between alien corporations for the breech of a charter made in a foreign country,[7] or of a suit in *personam* or *in rem* between the subjects of two foreign countries at war with each other to enforce the payment against a foreign vessel of a claim which arose in a foreign country.[8] Jurisdiction over claims by foreign seamen against foreign vessels is discussed in the following section.[9]

§ 560j. Claims by foreign seamen against foreign vessels. Courts of admiralty will take no jurisdiction of claims by foreign seamen against foreign vessels upon which these are shipped, when, by treaty, as in the case of Germany,[1] and Sweden and Norway,[2] exclusive jurisdiction of such suits is vested in the consul of the country who objects to the jurisdiction of the courts of the United States.[3] In such a case, an alien who has signed articles as seaman on a foreign ship, of a different country than that where he is born, is considered to be a subject of the latter kingdom.[4] In such cases it is the proper practice to notify the consul in order that he may have an opportunity to object to the jurisdiction;[5] but such a notice is not indispensable.[6] Where the consul knows of such proceeding and does not protest, the court may in its discretion take jurisdiction.[7]

The Seamen's Act of March 4, 1915, provides for the payment of one half the wages earned to seamen on demand at every port. "*And provided further,* That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen

6 One Hundred and Ninety-four Shawls, 1 Abb. Adm. 317 (salvage); Goldman v. Furness, Withy & Co., 101 Fed. 467 (breech of contract of carriage).

7 Aktieselskabet K. F. K. v. Rederiaktiebolaget Atlanten, 232 Fed. 403.

8 The Kaiser Wilhelm II, 230 Fed. 717, 721.

9 *Infra,* § 560j.

§ 560j. 1 17 St. at L. 928, art. 13.

2 8 St. at L. 352.

3 The Koenigin Luise, 184 Fed. 170; The Ester, 190 Fed. 216. As to Consular Courts, see § 74, *supra.*

4 The Amalia, 3 Fed. 652; The Ester, 190 Fed. 216.

5 The Strathearn, 239 Fed. 583.

6 Ibid.

7 Ibid.

for its enforcement."[8] Whether this affects the exclusive jurisdiction previously given to consuls by treaties has not been decided. It is constitutional,[9] and certainly applies to all other foreign ships and seamen.[10] Ordinarily, a court of admiralty will not take jurisdiction of the claim of a foreign seaman against a foreign vessel, on which he is enrolled,[11] unless it is necessary to prevent a failure of justice.[12] It may in its discretion refuse to entertain a suit by foreign seamen against a foreign ship for short allowance and bad provisions in foreign waters,[13] and for wages when their employment has not terminated and the result would be a detention of the vessel.[14] But where the libelant was a citizen of the United States, who signed in one of our ports after his discharge, the libel will be entertained.[15] Where one of several sailors was a citizen of the United States, the court of admiralty took jurisdiction of the claims of all, when they were entitled to a discharge which had not been given them, the duration of their employment being a disputed question.[16]

§ 561. Libel. The first step in an admiralty suit is the filing of the libel with the clerk of the District Court. Until this is done process will not issue.[1]

The form of the libel varies in the several districts with the methods of pleading adopted in the respective States, not by force of any rule of law or statute, but by a natural process of adaptation. The Supreme Court, in its Admiralty Rules, has, however, laid down certain positive rules of pleading. "All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as

8 The Epsom, 227 Fed. 158.

9 Ch. 153, § 4, 38 St. at L. 1164.

10 Strathearn S. S. Co. v. Dillon, 252 U. S. 348.

11 The Albani, 169 Fed. 220; The Ester, 190 Fed. 216.

12 Ibid; The Bank Lillian M. Vigus, 10 Benedict 385, 7 Fed. Cas. 8,346.

13 The Gloria de Larrinaga, 196 Fed. 590.

14 Slocum v. Western Assur. Co., 42 Fed. 235. But see The August Belmont, 153 Fed. 639.

15 The August Belmont, 153 Fed. 639.

16 The Falls of Keltie, 114 Fed. 357.

§ 561. 1 Adm. Rule 1.

the same may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and places of residence of the parties so far as known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights *in rem*, or *in personam*, as the case may be, and for such relief and redress as the court is competent to give in the premises." [2]

Libels of information are regulated by a different rule [3] and are discussed in a subsequent section.[4] The libel must expressly state the facts upon which the jurisdiction in admiralty depends.[5] These need not be stated in such clear and positive language as to defy technical or hypercritical attacks.[6] If the language is sufficiently clear to convey to men of average intelligence engaged in the particular arteraft, profession or business to which it relates the idea sought to be expressed, it is sufficient to meet the legal requirements.[7] It was held, that an averment, that a boat was discharging freight consigned to a place, was equivalent to an allegation that this freight was then being discharged thereat.[8] It is the safer practice to allege specifically that the waters where the cause of action arose are navigable.[9]

[2] Adm. Rule 22.

[3] Adm. Rule 21. The Falls of Keltie, 114 Fed. 357. See The August Belmont, 153 Fed. 639, and *supra*, § 25.

[4] *Infra*, § 606.

[5] The Whisper, 268 Fed. 464, 466. As to the insufficiency of allegations showing that the libelant had an interest in the property injured which entitled him to recover. See Minturn v. Alexandre, 5 Fed. 117. Allegations that the owner of a dredge hired another dredge and a barge from libelant to assist such dredge in its work and failed to pay the hire, and that through the negligence of such charterer the barge was sunk, do not establish a maritime lien which will support a suit in rem against the dredge. The Dixie, 236 Fed. 607.

[6] The Whisper, 268 Fed. 464, 466. For what is required to identify goods that have been damaged. See The Anchoria, 9 Fed. 840. As to what is a sufficient allegation of negligence by the master. See The Anaces, 93 Fed. 240.

[7] The Whisper, 268 Fed. 464, 466.

[8] Ibid.

[9] Admiralty Rule 22. But see Lands v. A Cargo of Two Hundred and Twenty-seven Tons of Coal, 4 Fed. 478.

If the proceeding is *in rem,* the libel must allege that the property proceeded against is within the district.[10] This does not oust the court of jurisdiction where the vessel was within the district when the libel was verified, departs before it is filed, returns after the filing, and is then seized on an alias monition.[11] Where the persons charged in a libel *in personam* reside in different districts of the same State, the suit may be brought in either district.[12] When the libelants are all foreigners the nationality of the ship should ordinarily be stated.[13] If *in personam,* it must set forth the names, occupations, and places of residence of the parties.[14]

Naming the libelant by the initials of his Christian name was held not to be a defect in the libel.[15] Where a party is a corporation, that fact should be stated in the libel.[16]

In its substantial, as distinguished from formal, allegations the libel follows the analogies of equity. The general rules of pleading apply to suits in admiralty.[17] It is sufficient for the libel to allege with reasonable certainty the essential facts which show a legal duty, a default therein and a result of injury, of which the default is a proximate cause.[18] Where the cause of action arises from a written contract it has been said that the contract should be annexed to the libel or a legal excuse given for its omission.[19] A libel *in personam,* for a collision or other tort, should state specifically that the respondent was the owner or in control of the vessel at the time when the libelant was injured.[20] A libel for damages, because of a breach of contract,

10 Adm. Rule 22.

11 The Queen of the Pacific, 61 Fed. 213; s. c., Bancroft-Whitney Co. v. The Queen, 78 Fed. 155.

12 Downs v. Wall, C. C. A., 176 Fed. 657.

13 The Falls of Keltie, 114 Fed. 357, 359.

14 Adm. Rule 22.

15 Hardy v. Moore, 4 Fed. 843.

16 Sun Mut. Ins. Co. v. Mississippi V. Tr. Co., 14 Fed. 699.

17 Jolivet v. City of Seattle, 226 Fed. 963.

18 Ibid.

19 Sun Mut. Ins. Co. v. Mississippi V. Tr. Co., 14 Fed. 699; Card v. Hines, 33 Fed. 189. But see Chamberlain v. The Torgorm, 46 Fed. 202. Where a contract reserving shipping space was made by libelant as broker, and provided that he would furnish certificates of readiness of shipper, it was held that an amended libel for breach of contract, which alleged that libelant was the shipper was inconsistent with the contract, and did not state a cause of action. Overseas Shipping Co. v. Struthers & Dixon, C. C. A., 265 Fed. 612.

20 The Consair, 145 U. S. 335, 36

should point out the manner in which any special damages that are claimed arose.[21] A libel which charges improper navigation is sufficient if it correctly states the essential facts, although it fails to give the proper interpretation thereof or the correct scientific reason for the result.[22]

A libel filed to enforce a lien or cause of action which does not then exist will be sustained after the lien or cause of action comes into existence.[23] There will be no reversal for a misjoinder of causes of action in a libel, when one of the causes of action has been dismissed, either on exception or a final hearing.[24]

The libel should conclude with a prayer specifying the relief [25] and the form of process.[26]

Ordinarily, there is no objection to the recovery by the libelant of more damages than his libel claims;[27] and where the allegations in the answer, when considered in connection with those in the libel, show a cause of action different from that pleaded and prayed, the proper relief will be granted.[28] In general, the testimony offered by the libelant must conform to the allegations in the libel.[29] Courts of admiralty are always liberal in

L. ed. 727; Danace v. The Magnolia, 37 Fed. 367.

21 The Oseoda, 66 Fed. 347.

22 Kelley Island Lime & Transp. Co. v. City of Cleveland, 144 Fed. 207.

23 Clark v. Five Hundred and Five Thousand Feet of Lumber, C. C. A., 65 Fed. 236; s. c., 70 Fed. 1020; Munson S. S. Line v. Glasgow Nav. Co., C. C. A., 235 Fed. 64.

24 The S. L. Watson, C. C. A., 118 Fed. 445.

25 Adm. Rules 21, 22.

26 Adm. Rules 21, 22.

27 The Gazelle, 128 U. S. 474, 32 L. ed. 496.

28 Deming v. The Rapid Transit, 52 Fed. 320, where libelant was allowed to shift his claim, from damages upon a contract of affreightment to a demand for general average.

29 The Ogeechee, 248 Fed. 803. That upon a libel *in rem* by laborers claiming wages they cannot recover for services as salvors or lightermen, The Sarah E. Kennedy, 29 Fed. 264. That unless the libel is amended wages cannot be recovered for services performed at a date prior to that alleged in the libel. Pinkham v. Rutan, 31 Fed. 496. That demurrage for detention subsequent to the filing of the original libel may in a proper case be recovered under a supplemental libel, Eight Hundred and Forty-one Tons of Ore, 25 Fed. 864. And that when a penalty is demanded against a vessel upon grounds not set forth in the libel, the demand will be ignored. The Pope Catlin, 21 Fed. 408.

the construction of pleadings.[30] It is immaterial whether the libel counts upon contract or tort.[31] A description of the suit as one for damages combined with allegations of negligence does not prevent a recovery upon contract.[32] Evidence of negligence not specifically pleaded has been admitted.[33]

The libel should be signed by the proctor, as the attorney for the libelant is usually termed.[34] The libel should be verified.[35] It is the safer practice for all the libelants to verify the libel;[36] but a defect in the verification, when not objected to in the trial court, cannot be availed of upon appeal.[37] If the libelant is absent from the district, his agent or attorney may verify the libel.[38]

§ 561a. Joinder of causes of action in libel. Great liberality is allowed in the joinder of different causes of action in the same libel in admiralty. A court of admiralty may, in its discretion, permit the joinder in the same libel of claims in contract and tort.[1] It seems that causes of action *in rem* and *in personam* may be joined in a libel whenever they arise out of the same transaction or are otherwise so connected that it will promote the cause of justice or conduct to the convenience of the court and the party to have them tried together.[2] It has been said that in no case under the Admiralty Rules promulgated by the Supreme Court can proceedings, *in rem* and *in personam* be

30 The Gwynedd, C. C. A., 228 Fed. 177.

31 Rainey v. N. Y. & P. S. S. Co., C. C. A., 216 Fed. 449; Dittmar v. Frederick Starr Contracting Co., C. C. A., 249 Fed. 437. But it has been held: that there can be no recovery for tort upon a libel which sets up an express contract only, Hays v Pittsburgh G. & B. Packet Co., 33 Fed. 552.

32 Dittmar v. Frederick Starr Contracting Co., C. C. A., 249 Fed. 437.

33 Norfolk Southern R. Co. v. Foreman, C. C. A., 244 Fed. 353.

34 Hardy v. Moore, 4 Fed. 843.

35 This is specifically required by Adm. Rule 1, S. D. N. Y. As to the practice in the Ninth Circuit, see Northwestern S. S. Co. v. Ransom, C. C. A., 174 Fed. 913.

36 Northwestern S. S. Co. v. Ransom, C. C. A., 174 Fed. 913.

37 Ibid.

38 But see Tibbol v. The Marion, 79 Fed. 104. As to signature by the libelant or his attorney, see Hardy v. Moore, 4 Fed. 843. *Cf.* § 494, *supra.*

§ 561a. 1 Welch v. Fallon, 181 Fed. 875.

2 The St. David, 209 Fed. 985; The Dawn, 212 Fed. 564; Benedicton's Admiralty [3d ed.] § 397. See *supra* § 142.

joined in the same libel except when therein expressly authorized.[3]

By the Admiralty Rules, "In all suits for mariners' wages or by materialmen for supplies or repairs or other necessaries, the libelant may proceed *in rem* against the ship and freight, or *in personam* against any party liable."[4] "In all suits for pilotage or damage by collision, the libelant may proceed *in rem* against the ship, or *in personam* against the master, or the owner."[5]

"In all suits founded upon a mere maritime hypothecation of ship or freight, either express or implied, by the master for moneys taken or in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of maritime interest, the libelant may proceed *in rem,* or *in personam* against the master, or the owners."[6]

"In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against any party liable for the salvage service."[7] It has been held that the vessel and owner may be joined in suits upon charter parties, bills of lading, and contracts of affreightment.[8]

§ 562. Security for libelant for costs. "In all cases the court may, on the filing of a libel or on the appearance of any respondent, or claimant, or at any other time, require the libelant, respondent or claimant, or either of them to give a stipulation or an additional stipulation with sufficient sureties, or an approved corporate surety, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against

[3] The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; The Alida, 12 Fed. 343; Dean v. Bates, 2 Woodb. & M. (U. S.) 87, 7 Fed. Cas. No. 3,704; Hale v. Washington Ins. Co., 2 Story (U. S.) 176, 11 Fed. Cas. No. 5,916; Citizens Bank v. Nantucket Steamboat Co., 2 Story (U. S.) 16, 5 Fed. Cas. No. 2,730; The Blackheath, 154 Fed. 758. But see The Planet Venus, 113 Fed. 387.

[4] Adm. Rule 13.

[5] Adm. Rule 14. See the Clatsop Chief, 8 Fed. 105; Joice v. Canal Boats, 32 Fed. 553; The Samson, 197 Fed. 1017.

[6] Adm. Rule 16.

[7] Adm. Rule 18.

[8] The Baracoa, 44 Fed. 102; The Director, 26 Fed. 708; The Monte A., 12 Fed. 331; The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150; Arthur v. The Schooner Cassius, 2 Story (U. S.) 81, Fed. Cas. No. 564. But see The Monte A, 12 Fed. 331; The Thomas P. Sheldon, 113 Fed. 779.

him, it, or them, by the final decree of the court, or by any interlocutory order in the progress of the suit, or an appeal by any appellate court."[1] The application may be denied for laches.[2] By the Act of June 12, 1917, Courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety.[3] No security is required of the United States in its proceedings, as costs are not allowed against the government.[4] Suits may be brought *in forma pauperis* upon application to the court.[5] If the libelant is a non-resident, he must, in the Southern and Eastern Districts of New York, furnish two sureties.[6] In the New York districts and in New Jersey the stipulation is for $250 in suits *in rem* and for $100 in suits *in personam*.[7] In Connecticut the stipulations are executed by the libelant and one surety, who must reside in the State within which the district is situated.

§ 563. Parties. In admiralty, the party entitled to relief should always be made libelant, and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases, such as suits by the owner to recover for loss of cargo, partially insured, where the insurance has been paid and the insurer is entitled by subrogation to a part of the recovery.[1] An agreement for a consolidation of several steamship companies does not divest one of them of the right to file a libel in its own name to enforce a chose in action of which there has been no assignment.[2]

Persons entitled to participate in the recovery, but not made parties in the original libel, may, upon petition, be allowed to

§ 562. [1] Adm. Rule 24.

[2] See *supra* § 425.

[3] Ch. 27, § 1, 40 St. at L. 157, Comp. St., § 1630a.

[4] The Antelope, 12 Wheaton 546, 6 L. ed. 723.

[5] By Adm. Rule 8, S. D. N. Y., "Process *in rem* in such causes, unless specially allowed by the Court, shall not issue except upon proof of twenty-four hours notice to owner of the *res* or his agent, of the filing of the libel." See § 413, *supra*.

[6] S. D. N. Y. Adm. Rule 6.

[7] Ibid.

§ 563. [1] Eastfield S. S. Co. v. McKeon, 186 Fed. 357.

[2] Eastfield S. S. Co. v. McKeon, 201 Fed. 465.

join in a suit as co-libelants on such terms as the court deems reasonable. When a number of persons have claims against a vessel, which will be supported by the same evidence, the court may permit them to unite in a single libel, or may consolidate the separate libels which they have filed.[3] This was done in the case of passengers on a steamer who complained of the quality of the food furnished upon the same voyage.[4]

Seamen claiming wages for the same voyage are not permitted to prosecute separate suits. Those not included in the original libel should petition to be made co-libelants.[5] If they file a second libel, they will be denied costs in case of recovery, and suits so brought will be consolidated, on motion. So suits for salvage arising out of services participated in by several vessels will be consolidated in one suit.[6] When jurisdiction has been taken of such a claim by an American seaman against a foreign ship it will be retained to enforce the claim of foreign seamen who are members of the same crew.[7]

"In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libelant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter."[8] The practice under this rule is subsequently described.[9] The objection of the libelant will not prevent this relief to the claimant or respondent.[10] It has been held, the substitution of a new owner as claimant of a libelled vessel which has been released on stipu-

3 The Rochester, 227 Fed. 203.

4 Ibid.

5 See Adm. Rule 3, S. D. N. Y.

6 Where upon a libel in admiralty against a city, to recover for salvage services to a scow, the respondent pleaded that the scow was under the hire of a corporation, which had contracted to return it in good condition, and that the service was rendered to such company, it appearing that before the issue of citation against the corporation it had been adjudicated a bankrupt, which subsequently appeared in the suit by its trustee, and that the city had security; it was held that the libelant was entitled to a decree against both respondents. Conway v. City of New York, 194 Fed. 529.

7 The Epsom, 227 Fed. 158.

8 Admiralty Rule 56.

9 *Infra* § 574.

10 Dailey v. New York, 119 Fed. 1005. Third party practice is regulated in S. D. N. Y. by Adm. Rule 15.

lation is not the bringing in of a new party, and may be allowed without notice to the surety on the stipulation.[11] It has been held, that, in a suit by a pledgee of a bill of lading of cargo to recover from the ship for a wrongful delivery thereof to persons who have sold the same, the claimant may bring in the persons to whom such delivery was made; if it appears from the pleadings, that if the libelant's contention was sustained the claimant would have a claim against them; and the fact that an action is pending at common law brought by the libelant, against such persons will not deprive the claimant of this relief.[12]

A libel was sustained when filed under a bill of lading against the charterer and another to whom the bill of lading had been transferred, to recover freight earned thereunder, and seeking recovery in the alternative against one or the other of them, stating that the libelant was unable to determine which is liable.[13]

A libel may be filed against more than one vessel. Thus, in a cause of collision, the owner of the damaged vessel frequently proceeds against the tug which had it in tow and a third vessel. So, different interests may be proceeded against in the same suit, as, for example, in a cause of salvage, the vessel salved, her cargo, and her freight money.

The owners of a vessel may find a libel for salvage on their own behalf and on behalf of the officers and new interests naming them.[14] A decree will not be reversed for an award of salvage compensation to persons who are not parties, when the objection was not taken below.[15]

§ 564. Mesne process. The process issued in pursuance of the prayer of the libel is either *in rem* or *in personam*. Each process is distinct from the other and regulated by different rules.[1] An appearance in answer to one alone will not justify such a judgment as might be warranted by the other.[2] Nor will an appearance in answer to a citation upon a libel *in personam*

11 The Cerea, 149 Fed. 924.

12 The Cerea, 149 Fed. 924.

13 Neall v. Curran, 93 Fed. 831.

14 The Flottbek, C. C. A., 118 Fed. 159.

15 Ibid.

§ 564. 1 The Kongsli, 252 Fed. 267, 269.

2 The Ethel Co., 66 Fed. 340. Process issued *in rem*. The Merrimac, 242 Fed. 572. Process issued *in personam*.

authorize the introduction of new claims by new claimants without service of a new citation.[3]

By the Admiralty Rules: "In all suits for mariners' wages or by materialmen for supplies or repairs or other necessaries, the libelant may proceed *in rem* against the ship and freight, or *in personam* against any party liable."[4] "In all suits for pilotage or damage by collision, the libelant may proceed *in rem* against the ship, or *in personam* against the master, or the owner."[5] "In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only."[6] "In all suits founded upon a mere maritime hypothecation of ship or freight, either express or implied, by the master for moneys taken or in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of maritime interest, the libelant may proceed *in rem*, or *in personam* against the master, or the owners."[7] "In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the properly hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by its own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer."[8]

"In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against any party liable for the salvage service."[9] "In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain pos-

3 Ex parte Indiana Transportation Company, Petitioner, 244 U. S. 456. See *supra*, § 170.

4 Adm. Rule 13.

5 Adm. Rule 14.

6 Adm. Rule 15.

7 Adm. Rule 16.

8 Adm. Rule 17.

9 Adm. Rule 18.

session of the ship for any voyage, on giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.''[10]

§ 565. Process in rem. If process *in rem* is prayed for, the clerk issues a monition, returnable on a day named, which recites the filing of the libel and its prayer for relief, and directs the marshal to arrest the property proceeded against, describing it, and cites all persons interested therein to appear on the return day[1] and answer the libel.[2] ''In all cases of seizure, and in other suits and proceedings *in rem,* the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.[3] By the notice all persons claiming any interest in the property attached are notified that they must present their claims on the return day, or their default will be taken and the property condemned.[4] In all suits *in rem* against a ship, or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree that the same be delivered into the custody of the marshal or other proper

10 Adm. Rule 19.

§ 565. 1 In the Southern District of New York, Tuesday is the return day; in the Eastern District it is Wednesday; in New Jersey, Monday.

2 By Adm. Rule 7, S. D. N. Y., ''In all possessory suits, the process shall be made returnable at the first general return day not less than three days after the filing of the libel, unless otherwise ordered by a judge. * * * The answer shall be filed upon return of the process duly served, and a day of hearing then fixed unless otherwise ordered.''

3 Adm. Rule 10. By Adm. Rule 7, S. D. N. Y., ''Notice by publication will not be required unless specially ordered.''

4 The form and time of publication in S. D. N. Y. is regulated by Adm. Rule 26.

officer, if on hearing it appears that the same is required by law and justice."[5]

§ 566. Cases in which the res cannot be arrested. The public vessels or other property of the United States[1] or of a foreign sovereignty are exempt from seizure in admiralty;[2] also vessels which are the property of a State or municipal corporation, or a department thereof, and are devoted to public uses.[3] Where property is in the possession of the Government of the United States, as, for example, in bonded warehouse or elsewhere in the custody, actual or constructive, of the collector of customs, it is irrepleviable, and subject only to the orders and decrees of the Federal courts.[4] The marshal is permitted to make the attachment without taking the property into his custody by leaving with the collector or person in charge of the property a copy of the monition, and also a notice requiring such person to detain the property in custody until the further order of the court.[5] He cannot take actual possession of the property without the express order of the court.[6]

The immunity of Government vessels from seizure while in the possession of the United States does not exempt them from subjection to a lien arising from acts then committed, which may be enforced against them when the Government has parted with their possession,[7] or against their proceeds after they have been sold.[8]

By the Act of September 7, 1916, boats purchased, chartered or leased by the United States Shipping Board "while employed solely as merchant vessels shall be subject to all law regulations, and liabilities governing merchant vessels, whether the United

5 Adm. Rule 9.

§ 566. 1 The Fidelity (Waite, C. J.), 16 Blatchf. 569; *infra*, § 566a.

2 The Schooner Exchange, 7 Cranch 116, 3 L. ed. 287. At least if in the full and complete possession of such foreign government. Long v. The Tampico & Progresso, 16 Fed. 491; *supra*, §§ 94, 102a.

3 The Protector, 20 Fed. 207; The F. C. Latrobe, 28 Fed. 377; Workman v. New York, 179 U. S. 552, 565, 45 L. ed. 314, 322.

4 U. S. R. S., § 934. The Conqueror, 49 Fed. 99; *Re* Fassett, 142 U. S. 479, 35 L. ed. 1086.

5 U. S. v. One Case of Silk, 4 Ben. 526. *Contra* Vol. XIX, p. 101.

6 The Conqueror, 49 Fed. 99.

7 The Florence H., 248 Fed. 1012; The City of Philadelphia, 263 Fed. 234, 237; The Ceylon Maran, 266 Fed. 396; The F. J. Luckenback, 267 Fed. 931.

8 The Siren, 7 Wall. 153, 19 L. ed. 129.

States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." [9]

This has been repealed by the Act of March 9, 1920, which is quoted in the following section.[10] It authorized the seizure under a libel *in rem* of ships requisitioned by the United States Shipping Board Emergency Fleet Corporation because of a collision which occurred when they were chartered to a private company for private purposes.[11] The jurisdiction acquired through an attachment under a libel *in rem* and the power of the court to subject the boat attached to a second attachment under a second libel was not ousted by a requisition of the use of the boat made by the United States Shipping Board, and the use of the vessel for government purposes while remaining in the custody of the marshal through the master who was appointed deputy.[12] It did not forbid a libel *in personam*[13] or an action at common law[14] against the United States Shipping Board Emergency Fleet Corporation which is a corporation of the District of Columbia.

By the Act of March 21, 1918, providing for the Federal control of railroads and other carriers "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control." [15]

This did not prevent a libel *in personam* against the Director General of railroads while Federal control existed.[16] Neither did it prevent the attachment to a lien upon such a vessel which

9 Ch. 451, § 9, 39 St. at L. 728; re-enacted by act of July 15, 1918, ch. 152, 40 St. at L. 900.

10 *Infra*, § 566a, note.

11 The Lake Monroe, 250 U. S. 246.

12 41 St. at L. 525, Comp. St., § 1251¼; Banque-Russo Asiatique-London v. U. S. Shipping Board Emergency Fleet Corporation, 266 Fed. 897.

13 Banque-Russo Asiatique-London v. U. S. Shipping Board Emergency Fleet Corporation, 266 Fed. 897. See *supra* § 95.

14 Perna v. U. S. Shipping Board Emergency Fleet Corporation, 266 Fed. 896.

15 40 St. at L. 451, ch. 25, § 10, Comp. St., §§ 3115¾a-3115¾p. See *supra*, § 96i.

16 Dampskibs Actieselskabet Sangstad v. Hustis, 257 Fed. 862.

might be enforced after the Federal control had ceased.[17] It forbade the maintenance of a libel *in rem* against a vessel while under such control of the Director General.[18]

By the Transportation Act of February 28, 1920, "No execution or process other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under federal control."[19] It has been held that this applies only to claims which have as a proximate cause possession and use by the Government for which the Government should properly be responsible and does not bar a libel *in rem* against a boat, brought after Government control has ceased, for salvage where the services were rendered during Federal control while the vessel was chartered to a private individual or corporation.[20]

The immunity extends to an unarmed vessel employed by a foreign subject or country in public service as well as to a man-of-war.[21] The courts are bound to respect and accept as correct a suggestion by the Government of the United States filed by the United States Attorney or the Attorney-General which states that a boat is owned or has been requisitioned by a foreign government.[22] They may follow a statement by the foreign minister or government to the same effect.[23] It has been held that the immunity does not extend to a boat requisitioned by a foreign government and employed in its service which remains under the control and management of the owner who employs and pays the officers and crew,[24] although the Government of the United States has duly filed a suggestion that the boat has

17 The City of Philadelphia, 263 Fed. 234, 237. See The Ceylon Maru, 266 Fed. 396; The F. J. Luckenbach, 267 Fed. 931.

18 The City of Philadelphia, 263

19 Ch. 91, § 206 (q.) 41 St. at L. 456, 462.

20 The Arizona, 267 Fed. 598.

21 The Adriatic, C. C. A., 258 Fed. 902. But see The Florence H., 248 Fed. 1013.

22 The Schooner Exchange, 7 Cranch 116, 3 L. ed. 287. But see The Attualita, C. C. A., 238 Fed. 909.

23 The Adriatic, C. C. A., 258 Fed. 902.

24 The Attualita, C. C. A., 238 Fed. 909.

been requisitioned without stating under whose control it is nor demanding its release.[25]

Property actually in the custody of a sheriff cannot be attached by the marshal.[26] But the possession of a sheriff will not defeat the operation of the laws of the United States imposing forfeiture for the wrongful act of the owner or person in charge of a vessel.[27] Canal boats cannot be libeled for wages.[28] But whatever the form of a vessel may be, if she is not engaged in navigating canals she is not a canal boat within the meaning of the statute.[29]

§ 566a. Libels in personam against the United States. By the Act of March 9, 1920: "Sec. 1. No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this Act shall not apply to the Panama Railroad Company.

"Sec. 2. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such

25 Ibid.

26 Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028; *supra,* § 56.

27 U. S. v. The Reindeer, 2 Cliff. 57.

28 U. S. R. S., § 4251.

29 Smith v. Canal Boat Wm. L. Norman, 49 Fed. 285.

district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross-libel *in personam* may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other District court of the United States.

"Sec. 3. Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause and assumes liability to satisfy any decree included within said bond or stipulation and thereafter any such decree shall be paid as provided in section 8 of this act.

"Sec. 4. If a privately owned vessel not in the possession

of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion of the United States, through its Attorney General or other duly authorized law officer, that it is interested for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

"Sec. 5. Suits as herein authorized may be brought only on a cause of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

"Sec. 6. The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

"Sec. 7. If any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought herein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Ship-

ping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: Provided, however, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

"Sec. 8. Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

"Sec. 9. The Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation having control of the possession or operation of any merchant vessel are hereby authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7 and 10 of this Act.

"Sec. 10. The United States, and the crew of any merchant

vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

"Sec. 11. All moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board or of such aforesaid corporation, having control of the vessel of cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

"Sec. 12. The Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation, and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived."[1]

§ 567. Process in personam. "In suits *in personam* the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libelant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent

§ 566a. [1] Ch. 95, 41 St. at L. 525, Comp. St., §§ 1251¼-1251¼k.

shall not be found within the district."[1] A monition in admiralty in a suit *in personam* should be personally served on the defendant, or, if he cannot be found, by an attachment of his property in accordance with Admiralty Rule.[2] Service by leaving a copy of the citation with a servant at defendant's residence is not sufficient.[3]

Service of a monition upon a corporation may be made upon its president or secretary[4] or in the case of a foreign corporation upon any person whom it has appointed to accept service of process in accordance with a State statute.[5] Ordinarily a State statute does not affect the manner of serving process *in personam* and in admiralty.[6] Service of monition in a proceeding *in rem* may be made on an agent of a non-resident in conformity, with a State statute authorizing such mode of service in actions at law or in equity.[7]

Where the libelant begins a proceeding in admiralty *in rem* to enforce a claim which does not constitute a maritime lien, and has made no personal service of a monition upon the owner, he cannot convert his libel by amendment into a proceeding *in personam* although the latter has appeared to claim and release the ship without service of a monition in accordance with the rule.[8]

§ 567a. Foreign attachment. The writ of attachment was a process in admiralty recognized long before any admiralty rules were adopted.[1] It has been said that the authority for its issuance does not depend upon such rules.[2] It was not the intention of the admiralty rules to abolish such writ in those cases where, by reason of the abolition of imprisonment on debt, there can be no warrant of arrest.[3] The writ may issue in any suit in admiralty, where the court has jurisdiction of the sub-

§ 567. [1] Adm. Rule 2.

[2] Walker v. Hughes, 132 Fed. 885.

[3] Ibid.

[4] American Potato Corp. v. Boca Grande S. S. Co., 233 Fed. 542.

[5] Norfolk Southern R. Co. v. Foreman, C. C. A., 244 Fed. 353.

[6] Ibid.

[7] Insurance Co. of North America v. Frederiek Leyland & Co. Ld., 139 Fed. 67.

[8] The Lowlands, 147 Fed. 986. See *supra*, § 564, *infra*, § 579.

§ 567a. [1] Manro v. Almeida, 10 Wheaton 473; Rosaseo v. Thompson, 242 Fed. 527.

[2] Rosaseo v. Thompson, 242 Fed. 527.

[3] Ibid. See The Horsa, 232 Fed. 993.

ject matter and the respondent cannot be served within the district and has not appeared or offered to appear.[4] It will not be issued where the respondent has previously offered to enter an appearance.[5] Nor where with real effort personal service can be made within the district.[6] The statutory prohibition against a suit to which an inhabitant of the United States is defendant in any other district than that whereof he is an inhabitant or is found does not apply to suits and proceedings in admiralty.[7] It has been held that a general appearance will not validate a foreign attachment issued without authority.[8]

"In all suits *in personam,* where goods and chattels, or credits and effects, are attached under a process authorizing the same, the attachment shall be dissolved by order of the court to which the process is returnable, on the giving of a bond or stipulation, with sufficient sureties, or an approved corporate surety, by the respondent whose property is so attached, or by someone on his behalf, conditioned to abide by all orders, interlocutory or final, of the court, and to pay the amount awarded by the final decree of the court to which the process is returnable, or in any appellate court, not exceeding, however, the value of the goods so attached with interest at six per centum per annum and costs; and upon such bond or stipulation, summary process of execution shall be issued against the principal and sureties or surety by the court to which the process is returnable, to enforce the final decree so rendered or on appeal by any appellate court."[9] Under the former rules a bond or stipulation given to secure

[4] Bjolstad v. Pacific Coast S. S. Co., 221 Fed. 692.

[5] The Athanasios, 228 Fed. 558.

[6] Birdsall v. The Germain Co., 227 Fed. 953; Shewan v. Hallenbeck, 150 Fed. 231. It will not issue against the property of a foreign corporation which maintains an office for the transaction of business within the district. Birdsall v. Germain Co., 227 Fed. 953. The presence within the district of the holder of the majority of the stock, who is also the managing officer of a foreign corporation and captain of a boat owned by the latter which is docked there for repairs will not justify the quashing of the writ. Am. Potato Corporation v. Boca Grande S. S. Co., 233 Fed. 542 *Supra,* § 164d.

[7] Atkins v. Fibre Disintegrating Co., 18 Wall. 272; Re Louisville Underwriters, 134 U. S. 488; See Robins Dry Dock & Repair Co. v. Chesbrough, C. C. A., 216 Fed. 121; American Potato Corp. v. Boca Grande S. S. Co., 233 Fed. 542; *supra,* § 560h.

[8] Birdsall v. The Germain Co., 227 Fed. 953.

[9] Adm. Rule 5.

the release of the property attached was void if the attachment was set aside.[10]

§ 567b. Garnishee process. In case of foreign attachment where the properties in the possession of a stranger to the suit, the marshal serves the citation upon the garnishee, and if he finds goods or chattels of the respondent in the hands of the garnishee, he takes them into his own possession. If credits only are found, they are held by the garnishee "to answer the exigency of the suit."[1]

"In case of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the respondent or claimant in his hands, and to such interrogatories touching the same as may be propounded by the libelant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits or effects, the same shall be held in his hands, or paid into the registry of the court and shall be held in either case subject to the further order of the court."[2]

"In cases of mariners' wages, or bottomry, or salvage, or other proceeding *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, on due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit, and if no cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and on failure of the party to comply with the order, may award an attachment, or other compulsory process to compel obedience thereto."[3]

Where the local rules permit, the garnishee may be released

10 Atkins v. Fibre Disintegrating Co., 18 Wall. 272.

§ 567b. 1 Adm. Rule 37. Adm. Rule 11, S. D. N. Y., provides for the service of foreign attachment on the garnishee and service of process in proceedings *in rem*, etc. Adm. Rule 10, S. D. N. Y., provides for the return of the garnishee and for payment of the garnished funds into court. Adm. Rule 12, S. D. N. Y., provides for the form of the monition in proceedings *in rem* on behalf of the United States and for service of the same.

2 Adm. Rule 36.

3 Adm. Rule 37. See Lathrop v. Freights of the John Ena, 212 Fed. 560.

from further liability by giving a stipulation for the amount of the sum in his hands belonging to the respondent to abide the further order of the court in regard thereto.[4] A garnishee may set off a claim in his favor against the respondent, although such claim is not cognizable in admiralty.[5]

When a debt which is the subject of a libel *in personam* has been previously garnisheed in another court, it seems to be the better practice in admiralty to suspend proceedings therein, until the former garnishee proceedings have been terminated.[6]

§ 567c. Arrests in admiralty. Although the Supreme Court Rules still contain a provision for warrants of arrest of the person,[1] such process cannot be issued by courts of the United States in states where imprisonment for debt has been abolished, and arrests of the person are now, in most cases, dependent upon the laws for similar arrests in the respective states.[2]

It has been held that the power of a court of admiralty to arrest a defendant upon a claim for damages for a personal injury and cruel treatment of a sailor is not affected by the State law.[3]

By the Admiralty Rules: "No warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise.[4]

"In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made on similar or analogous process issuing from the State court.

"And imprisonment for debt, on process issuing out of the

4 The Olson & Mahony, 231 Fed. 539.

5 Wilhelmsens D. A. S. v. Canadian Venezuelan Ore Co., C. C. A., 224 Fed. 881.

6 Rhederei Actien Gesellschaft Oceana v. Clutha Shipping Co., 226 Fed. 339.

§ 567c. 1 Adm. Rule 7. See The Alpena, Fed. 361; Harriman v. Rockaway R. Co., 5 Fed. 461.

2 Act of March 2, 1867, U. S. R. S., § 990; Admiralty Rule 3, Louisiana Ins. Co. v. Nickerson, 2 Low. 310. The Carolina, 14 Fed. 424; Chiesa v. Conover, 36 Fed. 334; The Bremena v. Card, 38 Fed. 144. It has been held that a party who has been arrested can be discharged upon giving the bail required by the State laws. Stone v. Murphy, 86 Fed. 158.

3 Bolden v. Jensen, 69 Fed. 745. *Cf. supra*, § 471.

4 Adm. Rule 2.

admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, on similar or analogous process issuing from a State court.[5]

"The marshal shall take from the party arrested, as bail, either sufficient cash or a bond or stipulation in a sufficient sum, with sufficient sureties or an approved corporate surety, to be held by him to secure the appearance of the party so arrested in the suit. And upon such bond or stipulation summary process of execution shall be issued against the principal and sureties or corporate surety by the court to which the process is returnable.[6]

§ 568. Return of process and defaults. On the return day, the marshal having returned the monition of the clerk with proof that he has seized the property and made due publication, proclamation is made in open court, and, if no one appears to claim the property, the libelant is entitled to a decree by default. In suits *in personam,* if the respondent, when served with the citation, fails to appear, his default is taken in the same way. So, in cases of foreign attachment, where goods and chattels have been attached, the default of the respondent may be taken. Where the property attached consists of credits or effects, the garnishee is required to appear and make return under oath, showing the property in his hands belonging to the respondent at the time the attachment was served, and at the time of the return. If he fails to appear or to make such an affidavit or to answer the interrogatories put to him as to the property of the respondent in his hands, he is subject to the compulsory process of the court, and may be punished for contempt, and compelled to furnish a stipulation.[1] Upon default the court will hear the cause *ex parte* and "adjudge therein as to law and justice shall appertain,"[2] or for convenience will refer it to a referee to ascertain the amount due the libelant.[3] In the Southern Dis-

5 Adm. Rule 3.

6 Adm. Rule 4.

§ 568. 1 Admiralty Rule 36.

2 Admiralty Rule 28. By Adm. Rule 28, S. D. N. Y., where no proctor has appeared for any claimant, a *fieri facias* will not issue, nor a decree enter, without proof of actual notice of the suit to an owner or agent of the *res* or to the master of the vessel in custody.

3 See *infra,* § 584.

trict of New York, process must be returned by the marshal on the return day; and if not then returned, within four days after written notice so to do. The return must state the day of seizure or of sale. All processes upon the return day thereof are called by the clerk, and if there is no opposition the orders prayed for, in accordance with the practice of the court, may be entered by the clerk without the intervention of a judge.[4]

§ 568a. Opening of default in admiralty. "The court may, in its discretion, on motion of the respondent or claimant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within sixty days after the decree has been entered, the respondent or claimant submitting to such further orders and terms in the premises as the court may direct; and the term of the court shall be deemed extended for this purpose until the expiration of such period of sixty days."[1]

§ 569. Release of property from custody of marshal. "No property in the custody of the marshal or other officer of the court shall be delivered up without an order of the court but, except in possessory actions, such order may be entered, as of course, by the clerk, on the filing of either a written consent thereto by the proctor on whose behalf it is detained, or an approved stipulation or bond given as provided by law and these rules; or upon the dismissal or discontinuance of the libel; except that in proceedings under section 941 of the Revised Statutes the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid into the court by the party receiving such property subject to the decision of the court with respect to the amount of costs due such officers."[1]

The owner of property attached, or his agent, may obtain its release from the custody of the marshal by filing with the clerk a claim to the property, and either depositing in the court a sum sufficient to secure the amount sued for, or giving a bond or

[4] Adm. Rule, S. D. N. Y., 13.

§ 568a. [1] Adm. Rule 39. St. Charles Amusement & Transportation Co. v. Elhardt, C. C. A., 254 Fed. 275. See *supra*, §§ 171, 172.

§ 569. [1] Adm. Rule 57.

stipulation therefor.[2] A bond accepted by the court is a substitute for the property.[3]

"In suits *in rem* the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, on putting in such claim, the claimant shall file a bond or stipulation for costs as above provided."[4]

§ 570. Security by claimants for costs. A claimant must file with his claim a stipulation for costs similar to that required of a libelant.[1] The court may upon his appearance or at any time require a respondent or claimant to file such a stipulation for costs.[2] In some districts, the respondent in a suit *in personam* is always required to give a stipulation for costs, or his appearance or answer will not be received on file.[3] In the New York districts the stipulation is for $250 in suits *in rem*, and for $100 in suits *in personam*.[4] It is not necessary to obtain the approval of stipulations for costs by the court or the adverse party before filing them; but the sureties must justify if the adverse party requires it.

§ 571. Stipulation for value. The form of security required in order to obtain the release of property from custody is either

2 Adm. Rule. By Adm. Rule 17, S. D. N. Y., "If, after decree for either party in a possessory suit, the other party shall apply to the Court for process in a petitory suit, and file the proper stipulation, the property shall not be delivered to the prevailing party in the possessory suit until after an appraisement is made, nor until he shall give a stipulation with sureties to restore the property without waste, in case his adversary shall prevail in the petitory suit, and also to abide all interlocutory and final decrees of the District Court, and, on appeal, of the Appellate Court."

3 The Palmyra, 12 Wheat. 1, 6 L. ed. 531; U. S. v. Ames, 99 U. S. 35, 25 L. ed. 295; The Haytian Republic, 154 U. S. 118, 38 L. ed. 930.

4 Admiralty Rule 25; The Two Marys, 12 Fed. 152.

§ 570. 1 Adm. Rule 25, *supra*, § 562.

2 Adm. Rule 24.

3 Adm. Rule 25, S. D. N. Y., Adm. Rule 6; Rawson v. Lyon (S. D. N. Y.), 15 Fed 831.

4 S. D. N. Y., Adm. Rule 6.

a bond to the marshal in double the amount claimed in the libel, or a stipulation for the value of the property or in the Southern District of New York, at least in suits for sums certain, by payment into court of the amount claimed, with interest up to the stated term next succeeding the return day, together with costs.[1] Such a stipulation is called a stipulation for value.

"In all suits either *in rem* or *in personam,* where bail is given or a bond or stipulation is taken, the court may, on motion, for due cause shown, reduce the amount of such bail or may reduce the amount of security given by either bond or stipulation; and in all cases, either *in rem* or *in personam,* where a bond or stipulation is given, if either of the sureties or the corporate surety shall be or become insufficient or the security for costs shall for any reason be insufficient pending the suit, new or additional security may be required by order of the court on motion."[2]

"All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, or otherwise by written agreement of the parties or their proctors of record."[3] It has been held that "a letter of indemnity, taken after a 'protective seizure' by the French Tribunal of Commerce in Oran, Algeria, upon which a vessel was released from attachment arising out of a collision, did not have the force of a bond given to discharge a vessel arrested upon a suit *in rem.*[4] The owner of a vessel seized under foreign attachment, who has been served with process, is not required to give a stipulation for value as a condition precedent to entering appearance to defend the suit."[5]

The amount of the stipulation for value is determined by an appraisement, unless fixed by the agreement of the parties. Where the value of the property attached is much greater than the amount of the libelant's claim, the parties usually agree

§ 571. [1] Adm. Rule 16, S. D. N. Y.

[2] Adm. Rule 8.

[3] Adm. Rule 9.

[4] The Kongsli, 252 Fed. 267.

[5] E. G. Lyons & Raas Co. v. Deutsche Dampschifffahrtsgesellschaft Kosmos, 243 Fed. 202.

upon a less value, for the purposes of bonding only, sufficient to secure the claim. The condition of a stipulation for value is that the claimant will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered by the District court, or by the appellate court if any appeal intervene.[6]

The sureties after payment of the decree are subrogated to the right of the libelant.[7] They are not bound to pay the claims of intervenors filed subsequently to the release of the vessel.[8] They are liable for costs, although the stipulation does not specify them, and even when a separate stipulation for costs has been given.[9]

When such stipulation provides for the payment of interest, the stipulators are liable for this pending an appeal, which results in an affirmance, although the libelant has waived further security upon such appeal.[10] The stipulators are not liable for interest on the sum stipulated, unless expressly provided for, except on default in complying with the terms of the stipulation.[11]

The court cannot enter a decree against the stipulators for a greater sum than that named in the stipulation.[12] But unless there has been a change of ownership or other rights or equities have intervened, a new stipulation in a larger amount may be ordered as an alternative to a second arrest of the vessel, although it has meanwhile departed from the jurisdiction and returned thereto.[13]

6 Adm. Rules 10 and 11. But see Pope v. Seckworth, 46 Fed. 858; The Stelvio, 30 Fed. 509. As to the liability for a malicious seizure, see Gow v. William W. Brauer S. S. Co., 113 Fed. 672; The Iris, C. C. A., 100 Fed. 104. In a suit against the owner for breach of a charter party the amount would not be reduced by a subsequent offer by him to furnish the use of the vessel which the libelant is not bound to accept. The Aztec, 222 Fed. 169.

7 Madgie, 31 Fed. 926.

8 The Willamette, C. C. A., 31 L.R.A. 715, 70 Fed. 874. See the Oregon, 158 U. S. 186, 39 L. ed. 943.

9 The Mt. Desert, 186 Fed 395.

10 Ibid.

11 The Ann Caroline, 2 Wall. 538, 17 Fed. 833; The Webb, 14 Wall. 406, 20 L. ed. 774; The Wanata, 95 U. S. 600, 24 L. ed. 461; The Sydney, 47 Fed. 260. But see the Maggie J. Smith, 123 U. S. 349, 31 L. ed. 175; The Maggie M., 33 Fed. 591.

12 The James M'Caulley, 181 Fed. 932.

13 The I. F. Chapman, C. C. A., 241 Fed. 836; The City of Hart-

A court has allowed a stipulation for value to be withdrawn because of the invalidity of the warrant of seizure,[14] and cancelled one given without appraisal upon the subsequent institution of proceedings for a limitation of liability accompanied by a bond for the appraised value of the vessel.[15] A stipulation for value, like stipulations for costs, must be executed by two sureties or a surety company if the principal is a non-resident. If he is a resident of the district, one surety is enough. Sureties need not be freeholders, but they must be residents of the State in which the district is situated. In order to obtain the approval of the stipulation, the claimant should serve upon the libelant's proctor a notice of justification, giving the name, occupation, and residence of each of the sureties proposed, and the time and place at which the libelant may attend and examine them. Such notice should be served a reasonable time before the examination. In the New York districts twenty-four hours' notice is required, except in suits for wages, when notice may be given *instanter*. When the sureties have been examined, the bond should be presented to the court for approval, on notice.

Where the stipulation provides that upon the failure of the stipulators to pay the amount of a decree against them, execution may issue against both the claimant and his surety, no demand is necessary upon the claimant in order to justify a demand on the surety.[16] In such a case, upon payment of the decree by the surety, he is entitled to a writ of *fieri facias* against the principal.[17]

§ 572. Bond to the marshal. The Revised Statutes provide that property attached must be discharged from custody by the

ford, 11 Fed. 89; The Fred M. Lawrence, 88 Fed. 910. But see Barney Dumping B. Co. v. The Mutual, 78 Fed. 144.

14 Deas v. The Berkeley, 58 Fed. 920. *Cf.* The Zodiac, 5 Fed. 220.

15 Société Napthés Transports v. Bisso Towboat Co., C. C. A., 241 Fed. 463.

16 The Lowlands, 147 Fed. 986.

17 Admiralty Rule 37. Adm. Rule 11, S. D. N. Y., provides for the service of foreign attachment on the garnishee and service of process in proceedings *in rem*, &c. Adm. Rule 10, S. D. N. Y., provides for the return by the garnishee and for payment of the garnished funds into court. Adm. Rule 12, S. D. N. Y., provides for the form of the monition in proceedings *in rem* in behalf of the United States and for service of the same.

marshal on receiving from the claimant a bond in double the amount claimed by the libelant, with sufficient surety, to be approved by the judge of the court, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in the case.[1] This statutory bond is under seal, and in that respect differs from the stipulations peculiar to admiralty. As by the terms of the statute the marshal is required to discharge the property on receiving such a bond, he cannot look to the claimant for his fees. Where a stipulation for value is given, the marshal's fees must be paid by the claimant. A summary judgment may be entered against both the claimant and his sureties for the penal sum named in the bond. In case a decree is not satisfied by the claimant, an order will be granted directing the stipulators to show cause within a fixed time[2] why execution should not issue, and if the stipulators fail to fulfil the engagements of their stipulation within such time, judgment is entered against them, and execution issues.

§ 573. Appraisement. The usual method of obtaining an appraisement of property for the purpose of bonding is to apply to the court for an order appointing one or more appraisers. If the parties agree upon the appraisers, an order is not necessary. Before acting, appraisers should take and subscribe before the clerk or deputy clerk an oath or affirmation for the faithful performance of their duties, which should be filed. Notice of the time and place of making the appraisement should be given in writing by the appraisers to the proctors in the cause, and should also be affixed in a conspicuous place near the court rooms, where the marshal usually affixes his notices. Upon completing the appraisement the appraisers should make and sign a report, which must be filed. Exceptions to the report may be filed by the parties, which will be heard by the court on notice.[1]

§ 572. [1] U. S. R. S., § 941, as awarded 30 St. at L. 1354; Comp. St., § 1567. See S. D. N. Y., Adm. Rule 16, 19, 20, 21. By Adm. Rule 18, S. D. N. Y., except in suits for seamen's wages, when the attachment is issued upon certificate pursuant to U. S. R. S., §§ 4546 and 4547, attachments and arrests may be summarily vacated upon evidence of improper practice or manifest want of equity.

[2] In the New York Districts, within four days of the service of a copy of the order on the proctor for the claimant. S. D. N. Y., Adm. Rule 44.

§ 573. [1] The practice in S. D. N.

§ 574. Petition to bring in additional parties. "In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libelant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall

Y. is regulated by Adm. Rule 24 as follows: "In case of seizure of property in behalf of the United States, an appraisement for the purpose of bonding the same may be had by any party in interest, on giving one day's previous notice of motion for the appointment of appraisers. If the parties or their proctors and the district attorney are present in court, such motion may be made instanter, after seizure, and without previous notice. Orders for the appraisement of property under arrest or attachment at the suit of a private party may be entered as of course, by the clerk, at the instance of any party interested, or upon the consent of the proctors for the respective parties. Only one appraiser is to be appointed, unless otherwise ordered, and, if the respective parties do not agree in writing upon the appraiser to be appointed, the clerk shall forthwith name him, either party having a right to appeal instanter to a judge from such nomination. Appraisers, before executing their trust, shall be sworn or affirmed to its faithful discharge before the clerk, or his deputy, a United States commissioner, or notary public, and shall give one day's notice of the time and place of making the appraisement, by notifying the proctors in the cause and by affixing the notice in a conspicuous place adjacent to the United States court rooms, where the marshal usually affixes his notices, to the end that all persons concerned may be informed thereof; and the appraisement, when made, shall be returned to the clerk's office."

appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libelant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libelant."[1]

The former rule upon the subject[2] was adopted by the Supreme court in consequence of a decision of the District court for the Southern District of New York in a collision case,[3] and was limited to cases of damage by collision; but the proceeding was extended by the courts to other cases. Thus, in a suit for damage to cargo, the charterers of a vessel have been made respondents upon the petition of the owners[4] and the managing owner at the petition of the charterer.[5] In a suit *in rem* to enforce a lien for supplies, the charterer may be brought in upon the owner's petition.[6] Upon a libel for breach of a charter party a corporation which had obtained possession of the vessel under a junior charter.[7] Wharfingers have been brought in on the petition of the claimants of a steamship sued for negligence in discharging cargo on a wharf which was insufficient.[8] In a suit against a boat for failure to deliver cargo, the respondent may bring in another vessel to which it delivered the cargo under a bill of lading giving the right of transhipment.[9]

The motion may be granted after the trial has begun.[10] The

§ 574. [1] Adm. Rule 561. C. F. Harms Co. v. Upper Hudson Stone Co., 225 Fed. 630; The Sarnia; The Robert Palmer; The E. T. Dalzell, C. C. A., 2nd ct., 261 Fed. 900. See *supra*, § 563.

[2] Former Adm. Rule 59.

[3] The Hudson, 15 Fed. 162.

[4] The Alert, 40 Fed. 836; The Barnstable, 181 U. S. 464, 45 L. ed. 954.

[5] Cuneo Importing Co. v. American Importing & Transportation Co., C. C. A., 247 Fed. 413.

[6] The Louis Dolive, 211 Fed. 782; s. c., 236 Fed. 279.

[7] N. Y. & Bermudez Co. v. Mowinckel, 227 Fed. 950.

[8] The City of Lincoln, 25 Fed. 835.

[9] The Cetriana, 232 Fed. 175. See Otts v. I. M. Ludington's Sons, 229 Fed. 454.

[10] Otts v. I. M. Ludington's Sons, 229 Fed. 454.

denial of a motion to bring in a third party is usually treated as made without prejudice to its renewal,[11] and a party against whom the libel has been dismissed may be again brought in.[12]

§ 575. Answer. The answer should be filed upon the return day, unless further time is allowed by the court or the libelant's proctor.[1] "If the respondent or claimant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court may pronounce him to be in contumacy and default and thereupon shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may set aside the default and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct."[2]

"In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answers of or on behalf of the respondent or claimant to the libels and interrogatories shall be on oath or solemn affirmation; and all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner or except to each interrogatory propounded by the libelant. But this rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District court shall be of opinion that the proceedings prescribed herein are necessary for the purposes of justice in the case before the court."[3]

11 The Wilhelmina, C C. A., 232 Fed. 430.

12 The Teaser, C. C. A., 246 Fed. 219.

§ 575. 1 By Adm. Rule 14, S. D. N. Y., "In cases where process has not been issued, but a claim or notice of appearance has been filed, the answer or exceptions shall be filed within two weeks thereafter, or within such further time as may be allowed by the court, or by consent."

2 Adm. Rule 28. Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, it was held that he was not entitled to have a release executed on such settlement filed in satisfaction of a judgment recovered against him by default, except on payment of costs. Naretti v. Scully, 133 Fed. 333.

3 Adm. Rule 26. O'Keefe v. Staples Coal Co., 201 Fed. 133, 137. "The seventh exception objects to the statements in the fourth article of each answer that, if the tug's helm was in fact ported, she did not respond, and her subsequent

"Where either the libelant or the respondent or claimant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the respondent or claimant when and as soon as it may be practicable or may receive a verification by agent or attorney with like force and effect as if made by the party."[4] "In all cases where the respondent or claimant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libelant, and the exception is allowed, the court may, by attachment or otherwise, compel the respondent or claimant to make further answer thereto; or may make such other order in the cause as it shall deem most fit to promote justice."[5]

course and speed forbade the supposition that her helm had been ported. This seems to me neither admission nor denial, nor new matter set up in defense, but argument only, and improper in an answer. The eighth exception objects to denials, in the same article of each answer, that the tide, at the time, was such as to put the tug in danger of being carried broadside to the bridge, forcibly enough to endanger her or those on board, if her helm had been seasonably ported. This I consider improper for similar reasons.

"The twelfth exception objects to denials in the seventh article of each answer that the county accepted and undertook the control of the bridge, or employed and paid those who opened or controlled it, 'in such legal effect as to constitute liability,' or 'personal liability.' This seems to me objectionable on similar grounds."

In a suit to enforce a maritime lien a failure to deny that the libelant has such a lien may be treated as an admission that it exists. The Hattie Thomas, C. C. A., 262 Fed. 943. In such a suit it is insufficient to allege that credit was not given to the vessel without an averment that the debt was contracted solely upon the personal credit of the owner. The Transit, 217 Fed. 87. A denial of the correctness of the libelant's account should aver what items are incorrect. The Transit, 217 Fed. 87. A failure to answer a petition setting up claims for wages concedes the correctness of the allegations therein and of the liens asserted; but does not preclude the respondent from contesting any claim of priority when the petition is silent in that respect. The Samuel Little, 221 Fed. 308.

[4] Adm. Rule 33, 29.

[5] In a suit for collision against a tug and her tow, the two considered as one vessel and an an-

A defense in the disjunctive is improper.[5a] New matter set up as a defense should be articled and pleaded separately and not blended with the response to any article of the libel.[6] Although it seems that a plea to the jurisdiction may be combined with an answer to the merits,[7] it has been said that an objection to the jurisdiction of a court of admiralty over a cause should be made by plea, or, where the want of jurisdiction is palpable, by demurrer.[8] Under the former rules where answers were indefinite, bills of particulars have been ordered providing for the penalty of not permitting testimony concerning the point as to which the particulars were omitted.[9]

Where a party is not informed as regards allegations, he may so state and raise the issue thereupon without a positive denial;[10] but not unless he pleads ignorance.[11] A positive denial, or a denial upon information and belief, of allegations concerning seaworthiness, proper manning and equipment, must set forth the facts upon which the respondent relies.[12] In a collision suit, the allegation in the libel that the libelant's vessel was without fault, should be answered by either a denial, an admission or an averment of want of knowledge.[13] The answer may set up equitable, as well as legal, defenses.[14] The impossibility of a performance of a charter may be recognized as a

swer by the claimant of the tug was held to be insufficient unless it also answered the charges against the tow. The Teaser, 188 Fed. 721.

5a Allegations that a collision and the sinking of a boat, was caused by the fault and want of care of the owner or from causes within the privity and knowledge of the owner and its managing officers, or careless and improper navigation, or permitting engines, machinery, appliances and equipment to be insufficient and defective, was set aside upon exceptions. The Pere Marquette 18, 203 Fed. 127, 130. See *Re* Davidson S. S. Co., 133 Fed. 411.

6 The Whistler, 13 Fed. 295.

7 Inman v. The Lindrup, 70 Fed. 718.

8 The August Belmont, 153 Fed. 639.

9 Foster v. Compagnie Francaise de Navigation a Vapeur, 219 Fed. 351. See *supra*, §§ 242-246.

10 *Re* Davidson S. S. Co., 133 Fed. 411.

11 O'Keefe v. Staples Coal Co., 201 Fed. 133, 137.

12 *Re* Davidson S. S. Co., 133 Fed. 411; The Pere Marquette 18, 203 Fed. 127, 130. See The Commander in Chief, 1 Wall. 43, 17 L. ed. 609.

13 The Teaser, 188 Fed. 721.

14 Texas Co. v. Hogarth Shipping Co., 265 Fed. 375.

defense,[15] but without an amendment testimony should not be received in support of a defense not pleaded.[16]

The answer may set up defenses by way of counter-claim, but no affirmative judgment can be obtained by the claimant or respondent without filing a cross-libel.[17] It has been held that a set-off in admiralty is cognizable only so far as it relates to the particular transaction which is the subject of the libel and goes to reduce or overcome the original demand.[18]

Contributory negligence is not a bar to a recovery in admiralty.[19] Where an injury is caused by the concurrent negligence of two ships, the custom is to divide the damages in accordance with the equitable considerations.[20] In collision cases, where both vessels are found guilty of fault contributing to the collision, and only one of them is injured, the libelant recovers one-half of his damages; where both vessels are injured, the damages suffered by the two vessels are added together and equally divided, and the vessel which suffers most recovers one-half the difference between the amounts of their respective losses.[21] It has been said that the rule in admiralty for the divi-

15 Ibid.

16 See The Solveig, 217 Fed. 805. The Reuben Doud, 3 Fed. 520. "It was held, under a plea that the libelant, a pilot, after signaling an offer of service, had pulled down his signal and sailed away, that the respondent could not prove that other pilots had offered their services at the same time, and that it would have put the vessel to serious inconvenience if it had taken the libelant."

17 Marshall v. The Earnwell, 68 Fed. 228; Howard v. 9,889 Bags of Malt, 255 Fed. 917. See also White v. The Renaier, 45 Fed. 773; Am. Steel Barge Co. v. Chesapeake & O. Coal Agency Co., C. C. A., 116 Fed 857; *infra*, § 580. Where in a suit *in rem* in a collision case, one of the vessels is so wholly lost that no cross-libel against her can be maintained, the defendant, if he desires to recoup or offset any damage, must state the facts in his answer in the same manner as upon filing a cross libel, and such statement of damage is without prejudice to any defense he may make that the collision was wholly the fault of the other vessel. Adm. Rule 41, S. D. N. Y.

18 Roney v. Chase, Talbot & Co., 160 Fed. 268; United Transp. & Lighterage Co. v. N. Y. & Baltimore Transp. Line, 180 Fed. 902; s. c., C. C. A., 185 Fed. 386.

19 The Max Morris, 137 U. S. 1, 34 L. ed. 586.

20 The North Star, 106 U. S. 17, 27 L. ed. 91; The Max Morris, 137 U. S. 1, 34 L. ed. 586.

21 The North Star, 106 U S. 17, 27 L. ed. 91; J. T. Morgan Lumber Co. v. West Kentucky Coal Co., 181 Fed. 271. In cases of tort other than collision the same rule has

sion of damages may be enforced in any case where the loss results from acts of negligence of both parties, without regard to the issues raised by the pleading.[22] The rule of the English common law as to imputed negligence[23] does not apply in admiralty.[24]

The rule that the owner is not responsible for the negligence of an independent contractor is usually followed.[25] A decree upon a claim made by the owner through his agent is *res adjudicata* upon a second libel in which the owner appears personally.[26] So is a decree upon a claim against a charterer in a subsequent proceeding between the latter and the managing owner.[27]

"When the respondent or claimant, in his answer, alleges new facts these shall be considered as denied by the libelant, and no replication, general or special, shall be filed unless ordered by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libelant may amend his libel so as to confess and void, or explain, or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the respondent or claimant shall answer such amendments."[28]

§ 576. Laches in admiralty. There is no statutory time within which an ordinary suit in admiralty must be instituted.[1] By the Act of August 15, 1913, "A suit for the recovery of remuneration, assistance, or salvage services shall not be main-

frequently been applied; although the Supreme Court has held that in such cases contributory negligence does not bar a recovery, it has not determined whether the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages. The Max Morris, 137 U. S. 1, 34 L. ed. 586.

22 J. T. Morgan Lumber Co. v. West Kentucky Coal Co., 181 Fed 271.

23 Thorogood v Bryan, 8 C. B. 115.

24 The Bernina, 12 Prob. Div. 58; Little v. Hackett, 116 U. S. 366; Robinson v. D. & C. Nav. Co., 73 Fed. 883.

25 The Satilla, C. C. A., 235 Fed. 58.

26 Sullivan v. Nitrate Producers' S. S. Co., 254 Fed. 361.

27 Cuneo Importing Co. v. Am. Importing & Transp. Co., 241 Fed. 421. See *supra*, §§ 186s, 186y.

28 Adm. Rule 48; The Claveresk, C C. A., 264 Fed. 276.

§ 576. 1 Elder Dempster & Co. v. Talge Mahogany Co., C. C. A., 256 Fed. 65. See *supra*, § 180p.

tainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business."[2]

The statute limiting the time for suits upon claims for death is previously quoted.[2a] Courts of admiralty are not bound by the State Statutes of Limitation,[3] except in so far as the limitation is by statute made a condition of the right sought to be enforced.[4]

Laches is a valid defense to a suit in admiralty and depends in every case upon the peculiar circumstances.[5] Previous unsuccessful litigation may be a sufficient excuse.[6] The same rules apply to claims against a fund on property in the possession of the Admiralty Court.[7]

In the absence of special circumstances, such courts will usually follow the analogy of the State Statute of Limitations.[8] This was done even when the respondent was a foreign corpora-

2 37 St. at L. 268, Comp. St., § 7993.

2a See *supra*, § 560e.

3 The Key City, 14 Wall. 653, 659; Southard v. Brady, 36 Fed. 560.

4 Pacific Coast S S. Co. v. Bancroft-Whitney Co., C. C. A., 94 Fed. 180. See *supra*, § 182.

5 The Key City, 14 Wall. 653, 20 L. ed. 896; Southard v. Brady, 36 Fed. 560; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., C. C. A., 94 Fed. 180, 189. See § 182, *supra;* Bartleson v. Fiedler, 149 Fed. 299; The Alabama, C. C. A., 242 Fed. 431.

6 Fill v. Cunard S. S. Co., 217 Fed. 854; Lincoln v. Cunard S. S. Co., 221 Fed. 623.

7 The Samuel Little, 221 Fed. 308; U. S. v. One Case Chemical Compound, 203 Fed. 63.

8 Nesbit v. Amboy, 36 Fed. 925; Bailey v. Sundberg, C. C. A., 49 Fed. 583, a libel *in personam;* the Southwark, 128 Fed. 149; Davis v. Smokeless Fuel Co., 182 Fed. 1004, a libel *in personam;* Lincoln v. Cunard S. S. Co., 221 Fed. 623, a libel *in personam.* In Scull v. Raymond, 18 Fed. 547, a libel *in personam* was barred after eight and one-half years. In Coburn v. Factors' & Tr. Ins. Co., 20 Fed. 644, after nine years. *Contra,* Pacific Coast S. S. Co. v. Bancroft-Whitney Co., C. C. A., Ninth Ct. 94 Fed. 180, 189, 190, where, in a suit *in rem* for damages to cargo, the court refused to follow the State statute making four years the period of limitation.

tion, which could not take advantage of the statute in the State courts.[9] A less period of time has been held to constitute laches.[10]

Because of laches, interest, or costs, may be denied the successful party;[11] or payment of the costs of a suit in the State court may be required before relief is given in admiralty.[12]

It has been said that the defense of laches cannot be raised unless pleaded in the answer.[13] A stipulation to enter an appearance and to give security for the payment of any recovery may be a waiver of a short period of limitation contained in a bill of lading.[14]

§ 577. Tender. A tender made before suit is of no avail as a defense unless, on suit brought, it is deposited in court. When a tender is first made after suit brought, it must include interest up to the next term of the court and the taxable costs then accrued.[1]

§ 578. Exceptions. "Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings or interrogatories filed by the other party; and if the court shall so adjudge on a hearing on the exceptions, and shall order further pleadings or answers to be filed by either party, such pleadings or answers shall be filed within such time and on such terms as the court may direct."[1] "Exceptions may

9 Davis v. Smokeless Fuel Co., 182 Fed. 1004.

10 Magee v. The Lyndhurst, 48 Fed. 839, where a delay of less than a year was held to bar a libel *in rem* for supplies, when, since the lien was incurred, the vendor had become insolvent and the vessel was in the hands of *bona fide* purchasers. See, also, The Thomas Sherlock, 22 Fed. 253.

11 The James McWilliams, C. C. A., 240 Fed. 951. But see Metcalfe v. The Alaska, 130 U. S. 201, 32 L. ed. 923; The Alaska, 33 Fed. 107; Starin v. The John Dillon, 46 Fed. 527; Jones v. The Carrie, 46 Fed. 796; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., C. C. A., 94 Fed. 180.

12 The Ocean Spray, 117 Fed. 971.

13 The Shady Side, 23 Fed. 721.

14 The Jeanie, C. C. A., 236 Fed. 463.

§ 577. 1 By Adm. Rules, S. D. N. Y., 30-32, tenders, offers to allow the entry of decrees, offers to allow libelants damages to be assessed at a specified sum and the withdrawal of the same, are regulated.

§ 578. 1 Admiralty Rule 27, Adm. Rule 34, S. D. N. Y., allows exceptions to the jurisdiction or sufficiency of a libel before answer. And Adm. Rule 35, S. D. N. Y., regulates the form and time of exceptions to the answer. Adm. Rule 36, S. D. N. Y., permits amendments within five days after notice of submission to exceptions.

be taken to any libel, allegation, answer or other pleading for surplusage, impertinence or scandal; and if on hearing the matter excepted to shall be held to be so objectionable it shall be expugned on such terms as the court may direct."[2] Exceptions correspond to special demurrers.[3] They must clearly specify the parts to which exceptions are taken.[4] Exceptions to a number of interrogatories "for the reason that they are each and all open to one or more of the following objections," followed by a statement of a number of objections, were held to be bad.[5]

The party against whom the exceptions are taken should notify the other side that he submits to them, or else notice them for hearing before the court. An affidavit cannot be considered upon the hearing of an exception to a libel.[6] The courts will, however, then consider facts not pleaded of which they may take judicial notice.[7]

Upon the allowance of exceptions, the court fixes the time for the amendment.[8] If the defendant's exceptions are overruled, he must file his answer within such time as the court allows. Where exceptions are peremptory, as, for example, to the jurisdiction, if they are sustained, judgment may be entered in favor of the successful party. If not peremptory the pleading excepted to must be amended. Exceptions to a libel should be filed on return of process. The time within which exceptions to an answer must be filed is determined by the rules of practice of the several districts.[9]

Where allegations in an answer are unnecessary and not responsive, they are not subject to exception for insufficiency.[10]

2 Adm. Rule 35. It has been held that exceptions to an answer for insufficiency and impertinence cannot be taken to the same matter either conjunctively or disjunctively. The Whistler, 13 Fed. 295.

3 Erie & Western Transp. Co. v. Great Lakes Towing Co., 184 Fed. 349.

4 Ibid.

5 Ibid.

6 Prince Steam Shipping Co. v. Lehman, 39 Fed. 704.

7 The Seminole, 42 Fed. 924; *supra*, §§ 329, 366. See also U. S. v. The Haytian Republic, 57 Fed. 508.

8 Prince Steam Shipping Co. v. Lehman, 39 Fed. 704.

9 In the Southern District of New York, the libelant has five days from the filing of the claim or answer in which to except thereto. S. D. N. Y., Adm. Rule 35.

10 The Teaser, 188 Fed. 721. As to exceptions to answers, see Todd v. Tulchen, 2 Fed. 600; The Dictator, 30 Fed. 699; The City of

Where an exception admitted the signature of a corporation to a contract pleaded by the libelant, it was presumed that the corporation executed this either as principal or surety.[11] Where exceptions to an answer were drawn with several specifications, the failure to sustain any specification was fatal to the exception.[12]

§ 579. Amendments. Great freedom of amendment is allowed in admiralty [1] by the rules. "In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time on motion to the court, as of course. And new counts may be filed and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. And where any defect of form is set down by the respondent or claimant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms on the libelant." [2] "When the respondent or claimant in his answer, alleges new facts, these shall be considered as denied by the

Salem, 10 Fed. 843; Morgan L. & T. S. S. Co. v. De Arrotegui, 25 Fed. 624.

11 Downs v. Wall, C. C. A., 176 Fed. 657.

12 The Intrepid, 42 Fed. 185.

§ 579. 1 The Adeline, 9 Cranch, 244, 284, 3 L. ed. 719; Clinton v. Smith & Terry, C. C. A., 249 Fed. 119.

2 Adm. Rule 49. By S. D. N. Y. Rule 2. "Amendments, or supplementary matters, must be connected with the libel or other pleadings by appropriate references, without a recapitulation or restatement of the pleading amended or added to." Where exceptions to a libel against a vessel and its owner were sustained, on the ground that they could not be sued jointly, the libelant was permitted to amend so as to declare against the vessel alone. The San Rafael, 141 Fed. 270. See *supra*, § 563. Amendments have been permitted to show that a libelant had the legal title to part of a vessel. The Olga, 254 Fed. 439; to join as libelants the partners of the man who originally filed the libel. The D. J. Sawyer, C. C. A., 236 Fed. 913; to transfer one of several claims for damages from a libel in a suit *in rem* against a boat, to a libel *in personam* against the owner. The Benefactor, 242 Fed. 582. For cases when amendments to libels were disallowed, see the Iona, C. C. A., 80 Fed. 933; The Keystone, 31 Fed. 412; New Haven S. D. Co. v. The Mayor, 36 Fed. 716. See *supra*, §§ 211, 567. For a case where an amendment to an answer was disallowed, see The Horace v. Parker, C. C. A., 74 Fed. 640. For a case where leave to file an amended answer was denied upon terms, see Munson S. S. Line v. Glasgow Navigation Co., C. C. A., 211 Fed. 1021.

libelant, and no replication or reply, general or special, shall be filed, unless ordered by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the District court, either by general rule or by special order, the libelant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the respondent or claimant shall answer such amendment.[3]

A libel *in rem* may be changed by amendment into one *in personam*, by adding a prayer for relief *in personam*, and a monition will then be issued against the owner;[4] but, it has been said, not when prayers for these two kinds of relief could not have been joined.[5] In a suit to recover damages for causing death, the libelant may be changed by amendment from the widow to the administrator of the deceased.[6] Where a case has been tried upon a theory not properly pleaded in the libel an amendment to conform the pleadings to the evidence will almost always be allowed.[7] The failure of the libelant or his agent to sign the libel is a defect curable by amendment.[8]

Notice of an application for an amendment should be served upon any party that has appeared.[9] An amendment which is permitted during the trial should be written out and entered on the record before the entry of final decree.[10] When an amendment to a libel is allowed, the respondent will usually be permitted to amend his answer so as to insert a denial of the new matter.[11]

§ 580. Cross-libel. A defendant cannot recover an affirmative judgment without filing a cross-libel.[1] The practice of

3 Adm. Rule 28.

4 The Monte A, 12 Fed. 331, 336, 337, 338; One Hundred and Eighteen Stieks of Timber, 10 Benedict 86, 18 Fed. Cas. 10,519; The Susquehanna, C. C. A., 267 Fed. 811.

5 The Steamship Zodiac, 5 Fed. 220; The Young America, Brown Adm. 462, 30 Fed. Cas. 18,178.

6 The Horsa, 232 Fed. 993.

7 Kelley Island Lime & Transport Co. v. City of Cleveland, 144 Fed. 207.

8 Haddy v. Moore, 4 Fed. 843.

9 The Monte A, 12 Fed 331, 336.

10 The D. J. Sawyer, C. C. A., 236 Fed. 913.

11 Ibid.

§ 580. 1 The Reuben Dond, 3 Fed. 520; The Nadia, 18 Fed. 729. As to the matters which may be set up by a cross-libel, see The Higland Light, 88 Fed. 296; The Walrus, C. C. A., 261 Fed. 676.

stipulating that the answer in the original suit operate as a cross-libel has been expressly disapproved by the Supreme Court.[2] A cross-libel cannot be maintained unless it arises out of the same cause of action as that propounded in the original libel.[3] New and distinct matters, not included in the original libel, but arising out of separate transactions, cannot be made the subject-matter of a cross-libel in admiralty.[4] Cross-libels may be filed by respondents against each other,[5] and by a third party against a respondent who has brought him into the suit.[6] In a suit begun by a libel *in rem*, a cross-bill *in personam* may be filed.[7] It has been held that upon a cross-libel the court has power to order a monition *in personam*, to be served upon the proctors of the original libelants who are nonresidents.[8]

§ 580a. Security by cross libelant. The court may require a cross libelant to give a stipulation, similar to that required of an original libelant, to pay all costs and expenses which shall be awarded against him by the final decree, or by any interlocutory order or upon appeal.[1]

§ 580b. Security for damages of cross libelant. "Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall

2 Ward v. Chamberlain, 21 How. 72, 16 L. ed. 219.

3 United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line, 180 Fed. 902, s. c., C. C. A., 185 Fed. 386.

4 George D. Emery Co. v. Tweedie Trading Co., 143 Fed. 144. *Cf.* § 197, *supra*. To a libel for services in lighterage the respondent cannot plead as a set-off or by way of cross-libel, a claim to recover money paid for similar services under previous contact, which are charged to have been exorbitant and fraudulently contracted for. United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line, 180 Fed. 902; s. c., C. C. A., 185 Fed. 386. See The Alliance, 236 Fed. 361. Nor, it has been held, can a claim for damages because of the detention be the subject of a cross-libel to a libel *in rem* for damage to the cargo. The Jane Palmer, 270 Fed. 609.

5 The Eliza Lines, 61 Fed. 308; The Lysefjord, 262 Fed. 623.

6 The Lysefjord, 263 Fed. 623.

7 The Arlyn Nelson, 243 Fed. 415.

8 The Eliza Lines, 61 Fed. 308.

§ 580a. 1 Adm. Rule 24, *supra*, §§ 562, 570. See Vianello v. The Credit Lyonnais, 15 Fed. 637; Empresa Maritima a Vapor v. N. & S. Am. St. Nav. Co., 16 Fed. 502; Genther v. Wiley, 85 Fed. 797; Empresa Maritima v. N. & S. Am. St. Nav. Co., 16 Fed. 502; Old Dominion S. S. Co. v. Kufald, 100 Fed. 331; Lochmore S. S. Co. v. Hagar, 78 Fed. 642.

have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs."[1] This rule does not apply to an answer which, although called a cross-libel, is not accompanied by a citation and cannot afford a basis for affirmative relief;[2] nor to a case where the libel was filed *in personam* without security and without attachment;[3] nor to a case where the cross respondent was the original libelant and had obtained no security.[4] Security for costs and for damages is not usually required of a cross libelant when the libelant is a receiver or trustee in bankruptcy.[5] A motion to compel the filing of such security may be denied for laches.[6] The assignment by the libelant of his claims to third persons is no ground for requiring security from them;[7] nor for requiring from him security which otherwise would not be required.[8]

§ 580c. Abatement and revivor in admiralty. The rule of the common law that an action abates by the death of a party thereto is not followed in admiralty.[1] By the Act of March 30, 1920, authorizing a recovery in the case of death caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore, "If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal repre-

§ 580b. [1] Admiralty Rule 50, Genther v. Wiley, 85 Fed. 797; Empresa Maritima v. N. & S. Am. St. Nav. Co., 16 Fed. 502; Old Dominion S. S. Co. v. Kufald, 100 Fed. 331; Lochmore S. S. Co. v. Hagar, 78 Fed. 642. As to stay, see Vianello v. The Credit Lyonnais, 15 Fed. 637; Empresa Maritima a Vapor v. N. & S. Am. St. Nav. Co., 16 Fed. 502.

[2] Mayer & Lage v. Prince Line, Ltd., 264 Fed. 854.

[3] The Transit, 210 Fed. 575; Prince Line v. Mayer & Lage, 264 Fed. 856.

[4] Ibid.

[5] Chesbrough v. Boston El. Ry. Co., 750 Fed. 922.

[6] Chesbrough v. Boston El. Ry. Co., 250 Fed. 922.

[7] Ibid.

[8] Ibid.

§ 580c. [1] U. S. v. Sampson, 187 U. S. 536, 47 L. ed. 248; The Student, 238 Fed. 937.

sentative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2."[2] A claim *in rem* for tort filed in proceedings for the limitation of the liability of a ship owner does not abate by the death of the claimant.[3] The same rule applies to a suit for a personal injury which occurred within a marine league of the shore when the State statutes provide that there shall be no abatement.[4] When a libel is filed by a person on his own behalf and on behalf of others upon his death the court may substitute another to continue the proceedings without bringing in his personal representative.[5] Upon the death of the respondent his personal representative may be brought in upon a motion on his part or on the part of the adverse party.[6]

§ 581. Interrogatories and discovery. Interrogatories may be annexed either to the libel[1] or to the answer.[2] "Either party shall have the right to require the personal answer of the other party or of its proper officer on oath or solemn affirmation to all interrogatories propounded by him, it, or them, in the libel, answer or otherwise as may be ordered by the court on cause shown and required to be answered. In default of due answer by either party to such interrogatories, the court may adjudge such party to be in default and enter such order in the cause as it shall deem most fit to promote justice."[3] "Either party may object by proper pleadings to answering any allegation contained in any pleading or interrogatory filed by the other party, which will tend to expose him, it, or them, to any prosecution or punishment for crime, or for any penalty or any forfeiture of

[2] The Lafayette, 269 Fed. 917. § 5, Comp. St. § 1251½d. See *supra*, § 560e.

[3] The Ticeline, 208 Fed. 670.

[4] The Student, 238 Fed. 937.

[5] U. S. v. Sampson, 187 U. S. 536, 47 L. ed. 248.

[6] See The Gilbert R. Green, 243 Fed. 926. The practice is prescribed in S. D. N. Y. by the local Adm. Rule 5.

§ 581. [1] Admiralty Rule 31; Scobel v. Giles, 19 Fed. 224; The Edwin Baxter, 32 Fed. 296. See § 596, *infra*. As to interrogatories addressed to corporations, see Bock v. International Nav. Co., 124 Fed. 711.

[2] Admiralty Rule 31; Stoffregan v. The Mexican Prince, 70 Fed. 246.

[3] Adm. Rule 31. But see The Fred E. Richards, The Mary L. Crosby, The Henry R. Tilton, 248 Fed. 956.

his, its or their property for any penal offense."[4] The party interrogated may object to the interrogatories on the ground of irrelevancy or impertinence, or on any ground for which exceptions to a pleading are permitted.[5] It has been held that it is no ground for exception to an interrogatory annexed to a libel, that a respondent's answer has answered the same.[6]

The extent of interrogatories rests largely in the discretion of the court of first instance,[7] and great liberality is permitted in their allowance.[8] Interrogatories so far as they call for evidence should be confined to testimony in support of the proponent's case on defense. They should not seek evidence which relates solely to the case of the opposite party; but particulars of the matters pleaded may be requested.[9] It is no ground for an exception to interrogatories that they call for detailed information, which will involve the expenditure of considerable time and labor by the respondent, or that incidentally they may solicit information which the interrogator would otherwise not be entitled to call for.[10]

The defendant to the libel must answer the interrogatories propounded to him at the same time that he files his answer. The time within which the libelant must answer interrogatories

[4] Admiralty Rule 30, Pollock v. The Sea Bird, 3 Fed. 573; Pollock v. Bridgeport St. Co., 114 U. S. 411, 29 L. ed. 147; La Bourgogne, 104 Fed. 823. See §§ 339, 348, *supra* § 602, *infra*. It is not necessary that a party to a suit in admiralty should be personally before the court in order to avail himself of the privilege given him by Admiralty Rules 31 and 32 to refuse to make answer to interrogatories which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense; but he is required to state specifically that his answers would have that effect, and a statement in refusing to make answer that the interrogatories were framed in support of allegations, which, if true, would or might tend to expose him to a penalty or forfeiture, is insufficient as a claim of privilege. *Re* Kniekerbocker Steamboat Co., 139 Fed. 713.

[5] Adm. Rule 28.

[6] The Teaser, 188 Fed. 721.

[7] Erie & Western Transp. Co. v. Great Lakes Towing Co., 184 Fed. 349.

[8] Chirurg v. Kniekerbocker Steam Towage Co., 177 Fed. 943; Erie & Western Transp. Co. v. Great Lakes Towing Co., 184 Fed. 349.

[9] Prince Line, Ltd. v. Mayer & Lage, 264 Fed. 856; The Princess Sophia, 269 Fed. 651.

[10] Erie & Western Transp. Co. v. Great Lakes Towing Co., 184 Fed. 349.

annexed to an answer is determined by the rules or practice of the several districts.[11] Answers to interrogatories are parts of the pleadings and do not stand as evidence for the party answering.[12] Exceptions may be filed to insufficient or evasive answers to interrogatories.[13] In the Southern District of New York, oral examinations of the parties are allowed.[14]

"After joinder of issue, and before trial, any party may apply to the court for an order directing any other party, his agent or representative, to make discovery, on oath, of any documents which are, or have been, in his possession or power, relating to any matter or question in issue. And the court may order the production, by any party, his agent or representative, on oath, of such of the documents in his possession or power relating to any matter in question in the cause as the court shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just.[15]

§ 581a. Dismissal of libel by the libelant. The libelant has the right to dismiss the libel at any time, before an order or decree giving rights to others,[1] except perhaps in prize cases.[2] If a cross libel has been filed, the court might retain jurisdiction thereof.[3] The dismissal might be conditioned on the payment of costs.[4]

11 In the New York districts, within four days from the filing of the answer and interrogatories.

12 Cushing v. Laird (Blatchford, J.), 6 Ben. 408; The Serapis, 37 Fed. 436.

13 See Adm. Rule 37, S. D. N. Y.

14 Adm. Rule 38, S. D. N. Y. See The Sisilina, 212 Fed. 1022.

15 Adm. Rule 33. It has been said that letters, reports, statements, telegrams, cablegrams and memoranda containing the substance of communications between the officers or crew of the vessel and the officers and agents of the owners are *prima facie* privileged. See The Princess Sophia, 269 Fed. 651. Before the adoption of this admiralty rule it was held: that the applicant for such inspection must specify the particular documents which he desired. Ibid. And that inspection to cablegrams should be denied where the applicant could otherwise obtain the originals or copies and all he could gain by discovery would be to establish the authority of the senders and the receipt of the messages which could be established by taking depositions. The Eros, 224 Fed. 194.

§ 581a. 1 Confiscation Cases, 7 Wall. 454, 457, 458, 19 L. ed. 196; Erie R. Co. v. Boston C. C. & N. Y. Canal Co., 270 Fed. 876.

2 Confiscation cases, 7 Wall. 454, 457, 458, 19 L. ed. 196.

3 See *supra*, §§ 580, 361.

4 See *supra*, § 361.

§ 581b. Dismissal for failure to prosecute in admiralty. "If, in any admiralty suit, the libelant shall not appear and prosecute his suit, and comply with the orders of the court, he shall be deemed in default and contumacy; and the court may on the application of the respondent or claimant, pronounce the suit to be deserted, and the same may be dismissed with costs."[1]

§ 582. Trial. In many of the districts, as in New Jersey and Pennsylvania, the evidence is taken before the clerk, as in equity and the court merely hears the case summed up. The proofs are taken subject to objections, which are renewed upon the trial and then passed on by the court. In other districts, as in Massachusetts, New York and Connecticut, the witnesses are examined in open court. Except when the statutes require a jury, the judge decides questions of fact as well as of law. In some of the districts experts are at times called by the court to sit with it in order to pass upon questions of navigation like the Trinity masters in the English practice.[1] In the trial of an admiralty cause, where the testimony is taken before the court, all testimony offered, although objected to, should be admitted subject to the objection for the benefit of the appellate court, unless so utterly irrelevant or immaterial that there can be no question of its inadmissibility.[2] The practice is not to permit a motion to dismiss the libel on the libelant's proofs alone, except where the defendant does not intend to introduce any evidence on his own behalf. He is not allowed to move to dismiss the libel on the libelant's proofs, and then, if the motion is denied, proceed with his own proofs. Leave to dismiss a libel without

§ 581b. [1] Adm. Rule 38; *supra*, § 362.

§ 582. [1] The Hypodame, 6 Wall. 216, 18 L. ed. 794; The Empire (E. D. Mich.), 19 Fed. 558. Where a case was submitted upon the pleadings, it was held that averments of new matter in the answer, and allegations in the libel which the answer denied, must both be disregarded, except in so far as they were admissions against interest. North Am. Dr. & Imp. Co. v. The River Mersey, 48 Fed. 686. By Adm. Rule 4, S. D. N. Y., "When various actions are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the Court, by order, at its discretion, may compel said actions to be tried together, and will enter a decree in each cause conformably to the evidence applicable thereto."

[2] Minnesota S. S. Co. v. Lehigh Valley Transportation Co., C. C. A., 129 Fed. 22.

prejudice is ordinarily in the discretion of the trial court [3] and will ordinarily be refused after the judge has indicated the nature of his decision.[4] The libelant has no right to a dismissal of his libel, without prejudice, after a hearing and the filing of an opinion against him.[5]

Upon a motion to reopen a case after a trial, in order to offer further evidence, the applicant should show that competent evidence can be produced by him.[6]

§ 582a. Trial by jury in admiralty. When Congress in the Act of 1845 intended to extend the admiralty jurisdiction over the Great Lakes the statute provided "saving however to the parties the right of trial by jury of all facts put in issue in such suit, where either party shall require it." [1] This saving clause is retained in the following section of the Revised Statutes, "The trial of issues of fact in the District courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it." [2] A trial by jury is not necessary upon a libel for a penalty for the failure to report a vessel from a foreign port to the consul and to enter the required manifest.[3] Nor to a libel against a vessel engaged in commerce exclusively between ports of the same State.[4] Nor to one against a vessel engaged in commerce upon the rivers

3 Folger v. Robert G. Shaw Co., 2 W. & M. 531, Fed. Cas. No. 4,899; The Bainbridge, C. C. A., 199 Fed. 404. See § 360, *supra*.

4 The Bainbridge, C. C. A., 199 Fed. 404.

5 The Bainbridge, C. C. A., 199 Fed. 404. *Cf.* § 360, *supra*.

6 Ibid.

§ 582a. 1 5 St. at L. 727. See Gillet v. Pierce, 1 Brown Adm. 553; The Erie Bell, 20 Fed. 63.

2 U. S. R. S., § 566, Comp. St. § 1583.

3 The Paolina, 11 Fed. 171.

4 Sanderson v. The City of Toledo, 73 Fed. 220.

Ohio and Monongahela.[5] It seems that the verdict of the jury is merely advisory.[6] It is reviewable by appeal and not by writ of error.[7] The Act of February 16, 1875,[8] which directs the finding of facts by the Circuit courts in admiralty cases, and, upon the consent of the parties, a trial by jury there by not less than five and no more than twelve, has been repealed.[9]

§ 582b. New trials in admiralty. A court of admiralty has jurisdiction to order a new trial at a term which begins subsequently to the entry of the decree.[1] In such a case it is the safer practice to make the application by a bill of review.[2] Courts of admiralty, however, usually follow by analogy the rules of the common law in this respect and deny a new trial unless the application is made at the term at which the decree is entered.[3] Before final decree all orders and interlocutory decrees are open to revision.[4] A new trial may, but rarely is, ordered upon an appeal.[5]

Upon an application for a new trial because of newly discovered evidence the nature of such evidence should be shown to the court.[6]

§ 583. Evidence in admiralty. In general, evidence in admiralty is taken, admitted, and excluded under the rules that prevail in actions at common law,[1] but in the admission of

5 Bigley v. The Venture, 21 Fed. 880.

6 The Empire, 19 Fed. 558; Sanderson v. The City of Toledo, 73 Fed. 220; The Western States, 151 Fed. 929; *supra*, §§ 378-381.

7 Boyd v. Clark, 13 Fed. 908.

8 18 St. at L. 315, 4 Fed. St. Ann. 557.

9 Munson S. S. Line & Miramar S. S. Co., C. C. A., 167 Fed. 960, 93 C. C. A. 360; The Nyack, C. C. A., 199 Fed. 383, 386.

§ 582b. 1 Jackson v. Munks, 58 Fed. 596; s. c., C. C. A., 69 Fed. 571.

2 Ibid.

3 Mainwaring v. The Carrie Delap, 1 Fed. 880. A new trial in the District Court has been ordered on an appeal. The Comfort, 32 Fed. 327; The Annex, 38 Fed. 669. But see The Madgie, 31 Fed. 926. *Supra*, §§ 478, 530.

4 The Dredge, A, 217 Fed. 617.

5 U. S. R. S., § 566, Comp. St. § 1583, *supra*, § 582a; The Glide, C. C. A., 72 Fed. 200. In an extraordinary case a new trial was ordered by the District Court upon a libel of review filed by a surety after the term.

6 The Grand Manan, 217 Fed. 926.

§ 583. 1 See chapter XXI, *supra*. Admissions are evidence against the pleader, Ward v. Fashion, Fed. Cas. 17,154; The Santa Clause, Fed. Cas. 12,327; Berry v. The Montezuma, Fed. Cas. 1358a. The admission of the master in answer to an interrogatory is entitled to great weight. The Sagamore, C. C. A., 247 Fed.

evidence much more liberality is exercised,[2] especially in the admission and consideration of the testimony of experts.[3] The court may take judicial notice of facts as to which it has personal knowledge as regards navigation and seamanship,[4] and as to the force and effect of currents and cross-currents in channels.[5]

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. When deemed necessary by the court or the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs.[6]

The party who asserts a maritime lien has the burden of proof thereof.[7] The amount of a lien may be established by an account stated.[8] In a suit upon a tort, the libelant usually has the burden of proving negligence,[9] but the burden of proving that the vessel was seaworthy usually rests upon the owner or charterer, as the case may be.[10] Where a boat is injured while in the possession of the respondent the burden is upon him to

743. The old rule in equity as to the weight of a sworn and responsive statement in the answer, *supra*, § 331, does not apply. U. S. v. The Matilda, Fed. Cas. 15,741, Brun. Col. Cas. 5 Hughes 44; Sherwood v. Hall, Fed. Cas. 12,777; Eads v. The Bacon, Fed. Cas. 4,232.

2 The Boskenna Bay, 22 Fed. 667; The Fountain City, C. C. A., 62 Fed. 87; The Eleanor, C. C. A., 248 Fed. 472; The Rosalia, C. C. A., 264 Fed. 285, 289; *supra*, § 329a, note 22.

3 The Rosalia, C. C. A., 264 Fed. 285, 289. See The Conquerer, 166 U. S. 110, 130, 17 Sup. Ct. 510, 41 L. ed. 937. This may be used to show the extravagance of actual expenditures. The Mason, C. C. A., 249 Fed. 721; to prove the cost of repairs which have not been made, The William E. Ferguson, C. C. A., 108 Fed. 984. To prove the value of tobacco damaged by salt water and coal dust when there has been no separation of this from the undamaged tobacco in the cargo, The Rosalia, C. C. A., 264 Fed. 285, 289.

4 The Boskenna Bay, 22 Fed. 667; The Fountain City, C. C. A., 62 Fed. 87; The Eleanor, C. C. A., 248 Fed. 472.

5 The Eleanor, C. C. A., 248 Fed. 472.

6 Adm. Rule 46.

7 The Louis Dolive, 236 Fed. 279.

8 The Hattie Thomas, C. C. A., 262 Fed. 943.

9 Bernstein v. Morse, 261 Fed. 435.

10 The Benjamin Noble, C. C. A., 244 Fed. 95.

show how the injury occurred and that he was free from negligence.[11] The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market; and in the absence of such market value, the value of the use of the boat in question to her owner in the business in which she was engaged immediately before the detention.[12] The books of the owner showing her earnings during a reasonable period before, are competent evidence of her probable earnings while she was detained.[13] A participation in a survey of damages to cargo is not an admission of liability for the damage.[14]

As an appeal in admiralty is a new trial [15] it is ordinarily not necessary to take exceptions to the rulings of the trial judge; but it is the safer practice to do so.[16] Objections to the admission and exclusion of evidence should be noted below.[17]

§ 583a. Depositions in admiralty. In cases in admiralty much of the evidence is taken *de bene esse* since the witnesses are, for the most part, seafaring men. This subject has been previously discussed.[1] When such a deposition was taken for use in the District Court of Porto Rico notice of the filing thereof was not required.[2] Testimony in admiralty may also be taken under a *dedimus potestatam* [3] and by letters rogatory.[4]

§ 583b. Documentary evidence in admiralty. It has been said to be the better practice to introduce the log of a vessel in evidence after the same has been duly authenticated, rather than to rely upon the testimony of the officer who made the entries, when he cannot do so without refreshing his recollection by reading the same.[1] Entries in a ship's log are strong evidence against the party making them.[2] A log kept by members

[11] Bernstein v. Morse, 261 Fed. 435.

[12] The Conqueror, 166 U. S. 110, 127, 17 Sup. Ct. 510, 41 L. ed. 937.

[13] Ibid.

[14] The Rosalia, C. C. A., 264 Fed. 285, 290.

[15] The San Rafael, C. C. A., 141 Fed. 270.

[16] Reid v. Fargo, 241 U. S. 544, *infra*, § 592.

[17] See La Bourgogne, 210 U. S. 96, 119, 52 L. ed. 973.

§ 583a. [1] *Supra*, §§ 354-355. See The Normandie, 40 Fed. 590.

[2] The D. J. Sawyer, C. C. A., 236 Fed. 913.

[3] The Titanie, 206 Fed. 500. See *supra*, §§ 356, 357.

[4] *Supra*, § 358.

§ 583b. [1] Bacon v. Conroy, C. C. A., 172 Fed. 532.

[2] The Newfoundland, 89 Fed. 510.

of the crew for their own benefit is admissible only against those who made or directed entries therein.[3] Invoices on file at a custom house are competent evidence of value.[4] The report of the examination of the provisions or water furnished for the use of the crew of a merchant vessel, when made upon complaint in accordance with the Revised Statutes, is evidence in any legal proceedings.[5]

§ 584. Interlocutory decree and reference. "In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises."[1]

The question of damages is seldom tried before the court. In case the libelant is successful, an interlocutory decree is entered, by which it is referred to a commissioner or referee to ascertain the damages sustained by the libelant, and report thereon to the court. Such a referee has the powers of a master in chancery.[2] The practice before such a commissioner is analogous to that before a master in chancery,[3] but, unlike a master taking proofs before trial, he rules upon questions of evidence.[4]

A court of admiralty has no power to refer the whole case to a commissioner or referee to hear and determine, except by consent;[5] but as error in making such a direction does not invalidate the reference, it may be treated as a reference to compute or assess the damages.[6] Where, by consent, the commissioner has been directed to hear and determine the issues the

3 U. S. v. Reid, 210 Fed. 486.

4 The Rosalia, C. C. A., 264 Fed. 285, 289.

5 U. S. R. S., § 4565, Comp. St. 8354, Pierce's Fed. Code, § 2525. As to evidence in summary proceedings to collect sailors' wages, see *infra*, § 604.

§ 584. 1 Adm. Rule 43.

2 Adm. Rule 43. The Eliza Lines, 114 Fed. 307; La Bourgogne, 144 Fed. 781.

3 Ibid. See *supra*, ch. XXVII.

4 Ibid.

5 The Bronx, C. C. A., 246 Fed. 809.

6 Ibid.

court is without power to rule upon the findings and the exceptions should be dismissed.[7]

Upon the filing of the report by the commissioner, the successful party should serve his opponent with notice of the filing, and of a motion to confirm the report, and thus limit the time within which exceptions may be filed; or the report may be confirmed *nisi* on motion, without notice, on the return day, which will also fix the time within which exceptions may be filed. The party filing exceptions should notice them for hearing. They must be specific[8] unless all the evidence is attached to the report.[9] Then a general exception is sufficient.[10] His findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses are not disturbed unless clearly erroneous.[11] This rule has been extended to cases where his conclusions are based upon documentary evidence.[12] It has been said that a court of admiralty may review a finding of fact by a commissioner in a case where a court of equity could not review a similar finding by a master in chancery.[13]

When a bond or stipulation is given, for the release of property, it should provide at least, when an attachment is dissolved, that the damages shall not exceed the value of the property released with interest at six per centum and costs.[14] Otherwise, the interest fixed by the State statutes is usually allowed.[15] In cases of tort for personal injuries, only from the time the amount

7 Luckenbach v. Delaware, L. & W. R. Co., 168 Fed. 560.

8 The Commander-in-Chief, 1 Wall. 43; The Cayuga, C. C. A., 59 Fed. 483; § 393, *supra*. But see Ross v. So. Cotton Oil Co. 41 Fed. 152. It has been held that the claimant may move to dismiss at the close of the libelant's case, and take testimony pending that motion without waiving his right to have his motion decided, regardless of the other facts brought out upon the cross-examination of his witnesses. Puget Sound M. Depot v. The Guy C. Cross, 53 Fed. 826. But see amendment to Rule 52, S. D. N. Y.

9 The Paquete Habana, 189 U. S. 453, 47 L. ed. 901.

10 Ibid.; Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co., D. C. S. N. Y., June, 1904.

11 La Bourgogne, C. C. A., 144 Fed. 781; The Minnehaha, 151 Fed. 782.

12 The Perry G. Walker, 216 Fed. 423.

13 Western Transit Co. v. Davidson S. S. Co., C. C. A., 212 Fed. 696.

14 Adm. Rule 5.

15 Steamship Wellesley Co. v. C. A. Hooper & Co., C. C. A., 185 Fed. 733; The Newaygo, 205 Fed. 178;

of damages has been judicially ascertained.[16] In cases of tort for injury to property, such as collision cases where the damages are fixed and certain, from the date when they accrue.[17] Interest upon demurrage from the time when the vessel returns to service.[18] When the damages are uncertain, only from the date of their liquidation by decree.[19] Laches before [20] or after [21] the institution of the suit may be a ground for reducing or disallowing interest.[22]

The rules of the Southern and Eastern Districts of New York provide: that a defendant may serve a written order to allow libelants, damages to be assessed at a specified sum and that unless the libelant obtains a decree for a larger sum he shall not recover any subsequent costs and expenses upon a reference after the offer.[23]

Upon the expiration of the time allowed by the practice of the District Court for the filing of exceptions, if none have been filed, a final decree may be entered.[24]

The court has power to consider exceptions filed after the expiration of the time described by the rules.[25] The final decree should contain a provision confirming the report. It is not necessary to enter an order of confirmation.

§ 585. Final decree. The form of the final decree varies according to the form of the action and the nature of the security furnished. In suits *in rem*, if the *res* has been bonded, a summary judgment for the amount of the bond may be

Cambria S. S. Co. v. Pittsburgh S. S. Co., C. C. A., 212 Fed. 674; Western Transit Co. v. Davidson S. S. Co., C. C. A., 212 Fed. 696.

16 The Argo, C. C. A., 210 Fed. 872.

17 Cambria S. S. Co. v. Pittsburgh S. S. Co., C. C. A., 212 Fed. 674; Western Transit Co. v. Davidson S. S. Co., C. C. A., 212 Fed. 696. *Re* Great Lakes Dredge & Dock Co., 250 Fed. 916.

18 *Re* Great Lakes Dredge & Dock Co., 250 Fed. 916.

19 The Mary B. Curtis, C. C. A., 250 Fed. 9. As to damages measured by foreign currency, see, The Laigon Maru, 267 Fed. 881.

20 See *supra*, § 576.

21 Gray's Harbor Tugboat Co. v. Petersen, C. C. A., 250 Fed. 956.

22 The James McWilliams, C. C. A., 240 Fed. 951, *supra*, § 576.

23 Former Adm. Rule 37.

24 In the New York districts four days are allowed from the date of notice of filing the report or from the return-day on which it is confirmed *nisi*, in which to file exceptions.

25 The Coquitlam City, 243 Fed. 767.

entered against the claimant and his sureties.[1] In a case of bail bonds for stipulations[2] or stipulations or bonds to release property which has been attached,[3] such a summary process of execution may be issued against the principal and sureties.

Where a stipulation for value has been given, the final decree provides that, unless the decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of the court, the stipulators for costs and value cause the engagements of their stipulations to be performed, or show cause within a time fixed by the rules,[4] or on the first day of jurisdiction thereafter, why execution should not issue against their property to enforce satisfaction of the decree. At the expiration of the time provided by the rules of the several districts and on proof of service of a copy of the decree on the proctors for the unsuccessful party, the court will grant an order to show cause why execution should not issue against the stipulators.

In suits *in rem,* the final decree always provides for the condemnation and sale of the *res;* but this provision is not carried out by an actual sale if the *res* has been bonded. The bond or stipulation takes the place of the *res,* which once released cannot be reached again by process, unless it be subject to execution as the property of one of the stipulators or bondsmen.[5] In suits *in personam,* the decree follows the form of an ordinary decree in equity containing, however, a provision for judgment against the stipulators for costs similar to that contained in a decree against stipulators for value. A decree *in personam* cannot be entered in a suit *in rem.*[6]

Where two vessels are proceeded against and both are adjudged in fault, the decree should be against the two vessels and

§ 585. [1] U. S. R. S., § 941; Comp. St. § 1567; Johnson v. Chicago & Pac. Elev. Co., 119 U. S. 388, 30 L. ed. 447. In the New York districts, four days.

[2] Adm. Rule 4.

[3] Adm. Rule 5.

[4] See Adm. Rule 5.

[5] The Union, 4 Blatchf. 90; The Thales, 3 Ben. 327; Johnson v. The Hattie Belle, 65 Fed. 119.

[6] The Zodiac, 5 Fed. 220. It has been held that summary proceedings are not maintainable in admiralty to set aside or satisfy a decree previously entered, where the controversy either arises collaterally between the parties or involves an adjudication between strangers to the original litigation. Carroll et al. v. Davidson, C. C. A., 152 Fed. 424.

their respective stipulators severally, each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of each vessel extends and should provide that any balance of such moiety over and above such stipulated value of either vessel, or which the libelant shall be unable to collect or enforce, be paid by the other vessel or its stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessels.[7] Where both the libelant's and the claimant's vessels are in fault, the damage done to both vessels is added together in one mass or sum and divided equally, and a decree is pronounced in favor of the vessel which has suffered the most against the other vessel for half the difference between the amounts of their respective losses.[8]

§ 586. Sales. In suits *in rem,* where a default has been taken, or where, although a defense has been interposed, the *res* has not been bonded, the final decree orders the clerk to issue a writ of *venditioni exponas* to the marshal, directing him to sell the property in his custody at public auction.[1] Such a sale gives the purchaser an absolute title, good as against all the world, if the proceedings have been duly taken.[2] Sales under a *fieri*

7 The Alabama and Gamecock, 92 U. S. 695, 23 L. ed. 763; The City of Erie, 250 Fed. 259. In Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., 202 Fed. 648, where the libel in such suit was filed by the owner of the vessel, in its own behalf and as representing the insurers, for an amount exceeding the insurance, but, owing to a division of damages, the recovery was less than the insured value, the libellant held the entire sum as trustee for the benefit of all the insurers ratably, and not of those only who gave their assent to the suit, and that each, whether assenting or non-assenting, was allowed to its share thereof after deducting the costs and expenses of suit.

8 The North Star, 106 U. S. 17, 28, 27 L. ed. 91, 95. The court may in a proper case consolidate two libels, try them together and enter a single decree. The North Star and The Ellen Warley, 106 U. S. 17, 27 L. ed. 91; The Eliza Lines, 61 Fed. 308; The Sarah E. Kennedy, 25 Fed. 672; *supra,* § 575. Or it may sever the claims in the same libel and render a decree in one before it disposes of the other. Larrinaga v. Two Thousand Bags of Sugar, 40 Fed. 507.

§ 586. 1 By Adm. Rule 29, S. D. N. Y., "Notice of sale of property after condemnation in suits *in rem* (except under the Revenue Laws and on seizure by the United States), shall be daily for at least six days before sale unless otherwise directed in the decree; and shall be published in the manner directed by § 939, U. S. Rev. Stat."

2 The Trenton, 4 Fed. 657; The Adeline, 252 Fed. 953.

facias, on the other hand, convey only the defendant's interest in the property sold.[3] "Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisement, to be had under the direction of the court, or on his filing an agreement in writing to that effect signed by the parties or their proctors of record, and on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation for like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule; and if the claimant shall unreasonably neglect to make any such application, then the court may, on the application of either party, on due cause shown, order a sale of such ship, and require the proceeds thereof to be brought into court or otherwise disposed of."[4] Where the part owner of a boat seeks to employ it in a dangerous and hazardous enterprise without the consent of the owner of the other part and against the latter's objection the court upon the latter's application may order the vessel sold and the proceeds distributed unless security against loss is given.[5]

"All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law."[6] In no case should a sale be permitted in a proceeding *in rem* by default or by consent of parties unless publication has been duly made;[7] but where the claimant had actual notice and took no action until after the distribution of the proceeds of the sale and expenditures upon the boat by the purchaser, the court refused to set the sale aside.[8] The sale should be made in the county where the boat is located;[9] but this requirement is not essential to jurisdiction.[10]

3 Milwaukee & M. R. R. Co. v. James, 6 Wall. 750, 18 L. ed. 854, 17 Cyc. 1289.

4 Adm. Rule 12.

5 The Ellenora, 252 Fed. 209; *supra,* § 560a.

6 Adm. Rule 40.

7 27 St. at L. 751, *supra,* § 565.

8 The Earl K, 215 Fed. 613.

9 27 St. at L. 751, *supra,* § 394.

10 The Earl K, 215 Fed. 613.

Where a court of admiralty ordered the sale of a libeled vessel by a marshal at public auction, it was held to be without authority to accept in open court a private bid or to authorize the marshal to accept the same;[11] but where a decree for a private sale was reversed after its confirmation and the buyers had resold the ship to persons outside of the district, who bought it in good faith and removed it therefrom, it was held that the vessel should not be recovered from the second purchasers, nor ordered resold, it appearing that in all probability the amount that would be realized after the payment of the costs would be less than was paid at the original sale.[12] A sale may be set aside for the inadequacy of the price.[13]

§ 587. Sales as perishable. "In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their proctors of record to that effect, or on a due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent per annum and costs, as the one or the other course shall be ordered by the court."[1] A sale will not be allowed merely on the ground that

11 Lambert's Point Towboat Co. v. U. S., C. C. A., 182 Fed. 388.

12 The John Twohy, Jr., 189 Fed. 965.

13 Lambert's Point Towboat Co. v. U. S., C. C. A., 182 Fed. 388. See § 394d, *supra*.

§ 587. 1 Adm. Rule 11. See

the expenses of custody pending the suit may be a burden to the owners of property. Such a sale confers a good title to the purchaser free of all common law or statutory liens and without regard to the title or interest of the respondent.[2]

§ 588. Intervenors. In suits *in rem* third persons often desire to intervene for their own interest or protection, as, for example, where there are many claims against a vessel, and one libelant contests the claim of another, either on the merits or on the question of amount due. Such a contestant is permitted to intervene in a suit and file an answer or petition upon giving security for costs.[1] In a suit in admiralty to recover a vessel which has been seized by State officers for violation of a State fishery law, and is held by respondents merely as their custodians, such officers or other representatives of the State may appear and answer without giving the stipulation with sureties for the payment of costs and damages.[2]

"If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, on filing his allegations, to give a stipulation with sufficient sureties or an approved corporate surety to abide by the final

Jones v. Springer, 226 U. S. 148, 57 L. ed. —; § 394, *supra*.

2 The Adeline, 252 Fed. 953.

§ 588. 1 Adm. Rule 34. See The Ethelwold, 165 Fed. 806; §§ 258-261, *supra*.

2 The W. J. Hingston, 144 Fed. 560. Where, in a creditor's suit against a corporation ship owner, in which defendant's vessels had been taken possession of through a receiver, claimants of maritime liens on such vessels intervened, asserting their liens and asking their adjudication and payment, their right to such liens was tried and determined adversely to them, both by the Circuit Court and on appeal. It was held that such adjudication was conclusive, and the interveners could not thereafter maintain a suit *in rem* in a court of admiralty to establish and enforce the same liens against the vessels in the hands of a purchaser under the equity decree. The J. R. Langdon, 145 Fed. 64.

decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree, whether it is rendered in the original or appellate court, not to exceed however in any event the agreed or appraised value of the property so claimed by him, it, or them, with interest at six per cent per annum and costs."[3]

§ 589. Petition against proceeds of sale. The proceeds of a sale when paid into the registry take the place of the *res*, and may be proceeded against in the same way as the *res* itself. It is not necessary to issue process; any person having an interest in the fund may file a petition against the proceeds, in which he should set forth his cause of action, and allege the sale and payment into court of the proceeds.[1] "Any person having an in-

[3] Adm. Rule 34.

§ 589. [1] Admiralty Rule 43; Schuchardt v. Babridge, 19 How. 239, 15 L. ed. 625; Petrie v. The Coal Bluff, 3 Fed. 531; Adm. Rule 48, S. D. N. Y.: "In proceedings *in rem*, after a sale of the property under a final decree, claims upon the proceeds of sale, except for seamen's wages, will not be admitted in behalf of lienors filing libels or petitions after the sale, to the prejudice of lienors under libels filed before the sale, but shall be limited to the remnants and surplus." In The Ethelwold, 165 Fed. 806, it was held that a libelant, who had brought a suit *in rem* and *in personam*, and after intervening libels asserting liens had been filed, without opposing them, proved his claim and took a decree only *in personam* against the owner, thereby waived his right to assert a lien upon the fund, and that such election bound his insurer who claimed the right of subrogation. Admiralty Rule 41. It has been said that conceding the jurisdiction of a court of admiralty, in a suit *in rem* to enforce liens against a vessel, to direct the payment from the remnants remaining in the registry of the court after all liens have been satisfied, of maritime creditors, who have proved their claims but have been adjudged without lien, still such jurisdiction should not be exercised where the owner is an insolvent corporation, represented by a receiver appointed by a State court in insolvency proceedings to wind up the affairs of the corporation; but in such case the remnants should be paid over to the receiver, to be distributed between the maritime and other creditors in accordance with the laws of the state. The admiralty court may, however, if the pleadings are sufficient to support judgments *in personam* against the owner, determine the amount due each of such maritime claimants, and enter judgment therefor. "It may be well enough to remark that the case is not of that kind where a court having obtained jurisdiction for one purpose, will keep it for all purposes to avoid further litigation and a multiplicity of suits. If that principle ever applies to a court of admiralty so

terest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party."[2] After the claims against a *res* and its proceeds have been paid or otherwise disposed of by the court, the person entitled to the remnants and surplus thereof may file a petition setting forth his interest and obtain thereon an order of referenee to determine his right to the fund. The court has power to distribute the surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated.[3] Where the salvor of derelict property, who claimed the whole, was awarded only half of its proceeds and the remainder deposited in the registry of the court; after ten years had elapsed without any claimants for the same, it was held that he was entitled to the balanee.[4]

The Revised Statutes provide: "All moneys paid into any court of the United States or received by the officers thereof in

as to authorize it to exercise common-law or equitable jurisdiction, it surely does not authorize the incongruous jurisdiction which would be found in operation if a court of admiralty should undertake to wind up an insolvent corporation under the statute of a state, either wholly or only as to a part of the assets of the corporation which happens to be found in the court of admiralty as remnants. The case of The Edith, 5 Ben. 432, Fed. Cas. No. 4,282, affirmed 11 Blatchf. 451, Fed. Cas. No. 4,283, and again affirmed by the supreme court, 94 U. S. 518, 24 L. ed. 167, fully sustains the ruling we here make, if it does not go further, and deny the right of any one to be paid out of the remnants in admiralty, even against the owner, unless he has a lien." The Liberty, 119 Fed 539, 541.

2 Adm. Rule 42.

3 The Lottawanna, 21 Wall. 558, 582, 22 L. ed. 654, 664; The E. V. Mundy, 22 Fed. 173; The Guiding Star, 18 Fed. 263, *infra*, § 590.

4 *Re* Moneys in Registry of District Court, 170 Fed. 470. Motions to allow a bond to be substituted for a fund deposited in the registry of the court are not usualy granted in the Eastern District of Pennsylvania. The R. C. Veit, 131 Fed. 400.

any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer or Assistant Treasurer or a designated depositary of the United States in the name and to the credit of such court, provided that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court."[5] "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term time or in vacation to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn, and it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid which have remained in the registry of the court unclaimed for ten years or longer to be deposited in a designated depository of the United States to the credit of the United States."[6] By the Admiralty Rules, "All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all of the checks so drawn and the date thereof."[7]

§ 590. Priorities. When the proceeds of a sale or the amount of a stipulation for value are insufficient to satisfy all the claims against a vessel or other *res*, it becomes necessary for the court to determine the order in which the claims shall be paid. The court will order payment in accordance with the priorities as settled by the admiralty law, without reference to the time when the libel was filed or the decree entered; but the libelant who files the first libel or in whose suit a sale is made, has ordinarily a priority so far as costs are concerned.[1]

[5] U. S. R. S., § 995, as amended by Act of February 19, 1897, c. 265, § 3, 29 St. at L. 575 (U. S. Comp. St. 1901, p. 711).

[6] U. S. R. S., § 996, as amended by Act of February 19, 1897, c. 265, § 3, 29 St. at L. 575, U. S. Comp. St. 1901, p. 711.

[7] Adm. Rule 41.

§ 590. [1] The Fanny, 2 Low. 508; The Barney Eaton, 1 Biss. 242, Fed. Cas. 1028.

Maritime liens differ from the liens enforced by courts of common law and of equity in that, for the purpose of maintaining the boat's credit so that commerce may be promoted, usually, junior liens take priority to those which previously arose in the inverse order of their creation. The liens of salvors take precedence over all others, previous, concurrent and in some cases subsequent.[2] Next in order are claims for damages caused by collision and other torts which seem to take precedence over prior liens.[3] Next come the liens of common sailors for wages. These are usually considered sacred,[4] and take precedence over all others,[5] including those for other necessaries,[6] even when the last are protected by possessory liens.[7]

Upon ships that sail the sea, the voyage rule, that liens for supplies, repairs and other necessaries, except wages,[8] furnished upon each voyage shall outrank those which arose during voyages which were previous, is usually applied.[9] The application of the voyage rule to vessels sailing on the inland waters of the United States where the voyages are usually short, unduly

2 Collins v. The Fort Wayne, 1 Bond. 476, Fed. Cas. 3012. (Prior seamen's wages and prior claims of materialman); Emerson v. The Pandora, Newb. Adm. 438, Fed. Cas. 4,442; Provost v. The Selkirk, Fed. Cas. 11,455; The Spaulding Brown Adm. 310, Fed. Cas. 13,215; The Athenian, 3 Fed. 248 (Prior seamen's wages); The M. Van der Cook, 24 Fed. 472, materialmen; The Lillie Laurie, 50 Fed. 219, subsequent claims of materialmen. Where the salvage was simple the court gave it no superiority over the concurrent claims of materialmen, The Enright, 12 Fed. 157. See Maritime Liens by Robert M. Hughes, 26 Cyc. 806. The lien for salvage is superior to that of the United States for import duties upon the cargo saved. Albury v. Cargo of the Lugano, 215 Fed. 963.

3 Norwich Co. v. Wright, 13 Wall. 104, 122; The John G. Stevens, 170 U. S. 113, 116; The M. Vandercook, 24 Fed. 472, 478; Abbott on Shipping, 10th Eng. ed. 533.

4 The Madonna D'Idra, 1 Dodson, 37 (1811), per Sir William Scott, "These are sacred liens, and as long as a plank remains the sailor is entitled, against all other persons, to the proceeds, as a security for his wages."

5 The Virgo, 46 Fed. 294; The Samuel Little, C. C. A., 221 Fed. 308.

6 Ibid.

7 Ibid, The Samuel Little, C. C. A., 221 Fed. 308, 310, citing Abbott on Shipping, 14th ed., A. D. 1901, p. 1025.

8 The Samuel Little, C. C. A., 221 Fed. 308.

9 The Charles Carter, 4 Cranch. 328, 332, 2 L. ed. 636.

limited the period of credit. The season rule was consequently adopted and under this, such claims which arose during each season were classified together and given precedence over those which in subsequent seasons arose.[10] This time was found too long for vessels such as tugs and other boats engaged in harbor navigation which make daily voyages or voyages of less than a day and are always subject to the service of process. For these consequently in the Second Circuit a forty day rule was adopted, to cover the usual period of credit, thirty days, plus ten days for preparation for the litigation. This makes the time for such classification forty days.[11] It has been held that the priority of the lien of the sailors' wages is not affected by any of these rules when there has been no laches,[12] unless liens of sailors for services performed upon different voyages are in conflict.[13] In Puget Sound the District Court for the western district of Washington has established a ninety day rule for vessels making voyages in Seattle Harbor and Puget Sound.[14] In some cases claims have been classified and paid when they arose within the same year; the class of each year outranking that of the prior year preceding.[15] Where the surrender of the possession upon the institution of proceedings to enforce a maritime lien for repairs was held to be an abandonment of the possessory lien and an election to rely upon the maritime lien which had no superiority over other liens for supplies and repairs within a

10 The Buckeye State, Newb. 111, 114 Fed. Cas. 13,445; The Dubuque, 2 Abb. U. S. 20, 32, Fed. Cas. 4,110; The Detroit, 1 Brown, Adm. 141, 157, Fed. Cas. 3,882; The Hercules, 1 Brown, Adm. 560, 563; The City of Tawas, 3 Fed. 170; The Athenian, 3 Fed. 248; The J. W. Tucker, 20 Fed. 129, 134, a canal boat; The Nebraska, C. C. A., 69 Fed. 1009, 1014; The Samuel Little, C. C. A., 221 Fed. 308.

11 The Gratitude, 42 Fed. 299; The Samuel Morris, 63 Fed. 736; The Glen Iris, 78 Fed. 511; The Glen Island, 194 Fed. 744. But see The Towanda, 216 Fed. 270; The Leonard F. Richards, 231 Fed. 1002.

12 The Samuel Little, C. C. A., 221 Fed. 308.

13 The Sea Foam, 243 Fed. 929 (the ninety day rule).

14 The Edith, 217 Fed. 300; The Sea Foam, 243 Fed. 929.

15 The Thomas Morgan, South Carolina, 123 Fed. 781; The John J. Freitus, W. D. N. Y., 252 Fed. 876; a tug engaged in harbor towing for the Great Lakes beyond and for more than a year, about seven months being the season. The Philomena, 200 Fed. 873.

year.[16] Where the proceeds are insufficient to satisfy all claims, any claimant with a lien may upon suitable terms as to costs be permitted to answer and resist another claim or oppose the right of the holder thereof, to a priority, although the latter has been previously allowed and even after an interlocutory decree.[17]

§ 590a. Costs in admiralty. The subject of costs in admiralty has been previously discussed.[1] Since this discussion in the preceding volume the following Admiralty Rules have been promulgated: "If costs shall be awarded by the court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party."[2] "Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs."[3]

§ 591. Libel of review. A court of admiralty may entertain a libel of review to correct its decree after the expiration of the term, where the petitioner is shown to be free from fraud or negligence, and the decree was entered through such fraud, accident or mistake, as would entitle the party to relief in equity.[1] It has been said that mere negligence or oversight will not be sufficient; but that a direct case of fraud, or something equivalent thereto, must be shown.[2] This relief was granted where the clerk, without the knowledge of the judge or counsel, entered a decree dismissing the libel, in accordance with an oral statement by the judge that he intended to dismiss the same, and the time for appeal had expired before discovery of the entry of

16 The John J. Freitus, 252 Fed. 876.

17 The Samuel Little, 206 Fed. 687; The Priscilla, 215 Fed. 282. "A judgment entered on a decision of the Circuit Court of Appeals, sustaining as a preferred lien the claim of the salvor of a vessel as against the claims of personal representatives of those who lost their lives in the accident, is not a conclusive adjudication against the claims of life salvors, who saved life at the time of the accident."

§ 590a. 1 *Supra*, §§ 411, 418.

2 Adm. Rule 7. See *supra*, § 419c.

3 Adm. Rule 47. See *supra*, § 419.

§ 591. 1 Snow v. Edwards, 2 Lowell, 273, Fed. Cas. No. 13,145; Munks v. Jackson, 66 Fed. 571, 13 C. C. A. 641; The Columbia, 100 Fed. 890; Hall v. Chisholm, C. C. A., 117 Fed. 807. See *supra*, § 451. See § 568.

2 The New England, 3 Sumner, 495, Fed. Cas. No. 10,151; N. W. Car Co. v. Hopkins, 4 Bissell, 51, Fed. Cas. No. 10,334.

that decree.[3] When the proceeds of a sale are still in the registry of the court, in a proper case a libel of review may be filed to reach them.[4]

§ 592. Appeals. Since the Evarts Act of March 3, 1891, an appeal may be taken from the final decree of a District Court in admiralty to the Circuit Court of Appeals irrespective of the amount involved.[1] The decision of the Circuit Court of Appeals is final in all admiralty cases, except that it may certify to the Supreme Court any questions of law concerning which it desires instruction, or the Supreme Court may itself require by *certiorari* or otherwise such a case to be certified to it for review and determination.[2] From the final sentences and decrees in prize cases, irrespective of the amount involved, appeals are taken immediately to the Supreme Court of the United States.[3] What are final decrees is discussed in the concluding chapter.[4] When a dispute which was not within the jurisdiction of admiralty

[3] Hall v. Chisholm, C. C. A., 117 Fed. 807.

[4] U. S. v. One Case Chemical Compound, 203 Fed. 63.

§ 592. [1] Jud. Code, § 128, 36 St. at L. 1087, re-enacting 26 St. at L. 826, § 6; The Robert W. Parsons, 191 U. S. 17, 33, 48 L. ed. 73, 80. See Chapter on Writs of Error and Appeals, *infra*.

[2] Ibid. The writ is frequently issued in cases of admiralty. See § 689, *infra*.

[3] Jud. Code, § 238, 36 St. at L. 1086, re-enacting 26 St. at L. 828, § 5; The Paquete Habana, 175 U. S. 677, 44 L. ed. 320.

[4] §695, *infra*. It has been held that the following decrees in admiralty are *final* and *appealable*. A decree dismissing a claim for a portion of the property libeled. Withenbury v. U. S., 5 Wall. 819, 18 L. ed. 613. An order dismissing a petition by the claimant of a vessel, libeled and sold for salvage, which prayed the petitioner's right to the fund be summarily determined under Adm. Rule 43 and that he be allowed to withdraw the same upon substituting a bond. The Chief, C. C. A., 142 Fed. 349. An order denying a motion to set aside and satisfy a decree in favor of a libelant against a steamer, its claimant and a surety on a bond for the release of the *res*. Carroll v. Davidson, C. C. A., 152 Fed. 424. An order releasing a vessel from arrest under a libel in *rem*. The Attualita, C. C. A., 238 Fed. 909. A decree adjudging that the petitioner was entitled to a limitation of liability, declaring that one class of claims could not be proved against the fund and referring all other claims to the commissioner for proof. La Bourgogne, 210 U. S. 95, 112, 52 L. ed. 973, 982; s. c., C. C. A., 144 Fed. 781. An order granting a decree against the charterer upon a libel by the subcharterer of a boat and dismissing a petition by the latter to bring in a man who had executed the charter party as managing owner who had answered setting up *res adjudicata*. Cuneo Importing Co. v. American

was tried before an admiralty court without objection the decree was treated upon appeal as a decree in admiralty where the facts could be reconsidered and not as a trial at common law before a judge without a jury.[5]

All parties against whom a joint decree is entered must join in the appeal except such as have been asked so to do and have refused, in which case such request and refusal must appear upon the record.[6] Such was held to be the case where joint and several decrees had been entered against the claimant and the surety upon its bond.[7]

Importing & T. Co., C. C. A., 247 Fed. 413. An order in such a proceeding enjoining claimants of damage from bringing suits where it appeared that the appellant's claim would be barred by the State Statute of Limitations before the petitioner's right to a limitation of liability could be determined. *Re* Oceanic Steam Navigation Co., C. C. A., 204 Fed. 259. An order in such a proceeding denying a petition to establish a preferred lien. Great Lakes Towing Co. v. St. Joseph-Chicago S. S. Co., C. C. A., 253 Fed. 635.

The following decrees in admiralty were held *not* final, and consequently not appealable: A decree of restitution with costs and damages, when the court had taken no action on the report of the commissioners appointed to ascertain the damages before the appeal was taken. The Palmyra, 10 Wheat. 502, 6 L. ed. 376. A decree on a libel *in personam*, for damages to be recovered, which appointed commissioners to ascertain the amount of the damages. Chace v. Vasquez, 11 Wheat. 429. A decree stating that the sum claimed by a petitioner was due from the fund in court, but that since the fund might not satisfy all claims, no order for payment would be made until further advised. Montgomery v. Anderson, 21 How. 386. A decree upon a libel claiming the condemnation of a schooner and cargo, which condemned the schooner, but made no mention of the cargo. Dayton v. U. S., 131 U. S. lxxx., and 18 L. ed. 169. A decree dismissing a cross-libel when jurisdiction was retained over the original libel and the questions arising thereupon was not determined, Bowker v. U. S., 186 U. S. 135, 46 L. ed. 1090. A decree dismissing a petition to bring in another party as indemnitor when there has been no determination of the issue as the claimant's liability. Oneida Nav. Corp. v. Job & Co., 252 U. S. 521. An order in a proceeding for limitation of liability which denied a motion to dismiss the petition and to vacate an order restraining the prosecution of action in a State court. The Transfer No. 21, C. C. A., 218 Fed. 636. But see *supra*, § 300.

[5] U. S. v. James W. Elwell & Co., C. C. A., 250 Fed. 939. See *supra*, 474.

[6] Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953; The Bylanders, C. C. A., 231 Fed. 101; *infra*, § 697.

[7] The Bylands, C. C. A., 231 Fed. 101. *Contra*, The Glide, C. C. A., 72 Fed. 200.

An order or decree disallowing a claim against the proceeds of a sale cannot be reviewed, except on an appeal by the claimant.[8] In a suit for wages by the master of a vessel against the owner and insurers, the only controversy was as to the ownership of the vessel during the time libelant's services were rendered; the owner claiming to have abandoned her to the insurers, and the insurers denying such abandonment. The court dismissed the libel as to the insurers and entered a decree in favor of libelant against the owner, who alone appealed. It was held that he was entitled to maintain such appeal and to a review of the decision as between himself and his correspondents.[9] Where cross-suits between the same parties, one in the Circuit Court and one in the District Court in admiralty, were by agreement tried together on the same evidence, but separate judgments were entered in each court, it was held that a subsequent order of the trial judge finding that the causes were consolidated into admiralty case was not sufficient to effect a *nunc pro tunc* consolidation, and the judgment which remained of record in the Circuit Court was not reviewable on an appeal taken in the admiralty suit.[10] Although a decree dismissing a libel in admiralty by a charterer to recover damages for breach of charter party was erroneous, it was not reversed, further than to award costs to the libelant, where with his acquiescence a portion of the damages claimed by him were proved and allowed as a set-off in a cross-action brought against him by the owners in another court, and no proceedings have been prosecuted to review the judgment in such action.[11]

Appeals must be taken within six months after the entry of the final decree.[12] But the rules of the District Courts fix the time in which if the appellant wishes to stay execution, an appeal must be taken.[13]

8 Henderson v. Kanawha Dock Co., C. C. A., 185 Fed. 781. Part of the claimants for damages who have intervened in a proceeding cannot ordinarily maintain a separate appeal from a decree limiting liability without procuring a severance from the others. Short v. The Columbia, C. C. A., 67 Fed. 942.

9 Hume v. Frenz, C. C. A., 150 Fed. 502.

10 S. P. Shotter Co. v. Larsen, C. C. A., 134 Fed. 705.

11 Ibid.

12 Act of March 3, 1891, ch. 517, § 11, 26 St. at L. 829.

13 In the New York and New Jersey districts the appellant has

An appeal is usually taken by the service of a brief notice in writing on the clerk of the District Court and the proctor for the adverse party of the intention of the appellant to appeal. The practice on appeals in admiralty is now analogous to the former practice on appeal from the Circuit Courts to the Supreme Court, rather than from the District to the Circuit Courts. The rules of the Circuit Courts of Appeals as to *supersedeas* and cost bonds, citations, docketing cases, dismissals of appeals, printing records and briefs, motions, arguments, rehearings, costs, and mandates apply as well to admiralty as to equity.[14]

The findings of the trial judge will not be disturbed by an appellate court upon mere questions of fact depending upon the credibility of witnesses who testify before him, unless there is found to be a decided preponderance of evidence to the contrary.[15] Findings based solely on the preponderance of the evidence are open to review and consideration *de novo* by the appellate court.[16] Where the testimony was taken by deposition, the former rule does not apply.[17] When an award for salvage is proper, its amount will rarely be reviewed.[18] Questions of discretion, such as the reopening of a case for further proof, are rarely reviewed.[19] Where the decree directed the payment of

ten days from the entry of the final decree. In Connecticut twelve.

14 The Admiralty rules of the Court of Appeals for the Second Circuit, provide that an appeal may be taken by filing in the clerk's office and serving on the proctor of the adverse part a simple notice of appeal, security in the sum of two hundred and fifty dollars for costs to be given within ten days after filing the notice (I, II). They allow the appellant to appeal from a part only of the decree (III). They also regulate the contents and form of the apostles or transcript, and the briefs (IV, XV).

15 Reed v. Weule, C. C. A., 176 Fed. 660; Peterson v. Larsen, C. C. A., 177 Fed. 617; Philadelphia & G. S. S. Co. v. McCauldin, C. C. A., 202 Fed. 734; Philadelphia, B. & W. R. Co. v. Southern Transp. Co., 205 Fed. 732; The Samson, C. C. A., 217 Fed. 344; Louisiana Excursion Co. v. Gidionsen, C. C. A., 217 Fed. 751; The Elenore, C. C. A., 217 Fed. 753; The A. G. Brower, C. C. A., 220 Fed. 648. But see The Mason, C. C. A., 249 Fed. 718.

16 The Fin MacCool, C. C. A., 147 Fed. 123. See *infra*, §§ 503, 582.

17 The Santa Rita, C. C. A., 30 L.R.A. (N.S.) 1210, 176 Fed. 890; Oelwerke Teutonia v. Erlanger, 248 U. S. 521.

18 The Kia Ora, C. C. A., 252 Fed. 507; The Kanawha, C. C. A., 254 Fed. 762.

19 The I. F. Chapman, C. C. A., 241 Fed. 836.

a fund to a person therein named, the Circuit Court of Appeals presumed that such payee was a party to the suit or appeared below as a claimant, in the absence of evidence upon the point.[20] "Where the final condition of the record is in accordance with the substantial rules of law, neither equity nor admiralty looks at the intervening steps.[21]

An appeal in admiralty by either party from the District Court to the Circuit Court of Appeals vacates altogether the decree of the District Court and opens the whole case for trial anew in the appellate court.[22] In some respects an appeal in admiralty is a new trial. The cause is tried before the appellate court *de novo*.[23] The pleadings may be amended, and new proofs introduced, or a new decision may be sought on the pleadings and proofs which were before the District Court.[24]

The appellate court may make findings proved by the evidence which the court below has failed to find.[25] The respondent may assign error in the failure to charge with liability another respondent who has not appealed and he may avail himself of charges against the latter which the libel contains.[26] A decree for the libelant may be increased although the respondent alone has appealed.[27] A party who has not appealed may be charged with costs as if he were an appellant when he has failed in an attempt to obtain an alteration of the decree in his favor.[28] He cannot, however, at least before argument, object to a withdrawal of the appeal.[29] Where upon a joint libel stating separate causes of action, as to some of them no finding or decree was made below, and the only appeal was by the claimant from decrees in favor of some of the libelants on one cause of action, the record not containing evidence relating to the others; it was

20 The Falcon, C.C.A., 177 Fed. 916.

21 Putnam, J., in The S. L. Watson, C. C. A., 118 Fed. 945, 951.

22 The San Rafael, C. C. A., 141 Fed. 270.

23 Irvine v. The Hesper, 122 U. S. 256, 30 L. ed. 1175; Reid v. Fargo, 241 U. S. 544; The Kaiser Wilhelm II, C. C. A., 246 Fed. 786. See *infra*, § 687.

24 The Lucille, 19 Wall. 73, 22 L. ed. 64.

25 The Fullerton, C. C. A., 211 Fed. 833.

26 The Willie, C. C. A., 231 Fed. 865.

27 Consolidation Coastwise Co. v. Conley, C. C. A., 250 Fed. 679.

28 The Bronx, C. C. A., 250 Fed. 843.

29 The John Twohy, C. C. A., 256 Fed. 224.

held that the appellate court could not try the case anew and enter decrees upon such other causes of action.[30]

Where a decree determined the issues upon separate causes of action, the acceptance by the libelant of payment of the amount awarded him upon some of them did not deprive him of the right to appeal from so much as denied him the right to recover upon the others.[31] According to the old practice, within ten days from the taking of the appeal the appellant must file with the clerk of the District Court, and serve upon the proctor for the appellee, a petition of appeal,[32] which is a summary statement of the proceedings in the cause, showing when and for what the libel was filed, when the answer was filed and what relief was prayed for in it, when and before whom the cause was tried, what the decree of the District Court was, when it was entered, and when the appeal therefrom was taken. It must state whether the appellant intends to make new allegations or proofs in the Circuit Court of Appeals, to pray different relief, or to seek a new decision on the fact.

The appellant cannot amend his pleadings or take new proofs in the appellate court unless he had stated his intention to do so in his petition of appeal.[33]

Unless the appellant gives security for damages and costs, the decree of the District Court may be enforced at the expiration of the time limited by the rules, as if there had been no appeal. The bond runs to the appellee, and should be executed by the appellant and two sureties; but it is not necessary that all the appellants should sign the bond.[34] The obligation of the bond is that the appellant will prosecute his appeal to effect, and answer all damages and costs that may be decreed against him by the appellate court, if he fail to make his appeal good. If a stay of execution is not sought, the bond may be given for costs

30 The John and Winthrop, C. C. A., 182 Fed. 380.

31 The C. S. Holmes, C. C. A., 237 Fed. 785.

32 The rules of the Second Circuit do away with the necessity for a petition of appeal and provide that the record shall contain a summary statement of the proceedings in the cause.

33 Phenix Ins. Co. v. Liverpool & G. W. S. S. Co., 22 Blatchf. 372; s. c., *sub nom.* The Montana, 22 Fed. 715, 730.

34 Brockett v. Brockett, 2 How. 238. In the Second Circuit the amount of the bond for costs is $250 (C. C. A. Rule 11, 2d Ct.)

only. So, if the security given in the District Court is by its terms enforceable in the appellate court, an additional bond for the whole claim will not be exacted. Security will be required only in an amount sufficient to pay the costs of the suit and damages for delay, and costs and interest on the appeal.[35]

The general rules of the Circuit Courts of Appeals provide that the appellant shall file an assignment of the errors which he intends to urge on appeal, and that errors not so assigned will be disregarded.[36] Rule 11 is broad enough in its terms to include admiralty causes. It is therefore necessary for the appellant in admiralty to file a formal assignment of errors,[37] except in the Second Circuit and such other Circuits as have by rule provided for appeals without the assignments.[38] An assignment that the court erred in not dismissing a libel against a vessel with costs was a mere expression of opinion of counsel as to the duty of the District Judge, and not a sufficient assignment of error.[39] Where a computation made by a commissioner in admiralty contains a plain error, which was called to the attention of the court, it may be corrected in the appellate court, although no formal exception was taken on that ground to the commissioner's report.[40] A bill of exceptions is not required on an appeal in admiralty from the District Court. The apostles as the transcript is called are made as provided in Rule 49 of the Rules of the Supreme Court in Admiralty.[41]

35 C. C. A. Rule 13; The Brantford City, 32 Fed. 324.

36 The Stadacona, C. C. A., 242 Fed. 624.

37 See *infra*, §§ 699, 700.

38 In the Second Circuit the rules adopted May 20, 1892, do away with the necessity of an assignment of errors. Their validity in this respect has not been decided by the Supreme Court.

39 The Wyandotte, C. C. A., 145 Fed. 321.

40 The Eliza Lines, C. C. A., 132 Fed. 242.

41 The clerks of the District Courts shall make up the records to be transmitted to the Circuit Court of Appeals.

I. They shall contain the following:

A. The style of the court.

B. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

C. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof, all bail and stipulations, and, if any sale has been made, the orders, warrants, and reports relating thereto.

D. The libel, with exhibits annexed thereto.

E. The pleadings of the respondent or claimant with the exhibits annexed thereto.

F. The testimony as taken on the part of the libellant, and any exhibits not annexed to the libel.

G. The testimony as taken on the part of the respondent or claimant and any exhibits not annexed to his pleadings.

H. Any orders and opinions of the court.

I. Any report of a commissioner or assessor, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the commissioner or assessor are to be stated.

J. The final decree.

K. The notice of or prayer for an appeal, and the assignment of errors.

II. The following shall be omitted:

A. The continuances.

B. All motions, rules, and orders which are merely preparatory for trial and to which no exception was taken or error assigned.

C. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

III. The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document at the end thereof under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule.

IV. In making up the record to be transmitted to the Circuit Court of Appeals, the clerk of the District Court shall omit therefrom any of the pleadings, testimony or exhibits which the parties, by their proctors, shall, by written stipulation, agree may be omitted, and shall receive and include in the record any statement of the case which may be signed by the proctors showing how the questions arose and were decided in the District Court and setting forth so much only of the facts alleged and proved, or sought to be proved, or of the evidence thereof, as is essential to a decision of such question by the appellate court, and such stipulation and statement shall be filed and certified up with the record.

It is the safer practice to prepare the record so that it will show which witnesses were examined in the presence of the district judge, and which were not. The Gypsum Prince, C. C. A., 67 Fed. 612. The Cheektowaga, C. C. A., 213 Fed. 18; The Catawissa, C. C. A., 213 Fed. 18.

The Act of February 16, 1875,[42] which required the Circuit Court to make findings of fact and conclusions of law, was designed to relieve the Supreme Court from the necessity of deciding questions of fact in admiralty causes. It does not apply to appeals to the Circuit Court of Appeals.[43] It has been repealed.[44] When upon appeal from a consent decree finding that all the material allegations of the libel were true, classifying claimants of liens and awarding those in one class a priority, was reversed because no reason for the preference appeared upon the record and the case was remanded "for a decree in accordance with the conclusions of this opinion"; it was held that the District Court had no authority to retry the question of priority upon evidence but that the consent concluded all the questions of fact and that a new decree must be entered allowing the appellant to share *pro rata* with those who were given a priority.[45] The practice upon appeals to the Supreme Court in Admiralty is the same as that upon other appeals to that tribunal, except that in prize cases testimony might perhaps be taken upon the appeal.[46]

§ 592a. Further proof on appeal in admiralty. Although an appeal in admiralty opens the decree of the lower court, and gives the parties another trial, the proofs adduced in the District Court are invariably used in the appellate court.

Further proof taken by leave of a Circuit Court of Appeals or the Supreme Court on an appeal in admiralty shall be taken in such manner as may be prescribed by statute or by said court.[1] In the Supreme Court the following rule prevails: "1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States. 2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testi-

[42] 18 St. at L., p. 315, ch. 77, § 3.

[43] The Havilah, C. C. A., 48 Fed. 684. It was held on appeal from a District to a Circuit Court that defective process could not be cured by amendment. The City of Lincoln, 19 Fed. 460.

[44] Munson S. S. Line v. Miramar S. S. Co., C. C. A., 167 Fed. 960, 93 C. C. A. 360; The Nyack, C. C. A., 199 Fed. 383.

[45] The Steam Dredge A, C. C. A., 229 Fed. 682.

[46] For the practice, see *infra*, Chapter XXXVI, on Writs of Error and Appeal.

§ 592a. [1] Adm. Rule 45.

mony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible."[2]

The Admiralty Rules of the Circuit Courts of Appeals in the First,[3] Second,[4] Sixth,[5] and Ninth[6] Circuits, provide for the taking of additional testimony in admiralty only by leave of the court, and by deposition only, and regulate the practice upon the subject.[7]

On an appeal from a decree in admiralty in a prize case, further proof may be received by the order of the appellate court.[8] It is the practice of the Supreme Court in prize cases to hear the cause in the first instance upon the evidence transmitted from the court below; and then to decide upon that evidence whether it is proper to allow further proof.[9]

[2] S. C. Rule 12.

[3] Adm. Rule 14, First Ct., 150 Fed.

[4] Adm. C. C. A. Rule, Second Ct., VIII.; *infra*, appendix.

[5] C. C. A., Sixth Ct., Rule 35; *infra*, appendix.

[6] Adm. Rule, Ninth Ct., VIII., *infra*, appendix.

[7] The Stonington, 25 Fed. 621; The Gypsum King, C. C. A., 172 Fed. 1022; The Philadelphia, C. C. A., First Ct., 60 Fed. 423, 9 C. C. A. 54; The Nyack, C. C. A., Seventh Ct., 199 Fed. 383, 387. The deposition of a member of the crew of a vessel run down by a steamer as to his discovery of the presence of the steamer, although a similar statement was contained in the deposition of another witness, is not cumulative within the meaning of the rule in the First Circuit excluding further proof which is cumulative upon appeal. The Sagamore, C. C. A., 247 Fed. 743.

[8] The Lady Pike, 21 Wall. 1, 22 L. ed. 499; The Samuel, 1 Wheat. 9, 4 L. ed. 23; The Mary, 8 Cranch, 388, 3 L. ed. 599; The Adeline, 9 Cranch, 244, 3 L. ed. 719; The Atalanta, 3 Wheat. 409, 4 L. ed. 422, *supra*, § 592.

[9] The London Packet, 2 Wheat. 371, 4 L. ed. 264. An order for further proof is always made with extreme caution, and only where the ends of justice clearly require it. The Gray Jacket, 5 Wall. 342, 18 L. ed. 646. Upon a motion for further proof in the appellate court, some excuse satisfactory to the court should be shown for the failure to offer the proof in the court

Further proof cannot be admitted until the cause is heard, but where upon the opening it appears to be a case for further proof, further proof may be admitted immediately, unless it appears that the other party should be allowed to produce further proof also.[10]

New proof may be allowed in support of a supplemental libel filed in the Circuit Court of Appeals.[11] A party is not per-

below. The Mabey, 10 Wall. 419, 19 L. ed. 963; The Beeche Dene (C. C. A.), 55 Fed. 526; Red River Line v. Cheatham, 60 Fed. 517; *Re* Hawkins, 147 U. S. 486, 37 L. ed. 251; *supra*, § 592. Where the evidence as it stood was not in the opinion of the court susceptible of any satisfactory explanation by the party desiring an order for further proof, the order was refused. The Hazard v. Campbell, 9 Cranch, 205, 3 L. ed. 706. Where the court looked into the further proof offered, and on comparing it with the evidence already in the case was of the opinion that it would be totally incompetent to make out a title in the party, his application for further proof was rejected. The Euphrates, 8 Cranch, 385, 3 L. ed. 598. The suppression of papers, where it appears to have been intentional and fraudulent and attended with other suspicious circumstances, is good cause for refusing further proof; but where the suppression appears to be owing to accident or mistake, and no other suspicious circumstances appear in the case, further proof may be allowed. The St. Lawrence, 8 Cranch, 434, 3 L. ed. 615; The Fortuna, 2 Wheat. 161, 4 L. ed. 209; The Fortuna, 3 Wheat. 236, 4 L. ed. 379. The claimant forfeits all right to offer further proof by a guilty concealment of the same in his first affidavit and claim. The Gray Jacket, 5 Wall. 342, 18 L. ed. 646. Further proof will usually be ordered by the Supreme Court in a prize cause, where the national character and proprietary interest of goods recaptured do not distinctly appear. The Adeline, 9 Cranch, 244, 3 L. ed. 719; The Atalanta, 3 Wheat. 409, 4 L. ed. 422. Affidavits to be used as further proof in a prize cause are usually taken by commission. The London Packet, 2 Wheat. 371, 4 L. ed. 264. On further proof the affidavit of the claimant is indispensably necessary. The Venus, 5 Wheat. 127, 5 L. ed. 50. Where affidavits were presented to show that the testimony of witnesses on which the decree was rendered was obtained by a corrupt agreement to pay them money, of which the appellant had no knowledge at the time of the trial; a commission was ordered to take the testimony of those witnesses. The Western Mortepolis, 12 Wall. 389, 20 L. ed. 394. Where an order for further proof is made, and the party disobeys the injunctions or neglects to comply with them, a court of prize will usually consider such neglect as contumacy, which leads to presumptions fatal to his claims. The La Nereyda, 8 Wheat. 108, 5 L. ed. 574.

10 The Venus, 1 Wheat. 112, 4 L. ed. 49.

11 Munson S. S. Line v. Glasgow Nav. Co., C. C. A., 235 Cal. 64.

mitted deliberately to withhold evidence in the District Court, and after having failed there, to offer it in the appellate court.[12]

In a prize cause the captors are competent witnesses upon an order for further proof, where the benefit of it extended to both parties.[13] A second order for further proof may be made when the further proof furnished in obedience to the first order is not satisfactory.[14]

Objections to the taking or admission of new proofs must be made promptly, and if the appellee has cause to show why new proofs should not be offered, he should give notice thereof to the Court of Appeals at the opening of the term, on affidavits stating the cause intended to be shown.[15]

§ 593. Limitation of the liability of shipowners. By the general maritime law, a ship-owner is liable in full for all damages caused by the negligence of his employees.[1] This liability has been limited by statute in Great Britain[2] and in the United States.

The statutes in force in the United States on the subject are as follows: "The liability of the owner of any vessel, for any

12 The Saunders, 23 Fed. 303; The Stonington, 25 Fed. 621. *Cf. Re* Hawkins, 147 U. S. 486, 37 L. ed. 251; *supra*, § 478.

13 The Anne, 3 Wheat. 435, 4 L. ed. 428.

14 The Frances, 8 Cranch 348, 3 L. ed. 585.

15 The Stonington, 25 Fed. 621. The Supreme Court of the United States refused to review this rule, although petitioned so to do by the leading members of the admiralty bar. *Re* Hawkins, 147 U. S. 486, 37 L. ed. 251. See The Nyack, C. C. A., Seventh Ct., 199 Fed. 383, 387.

§ 593. 1 The Wild Ranger, Lush. 553. Whether the Employers' Liability Act of April 22, 1908 (35 St. at L. 65, Comp. St. Supp, 1909, p. 1171), by implication, repeals so much of this statute as would otherwise apply to the vessels of a railroad company engaged in interstate commerce, has not yet been decided. The Passaic, 190 Fed. 644.

2 The Merchants' Shipping Act of 1894, 57 and 58 Vict., c. 60.

By the Canadian Shipping Act, "§ 921. The owners of any ship British, Canadian or foreign, shall not, whenever without their actual fault or privity any loss of life or personal injury caused any person carried or any damage or loss caused any goods, etc., on board by reason of improper navigation caused any person in any other vessel or any loss for damage by reason of improper navigation caused to any other vessel or to goods, etc., on any other vessel, be answerable in damages in respect of loss of life or personal injury either alone or together to aggregate an amount exceeding $38.92 for each ton of the ship's tonnage."

embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or, incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[3] "It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."[4]

"Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.[5]

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liabilty of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.[6]

[3] U. S. R. S., § 4283, 4 F. S. A. 839, Pierce's Fed. Code, § 2146. Comp. St., § 8021.

[4] U. S. R. S., § 4285, 4 F. S. A. 850, Pierce's Fed. Code, § 2148. Comp. St., § 8023.

[5] U. S. R. S., § 4284 amended Act of February 27, 1877, ch. 69, § 1, 19 St. at L. 251, Comp. St., § 8022.

[6] U. S. R. S., § 4286, Comp. St., § 8024.

"The provisions of the seven preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters.[7]

"The individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners." [8]

The last statute did not repeal the previous provision making an exception of a loss caused by an act or on omission committed with the privity or knowledge of the owner.[9]

By the Admiralty Rules: "When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and

[7] U. S. R. S., § 4289, amended, Act of February 18, 1875, ch. 80, § 1, 18 St. at L. 320. Act of June 19, 1886, ch. 421, § 4, 24 St. at L. 80, Comp. St., § 8027.

[8] Act of June 26, 1884, ch. 121, § 18, 23 St. at L. 57, Comp. St., § 8028.

[9] Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, 553; Richardson v. Harmon, 222 U. S. 96, 106; Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334.

fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or supplemented, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than 30 days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims." [10]

"In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liabilty of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided he, it or they shall have

[10] Adm. Rule 51.

complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied." [11]

"All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts." [12]

The Hepburn Act regulating the respective rights of shippers and carriers,[13] does not repeal any of the provisions of these sections of the Revised Statutes,[14] nor does the Employers' Liability Act, of April 22, 1908.[15]

The owner, who has chartered the vessel,[16] a part owner,[17] the charterer,[18] and an insurer, to whom a vessel has been abandoned as a total loss,[19] may take the benefit of the statute. The Director General of Railroads was allowed the benefit of the statute,[20] but not, it has been held, a towing company which

11 Adm. Rule 53.

12 Adm. Rule 55.

13 Act of February 4, 1887, ch. 104, 24 St. at L. 379, Comp. St. 1901, p. 3154; Act of June 29, 1906, ch. 3591, § 7, 34 St. at L. 595, Comp. St. Supp. 1907, p. 909.

14 The Hoffmans, 171 Fed. 455.

15 35 St. at L. 65 (Comp. St. Supp. 1909, p. 1171). The Passaic, C. C. A., 204 Fed. 267.

16 Quinlan v. Pew, C. C. A., 56 Fed. 111, 5 C. C. A. 438.

17 Benner Line v. Pendleton, 210 Fed. 67.

18 Thorp v. Hammond, 12 Wall. 408, 20 L. ed. 419.

19 Craig v. Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886.

20 The Virginia, 264 Fed. 986.

had engaged another to perform its contract for towage,[21] nor a lighterage company, which, in order to fulfill a contract to transfer cargo, had chartered a lighter, the owner of which employed the stevedores and superintendent of the work.[22]

Claims on behalf of the United States were thereby released.[23] The statute applies to liability for a tort; although this is not maritime nor cognizable by admiralty,[24] such as a collision with a structure on the land.[25] A claim for salvage after a collision is one of the debts and liabilities of the owner, limitation for his liability for which is determined by the proceedings.[26] It may be, however, that a highly meritorious salvage service, which benefits both the owner and the other claimants, is entitled to a preference upon the distribution of the fund.[27] It may be that claims for general average are also entitled to a preference.[28]

The limitation may be obtained, although there is but a single claim.[29] Where, however, it clearly appeared from the appraisement or otherwise that all the claims which can be asserted do not exceed the value of the property surrendered the petition will be dismissed.[30]

21 *Re* Reichert Towing Line, C. C. A., 251 Fed. 214.

22 Smith v. Booth, 110 Fed. 680; aff'd in C. C. A., 122 Fed. 626, 58 C. C. A. 479.

23 U. S. S. v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, C. C. A., 212 Fed. 40; The Florida, 212 Fed. 334.

24 Richardson v. Harmon, 222 U. S. 96, 56 L. ed. 110; The Steam Dredge No. 6, 222 Fed. 576; The Rochester, 230 Fed. 519; The No. 6, C. C. A., 241 Fed. 69.

25 Richardson v. Harmon, 222 U. S. 96, 56 L. ed. 110. This relieves the case of *Ex parte* Phoenix Ins. Co., 118 U. S. 610, 30 L. ed. 274, decided before the statute was amended. It has been held that the statute does not apply to an injury caused to a man on a pier by a collision of the vessel with the same. Elwell v. Bender, 79 Hun (N. Y.) 243, 29 N. Y. Supp. 357.

26 Richardson v. Harmon, 222 U. S. 96, 56 L. ed. 110; The San Pedro, 223 U. S. 365, 56 L. ed. 473.

27 The San Pedro, 223 U. S. 365, 376, 56 L. ed. 473. See The H. F. Dimock, 186 Fed. 662.

28 The H. F. Dimock, 186 Fed. 662.

29 White v. Island Transportation Co., 233 U. S. 346; Strong v. Holmes, C. C. A., 238 Fed. 554.

30 The Dauntless, 212 Fed. 455; Shipowners' & Merchants' T. Co. v. Hammond Lumber Co., C. C. A., 218 Fed. 161; The George W. Fields, 237 Fed. 403; Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co., C. C. A., 251 Fed. 266. But see The Defender, 201 Fed. 289; The Tug No. 16, 237 Fed. 405. The court is not ousted of jurisdiction by the recovery by the claimants of less than the stipulated

The recovery of insurance is no defense to the petition.[31] A surrender of the vessel to the insurer does not relieve the ship from liability.[32] The proceedings have no effect against a party who has already obtained a satisfaction of his demands.[33] The statute does not relieve the owner from any individual liability to material-men or repairers or others which he may have incurred;[34] nor for his personal warranty of seaworthiness,[35] nor from liability for overloading which is included in such warranty;[36] nor for the recovery of charter hire paid in advance.[37]

The right to secure a limitation is not waived by giving a stipulation for a release of the vessel.[38]

The proceeding may be instituted after a decree in admiralty against the owner or the vessel,[39] or after judgment against him in a State court,[40] but the court of admiralty may compel the petitioner to pay the costs of a suit in the State court that has proceeded to trial,[41] and also, a sum equal to the deterioration in value of the property surrendered, since the claim originated with interest from the date of the liquidation of the claim.[42] The petition may be filed before any suit has been brought to enforce the liability and in case a suit has been brought before any property has been attached or seized or at

value of the boat, where their original claims were greater than such value. Briggs v. Day, 21 Fed. 727.

31 The Pere Marquette, 203 Fed. 127.

32 The City of Norwich, 118 U. S. 468, 505, 30 L. ed. 134, 147.

33 New York & W. Steamship Co. v. Mount, 103 U. S. 239, 26 L. ed. 351; reversing 18 Fed. Cas. No. 10,200, 9 Ben. 44.

34 The Leonard Richards, 41 Fed. 818; Gokey v. Fort, 44 Fed. 364, 366; American Warehouse & Trading Co. v. Davison Lumber Co., C. C. A., 240 Fed. 126 (for wharfage).

35 Pendleton v. Benner Line, 246 U. S. 353; Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334; The Julia Luckenbach, C. C. A., 235 Fed. 388.

36 The Benjamin Noble, 232 Fed. 382.

37 *Re* Sugar Products Co. et al., 247 Fed. 623.

38 The Rochester, 230 Fed. 519; Société Napthés Transports v. Bisso Towboat Co., C. C. A., 241 Fed. 463.

39 Monongahela River Consol. Coal & Coke Co. v. Hurst, C. C. A., 200 Fed. 713; Lindley v. Ross, 200 Fed. 733; The Defender, 214 Fed. 316; The Ethelstan, 246 Fed. 187.

40 Gleason v. Duffy, C. C. A., 116 Fed. 298; The T. W. Wellington, 235 Fed. 728.

41 Gleason v. Duffy, C. C. A., 116 Fed. 298; The Ocean Spray, 117 Fed. 971.

42 The T. W. Wellington, 235 Fed. 728. See The Defender, 214 Fed. 316.

any other time.[43] The proceeding is not *in rem*, but partakes rather of the character of a loss *in personam*.[44]

§ 593a. Vessels in respect to which limitation of liability may be obtained. The statute applies to all vessels at sea, including fishing vessels,[1] lighters,[2] barges,[3] tugs[4] and their tows,[5] temporarily sunken drill boats[6] and to all vessels engaged in inland navigation on lakes, rivers and canals, including canal boats;[7] but not to dry dock although capable of floating and being towed.[8]

It was held to apply to vessels in the possession of the Director General of Railroads.[9]

The statute applies to foreign as well as to domestic vessels.[10] Owners of a foreign vessel may, in a proper case, file a petition for the limitation of their liability.[11] Owners of a domestic vessel may be relieved from their liability to a foreign vessel and its owners by proceedings under the statute.[12] When the injury is caused by a collision between a foreign and American vessel, the American statute applies, although the law of the vessel's flag imposes a severe liability.[13] The same rule applies to an injury caused by the navigation of a foreign vessel, upon the high seas where there are claimants of different nationalities, although by the law of the flag, the liability of the owner cannot be limited to the extent authorized by the United States.[14]

43 The Rochester, 230 Fed. 519.

44 The City of Norwich, 6 Benedict 30, 5 Fed. Cas. 2,762.

§ 593a. 1 Whitcomb v. Emerson, 50 Fed. 128.

2 The Annie Faxon, 66 Fed. 575, 580; Smith v. Booth, 110 Fed. 680, aff'd C. C. A., 122 Fed. 626.

3 The Bordentown, 40 Fed. 682, 687; The Annie Faxon, 66 Fed. 575, 580.

4 The Bordentown, 40 Fed. 682, 687; The Columbia, C. C. A., 73 Fed. 226; The Soerstad, 257 Fed. 130.

5 The Bordentown, 40 Fed. 682, 687; Craig v. Continental Ins. Co., 141 U. S. 638, 645, 35 L. ed. 886, 887.

6 Eastern S. S. Corp. v. Great Lakes Dredge & Dock Co., C. C. A., 256 Fed. 497.

7 The Annie Faxon, 66 Fed. 575, 580.

8 Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. 763. See *supra*, § 560.

9 The Virginia, 264 Fed. 986.

10 The Scotland, 105 U. S. 24, 26 L. ed. 1001.

11 Ibid.

12 *Re* Leonard, 14 Fed. 53.

13 The Scotland, 105 U. S. 24, 26 L. ed. 1001.

14 Oceanic Steam Navigation Co. v. Mellor, 233 U. S. 718, in which the author was counsel.

§ 594. Court where petition for limitation of liability may be filed. "The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf; when the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship shall have already been libeled or sold, the proceeds shall represent the same for the purposes of these rules."[1]

It has been said that the proceeding may be instituted in any district where the property to be distributed is located or where the District Court has control thereof.[2] It has been held that the phrase, "may be sued in that behalf," refers to suits already instituted;[3] and that the phrase, "district other than that in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case," must be construed as referring to the time when the proceedings have begun.[4] The filing of the petition for a limitation of liability with an offer of stipulation by the owner, gives the court jurisdiction, which is not lost by subsequent irregularities in the proceedings,[5] nor by the sailing of the vessel into another district.[6] Where a libel *in personam* has been instituted against a ship-owner in one district, he cannot institute proceedings to limit his liability in any other district.[7] In such

§ 594. [1] Adm. Rule 54; *Re* Morrison, 147 U. S. 14, 37 L. ed. 60; The John K. Gilkinson, 150 Fed. 454.

[2] *Re* Louisville & Cincinnati Packet Co., 223 Fed. 185.

[3] Strong v. Holmes, C. C. A., 238 Fed. 554.

[4] *Re* Louisville & Cincinnati Packet Co., 223 Fed. 185.

[5] *Re* Morrison, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60.

[6] Ibid.

[7] The Alpena, 8 Fed. 280; The Enterprise, 196 Fed. 404 (in this case, the ship-owner had submitted

a case, the proceedings can be instituted in the district where he is sued, although the action is brought in the State court and the boat is in another district.[8] The residence of the petitioner is immaterial.[9] The benefit of the statute may also be secured by proper allegations in the answer in admiralty,[10] or at common law; even in a State court.[11]

§ 595. Privity or knowledge of owner. In the case of a corporation, the privity or knowledge of its president,[1] or general manager,[2] or local manager with general powers in the place where his office is situated,[3] or manager of boat,[4] or superintendent,[5] is sufficient to bind the company. It must be that of a managing officer.[6] The privity or knowledge of a master of a vessel,[7] or wrecking master, or a marine inspector who had, amongst other duties, that of going to the assistance of wrecked and stranded vessels, is not.[8]

The liability of the ship-owner cannot be limited for a failure to comply with an act of Congress which requires a sufficient

to the jurisdiction of the first court and had not instituted his proceedings elsewhere until after a decree against him, from which he had appealed).

8 Gleason v. Duffy, C. C. A., 116 Fed. 298; s. c., 54 C. C. A. 100.

9 *Re* Leonard, 14 Fed. 53.

10 The Scotland, 105 U. S. 24, 26 L. ed. 1001; The Great Western, 118 U. S. 520, 535, 30 L. ed. 156, 151.

11 The Rosa, 53 Fed. 132.

§ 595. 1 The Republic, C. C. A., 61 Fed. 109, 9 C. C. A. 386; Weisshaar v. Kimball S. S. Co., C. C. A., 65 L.R.A. 84, 128 Fed. 397.

2 Parsons v. Empire Transp. Co., C. C. A., 111 Fed. 202; Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 Fed. 912, 921; M'Kie Lighter Co. v. Collins, C. C. A., 255 Fed. 524.

3 Parsons v. Empire Transp. Co., C. C. A., 111 Fed. 202; *Re* Jeremiah Smith & Sons, C. C. A., 193 Fed. 395; Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., C. C. A., 256 Fed. 497.

4 The Benjamin Noble, 232 Fed. 382; aff'd C. C. A., 244 Fed. 95, 99; aff'd as Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 354.

5 Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 Fed. 912; The Teddy, 226 Fed. 438; The Erie Lighter 108, 250 Fed. 490; *Re* P. Sanford Ross, C. C. A., 204 Fed. 248.

6 The Republic, C. C. A., 61 Fed. 109, 113; The No. 6, C. C. A., 241 Fed. 69.

7 The Colima, 82 Fed. 665, 679; The George W. Roby, C. C. A., 111 Fed. 601, where the master failed to station a lookout. See The Lusitania, 251 Fed. 716.

8 Craig v. Continental Ins. Co., 141 U. S. 638, 645, 647, 35 L. ed. 886, 887, 888.

crew,[9] or a boiler inspection,[10] or when the crew were sufficient in number, but composed of Chinese, nearly all of whom could not understand the language of the officers and who had never been drilled in launching life boats.[11] Nor where the President, or other managing officer of a corporation had notice,[12] or through carelessness in a personal inspection had failed to observe that the vessel was not seaworthy;[13] or had seen and did not object to the overloading of the boat.[14] Nor where the owner had failed to instruct the watchman of a drill boat to mark the boat in case of a wreck.[15]

It has been held that owners may obtain limitation of their liability for the negligence of a boiler inspector whom they had employed,[16] for a defect in the rigging, of which the master knew before the voyage,[17] for a failure to furnish a sufficient supply of life preservers when there was no violation of any act of Congress and the equipment was entrusted to a competent master,[18] for a defect in loading, making the vessel unstable, which was done by the stevedore under the supervision and direction of the master and first officer,[19] and when the vessel is not seaworthy, but they employed competent persons to inspect the same.[20] It seems that the fact that the master is a habitual

9 Ibid. *Re* Pacific Mail S. S. Co., C. C. A., 65 L.R.A. 71, 130 Fed. 76.

10 The Annie Faxon, C. C. A., 75 Fed. 312, 320; The Annie, 261 Fed. 797.

11 *Re* Pacific Mail S. S. Co., C. C. A., 65 L.R.A. 71, 130 Fed. 76.

12 *Re* Reichert Towing Line, C. C. A., 251 Fed. 214.

13 The Republic, C. C. A., 61 Fed. 109; The Annie, 261 Fed. 797.

14 Weisshaar v. Kimball S. S. Co., C. C. A., 65 L.R.A. 84, 128 Fed. 397; The Benjamin Noble, 232 Fed. 382; aff'd C. C. A., 244 Fed. 95, 99; aff'd as Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 354.

15 Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., C. C. A., 256 Fed. 497, 503.

16 The Annie Faxon, C. C. A., 75 Fed. 312.

17 Quinlan v. Pew, C. C. A., 56 Fed. 111, 5 C. C. A. 438.

18 The Jane Grey, 99 Fed. 582.

19 The Colima, 82 Fed. 665, 679.

20 Van Eyken v. Erie R. Co., 117 Fed. 712, 716, and cases cited. *Contra*, *Re* Myers Excursion & Navigation Co., 57 Fed. 240, 242; aff'd upon another point in The Republic, C. C. A., 61 Fed. 109, 9 C. C. A. 386. See, also, *Re* Eastern Dredging Co., 159 Fed. 541; The Tommy, C. C. A., 151 Fed. 570, 81 C. C. A. 50; The Longfellow, C. C. A., 104 Fed. 360, 45 C. C. A. 379; *Re* Louisville, &c., Packet Co., 95 Fed. 996; Memphis, &c., Packet Co. v. Overman Carriage Co., 93 Fed. 246; Quinlan v. Pew, C. C. A., 56

drunkard does not take a case from the operation of the statute, in the absence of evidence that this fact was within the knowledge or means of knowledge of the owner.[21] The limitation will be denied when a loss was caused by the boats leaving port when a dangerous storm was threatened of which the master and the managing owner had notice,[22] and because when after being stranded the owner forbad the master to accept aid or salvage until arrangements had been made as to the price of such services.[23] The owner is not excluded from the benefit of the statute because the vessel was operated at excessive speed during a fog, in the absence of evidence that he acquiesced therein.[24]

Fed. 111, 5 C. C. A. 438; The City of Para, 44 Fed. 689.

21 The Anna, 47 Fed. 525. But see Parsons v. Empire Transp. Co., C. C. A., 111 Fed. 202.

22 Texas & Gulf S. S. Co. v. Parker, C. C. A., 263 Fed. 864.

23 The Santa Rosa, 249 Fed. 760.

24 *Re* La Bourgogne, 117 Fed. 261; s. c., La Bourgogne, C. C. A., 139 Fed. 433, 440; s. c., 210 U. S. 95, 52 L. ed. 973.

In the Titanic, U. S., D. C., S. D. N. Y., before Mayer J. which was settled before a decision, Roger Foster argued: that the corporation which owned the steamship was in privity with the negligence of the master in operating the boat at excessive speed in the vicinity of icebergs, with one of which the Titanic collided; because the managing director Bruce Ismay who was on board and who escaped on one of the boats after orders had been given to exclude male passengers therefrom, knew that the Titanic was approaching the ice region at the rate of speed that was used and did not interfere.

"The loss of The Titanic is a case in which the owner of a steamboat cannot shield itself by the contention that it is a matter of technical skill in which its president was justified in relying upon the captain's judgment. If such were the case, then the captain would be the *alter ego* of the company and his employer consequently responsible. But this is not a matter of technical skill. It is no more such than the driving of a wagon through a storm, and, in the latter case, it has been held that a passenger on the vehicle seated by the driver's side is responsible for the latter's negligence in driving rapidly through a snow storm towards a railroad crossing without stopping to look for approaching trains, and this even when the driver was not the passenger's servant." Citing: Brickell v. New York, C. & H. R. R. R. Co., 120 N. Y. 290.

"We have proved that Ismay had knowledge of the negligence. He had privity as well." Mere privity also without active concurrence in some offenses is a crime, but the criminality may be greatly reduced by the passive part which the persons thus privy take in the affairs. * * * "It is understood that the petitioners may rely on *obiter dicta* in some cases to the effect that a captain has the control of persons on board the ship. But a lack of

When the master is a part owner, the other owner may claim the benefit of the statute, in spite of the former's fault.[25] A master who was a part owner was himself allowed the benefit of the statute when he had served out his watch and was asleep during the night when the negligence occurred.[26]

It was held that the judgment of a State court holding that the injury was due to the negligence of the superintendent, who was *alter ego* of the owner, was a conclusive adjudication that the defendant was in privity therewith and a bar to a proceeding for the limitation of his liability.[27]

§ 596. The libel or petition for limitation of liability. The Admiralty Rules provide that the proceeding must be instituted by a libel or petition, filed by the owner in the proper District Court of the United States, setting forth the facts and circum-

power to control the commission of an act that is negligent does not prevent a man who acquiesces therein from privity with the same. It has been so held of negligence. Brickell v. N. Y., C. & H. R. R. R. Co., 120 N. Y. 290. Moreover, those were cases which considered the right of the captain to control the action of the crew and passengers. They did not consider the rights of the ship owners over the captain. There is no doubt about the fact that such ship owners may at any time remove the captain with or without justification, and that his only remedy is an action against them for damages. The removal may be made after the voyage has begun and is valid and effectual even when the captain has a contract right to remain in possession for a specified term. He must quit the ship and quit the command. His only remedy is an action at common law for the damages caused by his unlawful discharge. This doctrine has been sustained by the Supreme Court of the United States and by Judge Story, as well as by the Supreme Court of the States of New York and Maine, the Circuit Court of Appeals for the Fourth Circuit and a number of Federal judges. "It rests upon reasons of public policy." Citing: Montgomery v. Wharton, 2 Peters Adm., 397, Fed. Cas. No. 9737; Childs v. Gladding, Fed. Cas. No. 2678; Clayton v. Schooner Eliza B. Emory, 4 Fed. 342; S. C. below, 3 Fed. 241; Lombard S. S. Co. v. Anderson, C. C. A., 134 Fed. 568, 569; Woodbury v. Brazier, 48 Maine 302, 304; Ward v. Ruckman, 36 N. Y. 26, 37, 38; Williams v. Hays, 143 N. Y. 442, 453; The New Draper, 4 Rob. Adm. Rep. 235, 287. As to what is sufficient notice to the owner, see Eastern S. S. Corporation v. Great Lakes Dredging & Dock Co., C. C. A., 256 Fed. 497.

[25] *Re* Leonard, 14 Fed. 53, 55; The Obey, L. R. 1 A. & E. 102; The Star of the Ocean, 34 L. J. Adm. 74; The Cricket, 48 L. T. 535.

[26] The Maria & Elizabeth, 12 Fed. 627, 630.

[27] The Teddy, 226 Fed. 438.

stances on which the limitation of liability is claimed.[1] If the

§ 596. [1] Am. Rule 55; The Sacramento, 131 Fed. 373.

Adm. Rule 54, S. D. N. Y., provides: "Petitions or libels to limit liability must state: (1) The facts showing that the application is properly made in this district. (2) The voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of liens, on contract or in tort, arising on that voyage, so far as known to the petitioners, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and if so, when and where; the value of the vessel at the close of the voyage, or in case of wreck, the value of her wreckage, strippings or proceeds, if any, as nearly as the petitioners can ascertain, and where and in whose possession they are; also the amount of any pending freight, recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information and belief of the petitioner, shall be sufficient."

Adm. Rule 55, S. D. N. Y.: "If a surrender of the vessel is offered to be made to a trustee, the libel or petition must further show any prior paramount lien on the vessel, and what voyages or trips if any she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens, arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; also the special facts on which the right to surrender the vessel is claimed, notwithstanding such subsequent trip or voyage, and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip. Upon surrender of the vessel no final decree exempting from liability will be made until all such liens as may be admitted or proved, prior to such final decree, to be superior to the liens of the claims limited, shall be paid or secured independently of the property surrendered, as may be ordered by the Court; and the monition in cases of surrender, shall cite all persons having any claim upon the vessel to appear on the return day or be defaulted, as in ordinary process *in rem*."

Adm. Rule 56, S. D. N. Y.: "If, instead of a surrender of the vessel, an appraisement thereof be sought for the purpose of giving a stipulation for value, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner, and the attorneys or proctors in any suits thereon; or if such creditors or lienors be numerous, then a sufficient number of them properly to represent all in the appraisement; and notice of the proceedings to appraise the property shall be given to such creditors as the Court shall direct, and to all the attorneys and proctors in such pending suits." It is proper to aver that "there is no

owner wishes to contest his liability or the liability of the ship, independently of the limitation of the same which he claims, the petition must state the facts and circumstances by reason of which such exemption is claimed.[2] The libel or petition should set forth the facts and circumstances on which the limitation is claimed,[3] and pray proper relief. When a petition is filed against another vessel, with which the petitioner's boat has collided, the petition may deny all liability by reason of the collision and claim, in the alternative, relief under the statute.[4] Interrogatories to be answered by a respondent may be attached thereto.[5] It should allege either that the vessel is within the district or that the owner has been there sued.[6] It is the safer practice for the petition to show the existence, or the probability of the existence, of more than one claim for damage.[7] It is not necessary to aver or prove that the claims against the vessel are in excess of her value.[8]

One or more of the part owners may join in a petition to limit their liability without joining the rest.[9] As soon as the petition is filed the court will grant an order, either appointing appraisers to appraise the amount or value of the interest of the

prior paramount lien on said lien." The Defender, 214 Fed. 316, 318. If the value of the vessel and freight is material, the averment thereabout should state the value at the end of the voyage. An allegation that the claim, a limitation of the liability for which he sought "far exceeds the petitioner's interest in said vessel and her freight pending" is insufficient. Ibid. So is an averment that no voyage or trip made by the boat since such claim arose "has unreasonably decreased the value," since this is in the nature of a negative pregnant. Ibid. For other decision as to pleading, see Butler v. Boston & S. S. S. Co., 130 U. S. 527, 32 L. ed. 1017; Black v. So. Pac. R. Co., 39 Fed. 565; The Garden City, 26 Fed. 766; The Benefactor, 103 U. S. 247, 26 L. ed. 354; Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 27 L. ed. 1038; The Luckenback, 26 Fed. 870; The Annie Faxon, C. C. A., 75 Fed. 312; s. c. (D. C.), 66 Fed. 575; § 561, *supra*.

2 Adm. Rule 56.

3 The Sacramento, 131 Fed. 373.

4 *Re* Piper Aden Goodall Co., 86 Fed. 670.

5 The Murrell, 188 Fed. 727. See *supra*, § 581.

6 The John K. Gilkinson, 150 Fed. 454.

7 The Rosa, 53 Fed. 132; The Eureka No. 32, 108 Fed. 672. But see *supra*, § 593.

8 The Garden City, 26 Fed. 766, 770. But see Delaware River Ferry Co. v. Amos, 179 Fed. 756, *supra*, § 593.

9 The S. A. McCaulley, 99 Fed. 302, *supra*, § 593.

owner or owners in such vessel and her freight for the voyage, or if they elect, without appraisal referring it to a commissioner to take proofs of such value.[10]

§ 597. Surrender to secure limitation of liability. Where an injury was produced by the fault of two vessels with the same owner, both must be surrendered in order to obtain the benefit of the statute.[1] When the injury was caused by the negligent operation of a tug, scows or other vessels thereto attached behind [2] or lashed along side [3] need not be surrendered. It has been held that whaling outfits, such as whaling gear, casks, provisions and supplies are not part of the ship and need not be surrendered.[4] The freight to be surrendered includes what is paid for the carriage of passengers,[5] as well as merchandise.[6] Freight paid in advance under contracts which do not require its return in case of loss, must be surrendered,[7] but not what must be returned in case the voyage is not completed.[8] The earnings of the previous voyage, from the home port to that from which the ship was returning when the loss occurred, need not be surrendered.[9] A claim for damages against another vessel because of a collision, which caused the loss, must be surrendered.[10] Insurance money need not be surrendered.[11] It has been held that the owner, when he owns the cargo as well as the vessel, must surrender a fair compensation for the trans-

10 Adm. Rule 51. See Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 591, 27 L. ed. 1038, 1043.

§ 597. 1 The San Rafael, C. C. A., 141 Fed. 270, 72 C. C. A., 388; The Dauntless, 212 Fed. 455, two tugs working tandem.

2 The O'Brien Bros., 252 Fed. 185.

3 Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U. S. 48; The Transfer No. 21, C. C. A., 248 Fed. 459.

4 Swift v. Brownell, Holmes, 467, 472.

5 The Main v. Williams, 152 U. S. 122, 131, 38 L. ed. 381, 384, 14 Sup. Ct. 486.

6 La Bourgogne, 210 U. S. 95.

7 La Bourgogne, 210 U. S. 95, 52 L. ed. 973, affirming on this point, C. C. A., 139 Fed. 433; modifying 117 Fed. 261.

8 The Scotland, 105 U. S. 24, 26 L. ed. 1001.

9 La Bourgogne, 210 U. S. 95, 52 L. ed. 973.

10 O'Brien v. Miller, 168 U. S. 287, 303, 307, 42 L. ed. 469, 475, 476. As to a right of subrogation, see The St. Johns, 101 Fed. 469, 477.

11 The City of Norwich, 118 U. S. 468, 30 L. ed. 134.

portation of the former.[12] The owner must surrender: in the case of a fishing boat, the earnings of the voyage;[13] in all cases; demurrage due and unpaid;[14] salvage due under a contract, by which he received a specified sum for such service, without deducting the value of other vessels or appliances in the same service, which were not surrendered;[15] but not an unliquidated claim for salvage that was volunteered,[16] nor any part of an annual subsidy, in return for which the mails were transported and other services rendered to the Government, which had the right to use the ship in case of war.[17] The value of the amount surrendered and the amount of the liability are measured as of the termination of the voyage, during which the injury occurred.[18] A loss upon a subsequent voyage cannot be deducted[19] when the vessel is sunk, the voyage terminates,[20] unless the boat can be saved in whole or in part.[21] Where the vessel, immediately after a collision, was surrendered to the underwriters, who took possession, and before she reached port was sunk by the negligence of her crew; she was appraised as of the date of the second misfortune and the amount realized by the underwriters from the sale of the wreck was the measure of its value.[22]

Wages[23] and towage,[24] after the injury and before the termination of the voyage, cannot be deducted; unless they are extraordinary expenses, made in order to earn the freight, and are in the nature of salvage, when they may be allowed the owner.[25]

12 Allen v. MacKay, 1 Sprague, 219.

13 Whitcomb v. Emerson, 50 Fed. 128. Held otherwise as to a whaler, in Smith v. Brownell, Holmes, 467.

14 The Giles Loring, 48 Fed. 463.

15 The Captain Jack, 162 Fed. 808.

16 *Re* Meyer, 74 Fed. 881.

17 La Bourgogne, 210 U. S. 95, 52 L. ed. 973; affirming in this respect, C. C. A., 139 Fed. 433; s. c., 117 Fed. 261.

18 The City of Norwich, 118 U. S. 468, 30 L. ed. 134.

19 The Americana, 230 Fed. 853.

20 The City of Norwich, 118 U. S. 468, 30 L. ed. 134; The Abbie C. Stubbs, 28 Fed. 719; The George L. Garlick, C. C. A., 107 Fed. 542.

21 The Abbie C. Stubbs, 28 Fed. 719, 720; The Anna, 47 Fed. 525, 528.

22 The Great Western, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. ed. 156.

23 The Abbie C. Stubbs, 28 Fed. 719, 720.

24 Ibid. The Ethelstan, 246 Fed. 187.

25 The Jose E. More, 37 Fed. 122; Pacific Coast Co. v. Reynolds, C. C. A., 114 Fed. 877, 52 C. C. A. 497.

It has been held that salvage and general average charges, which accrued subsequently to the collision, may be deducted;[26] but that the cost of telegrams concerning the loss,[27] notarial fees for a protest,[28] and payments for the transportation, comfort and benefit of the survivors,[29] cannot. There can be no deduction from the value of the vessel or from the freight surrendered because of liens previous to the injury;[30] neither for bottomry,[31] nor for mortgage,[32] nor for previous pilotage,[33] nor for wages of seamen,[34] nor for towage,[35] previously incurred.

Where the petitioner contumaciously refuses to put the court in actual or constructive possession of the fund to be distributed, its petition may be dismissed.[36] Where there is an honest controversy as to how much should be surrendered and there is no question as to the solvency of the petitioner, the court may permit him to withhold the disputed sum pending an appeal.[37]

§ 598. Appraisement in proceedings for limitation of liability. The rules provide that upon the filing of the petition, the court, "having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, or an approved corporate surety for the payment thereof to the court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall be ordered, or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such

26 The Abbie C. Stubbs, 28 Fed. 719.

27 The Jane Gray, 99 Fed. 582, 593.

28 The Jane Gray, 99 Fed. 582, 593.

29 Pacific Coast Co. v. Reynolds, C. C. A., 114 Fed. 877, 52 C. C. A. 497; *certiorari* denied, 187 U. S. 640, 23 Sup. Ct. 841, 47 L. ed. 345; approved in La Bourgogne, C. C. A., 139 Fed. 433.

30 The Maria & Elizabeth, 12 Fed. 627, 630; The Leonard Richards, 41 Fed. 818, 820; The Jane Gray, 99 Fed. 582, 592; Barnes v. Steamship Co., 6 Phila. 479, 2 Fed. Cas. No. 1021.

31 Barnes v. Steamship Co., 6 Phila. 479, 2 Fed. Cas. No. 1021.

32 Ibid.

33 Ibid.

34 The Jane Gray, 99 Fed. 582, 592; Barnes v. Steamship Co., 6 Phila. 479, 2 Fed. Cas. No. 1021.

35 The Jane Gray, 99 Fed. 582, 592.

36 La Bourgogne, 210 U. S. 95, 141, 52 L. ed. 973, 994.

37 Ibid.

vessel and freight, to a trustee to be appointed by the court under the fourth section of said act."[1] It has been said that an appraisement is not required when the allegations in the libel or petition show the amount for which the vessel sold that the deductions claimed by the owner should not be allowed.[2]

The practice upon appraisements and the rules regulating stipulations for value are ordinarily like the general practice in admiralty proceedings in these respects.[3] It is the better practice to serve notice of the hearing upon the appraisal, upon the parties liability to whom is sought to be limited;[4] but an appraisement *ex parte* is not void.[5]

The vessel is valued as of the date of the termination of the voyage upon which the loss occurred.[6] When the vessel is sunk, the voyage terminates.[7] If the vessel has deteriorated in value, while used by the owner for a considerable time after the claims arose, the owner is responsible for the reasonable value of the vessel when the liability was incurred.[8] Deductions from her present value on account of additions made since an accident occurred should be made at their value at the time of the appraisal, not at their cost.[9] Where a bond for value is given by the petitioner it must cover the value of the vessel at the time she ended her voyage.[10] There can be no deduction because of freight then pending or unadjudicated claims for salvage or for general average, although these claims might be entitled to precedence over thereof into court whenever the same shall be ordered; or, if other claimants; for such other claimants have the right to contest the same.[11]

The question of interest is in the discretion of the court.[12] When a bond or stipulation for value is given, interest runs

§ 598. 1 Adm. Rule 51.

2 The Ethelstan, 246 Fed. 187.

3 *Supra*, §§ 571, 573.

4 The George L. Garlick, C. C. A., 107 Fed. 542.

5 The Abbie C. Stubbs, 28 Fed. 719; The George L. Garlick, C. C. A., 107 Fed. 542.

6 *Re* Morrison, 147 U. S. 14, 34, 37 L. ed. 60, 67.

7 Ibid.; The H. F. Dimock, 52 Fed. 598.

8 The Passaic, 190 Fed. 644; *supra*, § 584.

9 The Captain Jack, 162 Fed. 808.

10 The H. F. Dimock, 186 Fed. 662; *supra*, § 571.

11 Ibid.

12 The Scotland, 118 U. S. 507, 30 L. ed. 153.

from the date of the same[13] which should provide therefor.[14] Where the ship-owner sets up the statutory limitation by an answer without surrendering the vessel or giving a bond, interest is charged on the value of the vessel from the date of the injury.[15] Otherwise, except under extraordinary circumstances, interest against the owner is charged only from the date of the decree.[16]

§ 599. Injunctions in proceedings to limit liability. When proceedings for the limitation of liability are instituted, the court has the power to enjoin all proceedings against the vessel in any other court,[1] even when the same have been already instituted.[2] Such an injunction, however, is not necessary, since the issue of the monition has the effect of a statutory injunction at least to the extent of superseding such proceedings in the State courts should those in the Federal court be finally sustained.[3]

The Federal court has allowed an action in the State court to be begun pending the proceedings to limit the owner's liability in order to stop the running of the State Statute of Limitations.[4] Where a verdict had been obtained prior to the institution of the proceedings for limitation of liability, the court of admiralty gave leave to the plaintiff to enter judgment thereupon, for the purpose of liquidating his claim.[5] It was held that this judgment, though not conclusive, should be accepted as determining the amount of the plaintiff's claim, unless the court was satisfied that it was excessive.[6] It was held subse-

13 Smith v. Booth, 112 Fed. 553; The George W. Roby, C. C. A., 111 Fed. 601.

14 *Re* Harris, C. C. A., 57 Fed. 243.

15 Smith v. Booth, 112 Fed. 553.

16 The Manitoba, 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. 1158; The Jose E. More, 37 Fed. 122.

§ 599. 1 The Scotland, 105 U. S. 24, 26 L. ed. 1001; *Re* Morrison, 147 U. S. 14, 35; Moran v. Sturges, 154 U. S. 256, 270, 38 L. ed. 981, 985; The San Pedro, 223 U. S. 365, 372, 56 L. ed. 473, 474.

2 Ibid.; The Revere, 191 Fed. 253.

3 Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 600, 27 L. ed. 1038, 1046; The San Pedro, 223 U. S. 365, 372, 56 L. ed. 473, 474.

4 *Re* Oceanic Steam Navigation Co., C. C. A., 204 Fed. 260, reversing The Titanic, 204 Fed. 295.

5 Davenport v. Winnisimmet Co., C. C. A., 162 Fed. 862; reversing The City of Boston, 159 Fed. 257; s. c., The City of Boston, 182 Fed. 174.

6 The City of Boston, 182 Fed.

quently however, that, where the action in the State court had not been tried, a court of admiralty had no power to allow the question of liability to be there litigated and determined against the petitioner's objections.[7] Attachments cannot be levied after the Federal proceedings have begun.[8] When judgment is recovered in the State court, the amount paid cannot exceed the value of the vessel if limitation is allowed.[9] The injunction does not prevent a claimant from withdrawing his claim irrespective of what future acts he may contemplate.[10]

No injunction will run against materialmen,[11] nor against others,[12] who have repaired a vessel upon the security of the owner, so as to forbid a suit *in personam*. It has been held that the effect of such an injunction upon pending suits in a State court is to remove them into the Federal court of admiralty where, for the purposes of the Statute of Limitations, they are to be considered as continued.[13]

§ 600. Monition. Upon the payment into court of the value ascertained, or the giving of a stipulation therefor, or the transfer to a trustee, as the case may be, the court must issue a monition against all persons claiming damages for the loss on account of which limitation of liability is sought, citing them to appear and file their claims at or before a certain time to be named in the writ, not less than thirty days from the issuing of the same. Public notice of the monition must be given as in other cases, and notice must also be served through the post-office or otherwise as the court may direct; and on the application of the owners the court will make an order restraining the further prosecution of all suits against said owners in respect of any such claims.[1] Such an order is a bar to a subsequent suit

174. See *Re* P. Sanford Ross, 196 Fed. 921.

7 The Revere, 191 Fed. 253.

8 *Re* Oceanic Steam Navigation Co., C. C. A., 204 Fed. 260.

9 *Re* P. Sanford Ross, 196 Fed. 921.

10 The Titanic, C. C. A., 225 Fed. 747.

11 The Leonard Richards, 41 Fed. 818, 822.

12 Gokey v. Fort, 44 Fed. 364, 366.

13 Union Steamboat Co. v. Chaffin's Adm'rs, C. C. A., 204 Fed. 412.

§ 600. 1 Adm. Rule 51, Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 592, 27 L. ed. 1038, 1043.

on a claim in another court, although brought by an administrator who had not at that time been appointed.[2]

§ 601. Proof of claims in proceedings for limitation of liability. "Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same; and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled."[1]

In a proper case the claim may be amended.[2] The time to file a claim may be extended after the expiration of the term fixed in the monition, before,[3] but not, it has been held, after the final decree.[4] Upon confirmation of the commissioner's report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court, or the proceeds of the ship and freight, after payment of costs and expenses, are divided *pro rata* among the several claimants in proportion to the amount of their respective claims proved and confirmed, saving to all parties any priority to which they may be legally entitled.[5] Holders of maritime liens of the same class, which have not been forfeited, are entitled to a distribution in equal propor-

2 Seese's Adm'x v. Monongahela River Consol. C. & C. Co., 155 Fed. 507.

§ 601. 1 Adm. Rule 52. The form of the proof and proceedings upon the same is regulated by S. D. N. Y., Adm. Rule 58. See *supra*, § 589.

2 *Re* Great Lakes Dredge & Dock Co., 250 Fed. 916.

3 The City of Boston, 159 Fed. 257. See Union Steamboat Co. v. Chaffin's Adm'rs, C. C. A., 204 Fed. 412.

4 Dowdell v. United States District Court for Northern District of California, 139 Fed. 444.

5 Adm. Rule 55.

tons, irrespective of the date when they issued process or obtained decrees.[6]

In case of a collision, the fund is distributed among the parties thereby injured, without reference to liens previously accruing.[7] Where there has been a collision, the owner of a vessel which was not in fault can share *pro rata* in the fund with the other claimants;[8] but where such vessel was partly at fault, it will be awarded no share of the fund until the claims of passengers and owners of cargo have been satisfied.[9]

The owner of a boat sunk in a collision cannot prove, in addition to the value thereof, his loss of earnings under an unexpired charter for the season.[10] He can recover for her "freight pending."[11] Where the vessel has not been totally destroyed, he can prove all the loss due to the detention for repairs, which may include the profits of a charter, the terms of which has not yet begun.[12] Claims for salvage[13] for personal injuries and death claims are barred by the proceedings and may be proved where a liability exists.[14] The right of a claimant to invoke a foreign statute cannot be raised by a motion to direct the commissioner to make findings as to matters irrelevant under the law of the United States; but must be raised by proper plea.[15] Where without any apparent reason the commissioner's report was not filed for more than three years after notice of its completion had been given, interest was allowed on all claims from the date of such completion.[16] Laches in their part of the proceedings may be sufficient reason for the disallowance of

6 The Battler, 67 Fed. 251; *supra*, § 590.

7 The Maria and Elizabeth, 12 Fed. 627, 630.

8 Norwich & New York Transp. Co. v. Wright, 13 Wall. 104, 122, 20 L. ed. 585; The George W. Roby, C. C. A., 111 Fed. 601, 615.

9 The George W. Roby, C. C. A., 111 Fed. 601, 615.

10 The George W. Roby, C. C. A., 111 Fed. 601, 615.

11 Ibid.

12 The Umbria, 166 U. S. 404, 421, 17 Sup. Ct. 610, 41 L. ed. 1053; Mason v. Marine Ins. Co., C. C. A, 54 L.R.A. 700, 110 Fed. 452; The George W. Roby, C. C. A., 111 Fed. 601, 615.

13 The San Pedro, 223 U. S. 365, 56 L. ed. 473.

14 Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 592, 27 L. ed. 1038, 1043; Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, 32 L. ed. 1017; La Bourgogne, 210 U. S. 95, 52 L. ed. 973; *supra*, § 560.

15 The Titanic, 204 Fed. 298.

16 Union Steamboat Co. v. Chaffin's Adm'rs, C. C. A., 204 Fed. 412.

interest,[17] but not the appointment of receivers of the property of the owners because of insolvency when the insurers are the real parties in interest.[18]

§ 602. Answer in proceedings for the limitation of liability. The owner may contest his liability, or the liability of his vessel, on the merits, for the damage claimed, independently of the limitation provided by the statutes. In such case he must state in his libel or petition the facts and circumstances by reason of which he claims exemption from liability and give a bond for costs.[1] Any person claiming damages who has presented his claim to the commissioner pursuant to the monition may file an answer to the petition contesting the right of the petitioner either by an exemption or to a limitation of liability.[2] No answer can be filed until the claim has been filed.[3]

The answer must be full and explicit and distinct to each separate article and separate allegation.[4] If the party answering is uninformed in the premises, he may so state, and thus raise an issue without admission or denial; but a denial must be founded on information, and, possessing this the pleader must state the facts accordingly, either positively or upon information and belief.[5] Since the ship-owner has the burden of proving that the act of negligence of those in charge of his vessel, which caused the damage, was without his privity or knowledge, it has been said that a denial of such an allegation is unnecessary,[6] but it is the safer practice to include one. Where the claimant interposes such a denial with the intention of raising an issue of fact and offering evidence thereupon, he should specify the acts which he contends established the privity or knowledge of the petitioner.[7] In the absence of such an allega-

17 Ibid.

18 The Perry G. Walker, 216 Fed. 423.

§ 602. 1 Adm. Rule 53. The Benefactor, 103 U. S. 239, 26 L. ed. 351; Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 27 L. ed. 1038.

2 Adm. Rule 53.

3 The Pere Marquette 18, 203 Fed. 127; The Klotawah, 210 Fed. 677.

4 *Re* Davidson S. S. Co., 133 Fed. 411; The Pere Marquette 18, 203 Fed. 127. See § 575, *supra*.

5 *Re* Davidson S. S. Co., 133 Fed. 411, 414.

6 The Murrell, 188 Fed. 727.

7 Adm. Rule 53. The Murrell, 188 Fed. 727; The Pere Marquette 18, 203 Fed. 127, 130. The following averments have been held to be insufficient. That petitioner "breached and violated its duties

tion, the respondents are entitled to cross-examine any witnesses called by the petitioner to prove seaworthiness or want of privity or knowledge.[8] The question whether a subsequent statute, such as the Employers' Liability Act,[9] has removed a class of persons from the previous statutory right, must, it has been said, be raised by a plea in bar and is waived by an answer upon the merits.[10] The respondents have been allowed to raise affirmative issues between themselves upon questions of negligence.[11] Interrogatories may be annexed to the answer;[12] but it has been held that the petitioner may refuse to answer when the purpose of an interrogatory is to show that he violated a statute, which imposes a penalty.[13]

§ 603. Trial of proceedings for limitation of liability. On the issues thus joined, the parties proceed to trial. The liability of the petitioner may be denied in toto.[1] The court first tries the case on the merits, and if it finds the petitioner liable for the loss or damage claimed, then tries the question of the petitioner's right to a limitation under the statutes.[2] The issue of a vessel's liability to the claimants must be raised by separate issues, in conformity with the general requirements applicable

to'' claimant's intestate, which ''proximately and directly caused the loss of life,'' and that ''the sinking of the said steamer as aforesaid and the loss of life * * * proceeded directly and proximately from the fault and want of care of the petitioner, * * * and was due directly to causes within the privity and knowledge of petitioner and its said managing officers.'' That the steamer ''was insecure and unseaworthy and unequal to meet the perils of navigation, and was unsafely constructed so that water was likely to fill the hold of the said boat and cause it to sink, * * * and that the officers, agents, and servants * * * carelessly and negligently failed to inspect the same and to repair''; ''that the engines, appliances, machinery, and equipment'' were so ''defective and insufficient that the boat was caused to sink.'' The Pere Marquette 18, 203 Fed. 127, 132.

8 The John H. Starin, C. C. A., 191 Fed. 800.

9 35 St. at L. 65.

10 The Passaic, 190 Fed. 644, 649.

11 The Adah, 245 Fed. 378.

12 La Bourgogne, 104 Fed. 823, a most inequitable decision. See *supra*, § 581.

13 Ibid.

§ 603. 1 The O'Brien Bros., 252 Fed. 185.

2 *Re* Davidson S. S. Co., 133 Fed. 411. See La Bourgogne, 106 Fed. 232, 233. By Adm. Rule 57, S. D. N. Y., the issues are not heard until the publication of the monition, unless otherwise ordered.

to pleadings in admiralty.[3] The petitioner has the burden of proof to establish his lack of knowledge or privity;[4] but proof upon this point may be waived by the respondents.[5] He has the burden of proof to establish seaworthiness,[6] including overloading.[7] The proof, required in support of the petition, that any liability incurred with, or without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for individual claims sought to be proved. The right to contest this is reserved to the petitioner. This issue should be presented by appropriate pleadings conforming to the general practice in admiralty. The claimant is required to allege and prove a cause of action as in an original suit.[8] Where a decree dismissing a petition for the limitation of liability was reversed and the cause remanded with instructions to adjudicate the rights of the parties and to take such proceedings as were not inconsistent with the opinion of the court of review; it was held that this merely established the right to limitation and that the claimant must prove that she had a right to recover and to what extent.[9] Where the liability of the petitioner has been adjudicated in a previous suit, that cannot be contested in a proceeding for a limitation of the same.[10] A judgment upon a claim, entered before the proceedings are instituted, is *res adjudicata;*[11] but a verdict previously rendered is merely advisory;[12] although it has been said that it should be followed by the court, unless it appears to be excessive.[13]

3 *Re* Davidson S. S. Co., 133 Fed. 411, 412.

4 The Benjamin Noble, C. C. A., 244 Fed. 95, affirming 232 Fed. 382. This may be established by circumstantial evidence. The Annie Faxon, C. C. A., 75 Fed. 312, 317.

5 White v. Island Transportation Co., 233 U. S. 346.

6 The Benjamin Noble, C. C. A., 244 Fed. 95.

7 Ibid.

8 *Re* Davidson S. S. Co., 133 Fed. 411.

9 The Tommy, 168 Fed. 563.

10 The Maria and Elizabeth, 12 Fed. 627; Monongahela River Consol. Coal & Coke Co., C. C. A., 200 Fed. 711; *Re* Ross, C. C. A., 204 Fed. 248. See The Kaiser Wilhelm der Grosse, 175 Fed. 215; The Teddy, 226 Fed. 438, an adjudication which established privity; *supra*, § 595.

11 *Re* P. Sanford Ross, 196 Fed. 921, 923; aff'd C. C. A., *Re* Ross, 204 Fed. 248. See The Kaiser Wilhelm der Grosse, 175 Fed. 215.

12 The City of Boston, 159 Fed. 257, 182 Fed. 174; The Revere, 191 Fed. 253.

13 The City of Boston, 159 Fed. 257, 182 Fed. 174.

A motion to consolidate proceedings for the limitation of liability, begun independently by the owners of each of two vessels in collision, was denied,[14] but it was held that upon the appointment of a commissioner to take proofs of claims for damages in the proceedings, the owner of the other vessel should be brought in by notice, since he was liable to contribution if the claim was established and enforced.[15]

Where a District court has acquired jurisdiction of a proceeding for limitation of liability for a claim for damages on which the owner has sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel and her pending freight.[16]

A decree in admiralty in proceedings for limitation of liability adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages is reviewable on an appeal taken after the entry of a final decree on the commissioner's report although the time for taking an appeal from the first decree has expired, such decree being in its nature interlocutory.[17] It has been held that when the petition is denied the court must dismiss the proceeding leaving the claimants free to pursue their remedies elsewhere or in other proceedings and has no jurisdiction to proceed further.[18]

§ 604. Summary proceedings to collect sailors' wages. The Revised Statutes provide that "the master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall pay to every seaman his wages within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid on account a sum equal to one-fourth part of the balance

14 The City of Boston, 182 Fed. 171.

15 Ibid.

16 The John K. Gilkinson, 150 Fed. 454.

17 La Bourgogne, 210 U. S. 95, 52 Fed. 973, affirming on this point C. C. A., 139 Fed. 433. See § 695, *infra*.

18 Quinlan v. Pew, C. C. A., 56 Fed. 111; The Erie Lighter 108, 250 Fed. 490, 493.

due to him. Every master or owner who neglects or refuses to make payment in manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days; during which payment if delayed beyond the respective periods; which sum shall be recoverable as wages in any claim made before the court. But the section shall not apply to the masters or owners of any vessels the seamen on which are entitled to share in the profits of cruise or voyage."[1] "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of an attachment, incumbrance, or arrestment thereon; and no assignment or sale of wages, or of salvage, made prior to the accruing thereto, shall bind the party making the same, except such advantage securities as are authorized by this Title."[2] "No sum exceeding one dollar shall be recoverable from any seaman, by any one person, for any debt contracted during the time each seaman shall actually belong to any vessel, until the voyage for which such seaman engaged shall be ended."[3] "Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of this Title, or any dispute arises between the master and seaman touching wages, the district judge for the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then any judge, or justice of the peace, or any commissioner of a Circuit court, may summon the master of such vessel to appear before him, to show cause why process

§ 604. [1] U. S. R. S., § 4536. See The Ocean Spray, 4 Sawyer, 105; Covert v. The Brig Wexfords, 3 Fed. 577; Moore v. Neafle, 3 Fed. 650; The Minna, 11 Fed. 759 and note; The Ole Oleson, 20 Fed. 384; The Modoc, 20 Fed. 398; The Wanderer, 20 Fed. 655; Thorson v. Peterson, 14 Fed. 742; Boulton v. Moore, 14 Fed. 922; The Pacific, 18 Fed. 703; Marsland v. The Yosemite, 18 Fed. 331; Black v. The Louisiana, 2 Pet. Adm. 268. In S. D. N. Y., Adm. Rules 51 and 52 authorize summary proceedings in all cases where the matter in demand does not exceed fifty dollars and regulate the practice of the same.

[2] U. S. R. S., § 4536.

[3] U. S. R. S., § 4537.

should not issue against such vessel, her tackle, apparel and furniture, according to the course of admiralty courts, to answer for the wages."[4] "If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice or commissioner shall certify to the clerk of the District court that there is sufficient cause of complaint whereon to found admiralty process and thereupon the clerk of such court shall issue process against the vessel, and the suit shall be proceeded on in the court and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suit all the seamen having cause of complaint of the like kinds against the same vessel, shall be joined as complainants; and it shall be incumbent on the master to produce the contract and log book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master. But nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of ten days next after the delivery of her cargo or ballast."[5]

[4] U. S. R. S., § 4546.

[5] U. S. R. S., § 4547.

U. S. R. S., § 4555. "In any proceeding relating to the wages, claims, or discharge of a seaman, carried on before any shipping-commissioner, under the provisions of this Title, such shipping-commissioner may call upon the owner, or his agent, or upon the master, or any mate, or any other member of the crew, to produce any log-books, papers, or other documents in their possession or power, respectively, relating to any matter in question in such proceedings, and may call before him and examine any of such persons, being then at or near the place, on any such matter; and every owner, agent, master, mate, or other member of the crew who, when called upon by the shipping-commissioner, does not produce any such books, papers, or documents, if in his possession or power, or does not appear and give evidence, shall, unless he shows some reasonable cause for such default, be liable to a penalty of not more than one hundred dollars for each offense;

"This is an enabling statute; it affords a cumulative, not an

and, on application made by the shipping-commissioner, shall be further punished, in the discretion of the court, as in other cases of contempt of the process of the court." Comp. St., § 8344.

U. S. R. S., § 4550. "Every master shall, not less than forty-eight hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping-commissioner, to such shipping-commissioner, a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; and in default shall, for each offense, be liable to a penalty of not more than fifty dollars. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed, unless it is included in the account delivered; and the master shall, during the voyage, enter the various matters in respect to which such deductions are made, with the amounts of the respective deductions as they occur, in the official log-book, and shall, if required, produce such book at the time of the payment of wages, and, also, upon the hearing, before any competent authority, of any complaint or question relating to such payment." Comp. St., § 8339.

U. S. R. S., § 4547, amended, Dec. 21, 1898, ch. 28, § 6, 30 at L. 756. "If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice or commissioner shall certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of such court shall issue process against the vessel. In all cases where the matter in demand does not exceed one hundred dollars the return day of the monition or citation shall be the first day of a stated or special session of court next succeeding the third day after the service of the monition, or citation, and on the return of process in open court, duly served, either party may proceed therein to proofs and hearing without other notice, and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suits all the seamen having cause of complaint of the like kind against the same vessel may be joined as complainants, and it shall be incumbent on the master to produce the contract and log book, if required to ascertain any matter in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the burden of proof of the contrary shall be on the master. But nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the day when such wages are due, in accordance with section forty-five

exclusive remedy; it is permissive, not imperative."[6] The seamen may, without pursuing the remedy authorized by these statutes, libel the vessel at once.[7] A libel will not necessarily be dismissed because prematurely brought, if substantial justice can be done under it.[8] It is doubtful whether a delay of ten days can be exacted where a seaman is absolutely discharged.[9] A dispute does not arise within the statute so as to authorize a mariner to sue before the ten days, when he has demanded his wages, and the owner has refused to pay until the expiration of the ten days.[10] Where a minor, who contracted to serve on his own account, has no parent or guardian to receive his wages, courts of admiralty will permit him to sue in his own name.[11] Matters in bar may be set up in the answer and urged at the final hearing, although not presented in the preliminary hearing, before the magistrate, upon the summons. That hearing is not intended to preclude the owner from interposing a substantial defense upon the merits, which he has not set up on such preliminary hearing. The silence of the defendant then is no implied waiver; nor is the decision of the magistrate, as to the sufficiency of the cause shown conclusive.[12] Sailors are competent witnesses for each other.[13] The execution, by the master, of a bill of sale of the vessel, to a claimant, does not render him

hundred and twenty-nine of the Revised Statutes." Comp. St., § 8336.

6 The Shelbourne, 30 Fed. 510. See also The Waverly, 7 Bissell, 465, Fed. Cas. No. 17,301; Murray v. Ferryboat, 2 Fed. 86; The Edwin Post, 6 Fed. 206; The Frank C. Barker, 19 Fed. 332; The M. W. Wright, 1 Brown Adm. 290.

7 The Elihu Thompson, 139 Fed. 89.

8 The L. B. Snow, 15 Fed. 282. See McCarty v. The City of New Bedford, 4 Fed. 818.

9 The Cypress, 1 Blatchf. & H. 83, Fed. Cas. No. 3,530; The Warrington, 1 Blatchf. & H. 335, Fed. Cas. No. 17,208; Collins v. Nickerson, 1 Sprague, 126, Fed. Cas. No. 3,016.

10 The Commerce, 1 Sprague 34, Fed. Cas. No. 3,054.

11 The David Faust, 1 Ben. 183. See Gifford v. Kollock, 3 Ware 45, Fed. Cas. No. 5,409; McGinnis v. The Grank Turk, 2 Pittsb. Rep. 326, Fed. Cas. No. 8,800; Wicks v. Ellis, Abb. Adm. 444, Fed. Cas. No. 17,614; Coffin v. Shaw, 21 Law Rep. 463, Fed. Cas. No. 2,951; Lovrein v. Thompson, 1 Sprague, 355, Fed. Cas. No. 8,557; Luscom v. Osgood, 1 Sprague, 82, Fed. Cas. No. 8,608.

12 The Warrington, 1 Blatchf. & H. 335, Fed. Cas. No. 17,208.

13 The Cypress, 1 Blatchf. & H. 83, Fed. Cas. No. 3,530; The Susan, 3 Ware, 222, Fed. Cas. No. 13,631; The Cabot, 1 Abb. Adm. 150, Fed. Cas. No. 2,277; Walsh v. The Louisiana, 4 Fed. 751.

an incompetent witness for the libelant in a suit *in rem* for wages.[14] In the absence of shipping articles, the testimony of the master is sufficient to establish the time of each seaman's service and the amount of wages due.[15] The discharge of the seamen may be established by circumstantial evidence.[16] The fact that the master or owner delays unloading the vessel beyond a reasonable time may be regarded as equivalent to a discharge.[17] The burden to show a discharge before the unloading is upon the seamen, and the oath of a seaman alone was held not to be sufficient to establish it.[18] A receipt, purporting to be "in full of all debts, dues and demands," is not conclusive upon the sailor; since it may be shown that it was given under duress, fraud or mistake.[19] The owner cannot insist that the mariner sign a receipt in full as a condition for the payment of the wages.[20] It is sufficient, to show a reasonable ground of belief that the vessel is about to proceed to sea within ten days.[21] The respondent cannot avoid the payment of costs by settling with the libelant, without the knowledge of the latter's proctors.[22] A set-off of indebtedness for a house was not allowed.[23] It has been held that jurisdiction under the statute may properly be exercised by a United States Commissioner.[24] It is doubtful whether a District court has jurisdiction of an appeal from such proceedings before a commissioner.[25] It has been held that these sections do not override plain treaty stipulations with a foreign power.[26] When the suit is continued, all the seamen must be joined as complainants.[27] "The right of a seaman to

14 The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

15 The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

16 The David Faust, 1 Ben. 183.

17 The Eagle, Olc. 232, Fed. Cas. No. 4,233.

18 The Eagle, Olc. 232, Fed. Cas. No. 4,233.

19 Jackson v. White, 1 Peters Adm. 179, Fed. Cas. No. 7,151; Whiteman v. The Neptune, 1 Peters Adm. 180, Fed. Cas. No. 17,569.

20 The Commerce, 1 Sprague, 34, Fed. Cas. No. 3,054.

21 The Trial, 1 Blatchf. & H. 94, Fed. Cas. No. 14,170.

22 The Ontonagon, 19 Fed. 800.

23 The Two Brothers, 4 Fed. 158.

24 The Jackson Borden, 6 Fed. 301.

25 The Eagle, Olc. 232, Fed. Cas. No. 4,233.

26 The Salomoni, 29 Fed. 534. See § 560, *supra*.

27 U. S. R. S., § 4547; The Merchant, Abb. Adm. 1, Fed. Cas. No. 9,434; Oliver v. Alexander, 6 Peters 143, 8 L. ed. 349.

his wages is perfect upon the completion of his service, and before the statutes if payment was refused, he could have instantly commenced a suit *in personam* against the owners or master, or *in rem* against the vessel or freight. The statute affects only one of these remedies, viz., against the vessel. It does not touch suits *in personam* or against the freight. By the statute, as a general rule, no proceeding can be had against the vessel until ten days after the right to wages has accrued. But there are three events in which such proceedings may be had within the ten days; viz., if a dispute has arisen, if the vessel has departed from her port of discharge or if she is about to proceed to sea. In the last two cases the statute is inoperative and the right to process is the same as if it had never been passed. The expiration of ten days, and a dispute having arisen, are by the act made equivalent to each other; and upon the happening of either the new proceeding by summons to the master is authorized, but not required. The act is in this respect permissive, not imperative. The judge may order process against the vessel without previous summons to the master. In the absence of the judge, the clerk may issue process according to rules prescribed or instructions given by the judge." [28]

§ 605. Proceedings in prize causes. The District court have original and exclusive jurisdiction in prize causes.[1] The Prize Act, passed by Congress June 30, 1864, now embodied in Title LIV. of the Revised Statutes,[2] authorizes the District courts to appoint three prize-commissioners in each district, one of whom must be a retired naval officer.[3] It is their duty to receive from the captors the documents found on board the captured ship, or having reference to the captured property, and return them to the court with the affidavit of the prize-master that they are in the same condition as delivered to him; also to examine the prize property as soon as it comes within the district, secure it by seals, and report to the court whether any part of it is in a condition requiring immediate sale, and anything relating to its condition, custody, or disposal which may require action by the court. They are also required to take the depositions of the persons captured with, or who claim, the captured property,

[28] The William Jarvis, 1 Sprague, 485, 498.

§ 605. [1] U. S. R. S., § 563, cl. 8.

[2] U. S. R. S., §§ 4613-4652.

[3] U. S. R. S., § 4621.

upon standing interrogatories prescribed by the court.[4] These depositions are returned by the commissioner to the court, and, with the documentary evidence obtained from the captured property, constitute the only evidence on which the cause is heard in the first instance. If upon this evidence the case is doubtful, the court may require further proofs to be taken; but in no case are witnesses examined orally before the court.[5] At any time after the property is brought within the jurisdiction of the court a libel may be filed for its condemnation.[6] The proceeding must be *in rem*. Where the capture has been made by a public vessel of the United States the libel is filed in the name of the United States by the district attorney.[7] Where the capture is made by a privateer the proceeding is begun in the name of the captors by their own proctors. Upon the filing of the libel a monition will issue, which, in case the captured property is in port, is served by the marshal in the same way as in proceedings for forfeiture under the revenue laws. If the property is not in port, as, for example, where it has been carried into a foreign port and there delivered upon bail by the captors, the monition must be served on the parties in interest, their agent, or proctor, if known to reside in the district; otherwise by publication daily in one of the newspapers of the port for ten successive days preceding the return.[8] Any person interested in

[4] U. S. R. S., § 4622.

[5] The Dos Hermanos, 2 Wheat. 76, 4 L. ed. 189; The Sir William Peel, 5 Wall. 517, 18 L. ed. 696; The Ambrose Light, 25 Fed. 408. U. S. R. S., § 4654. "Whenever the court shall allow fees to any witness in a prize-cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the marshal, and shall be repaid to him from any money deposited to the order of the court in the cause; and any amount not so repaid the marshal shall be allowed as witness-fees paid by him in cases in which the United States is a party." Pierce's Code, § 9613.

[6] U. S. R. S., § 4618.

[7] The Palmyra, 12 Wheat. 1, 6 L. ed. 531; Jecker v. Montgomery, 18 How. 110, 124, 15 L. ed. 311, 317.

[8] S. D. N. Y. Prize Rules, Rule 44. U. S. R. S., § 4625. "The marshal shall be allowed his actual and necessary expenses for the custody, care, preservation, insurance, sale, or other disposal of the prize-property, and for executing any order of the court respecting the same, and shall have a commission of one-quarter of one per centum on vessels, and of one-half of one per

the property who wishes to contest the capture or procure restitution of the property captured, must file a claim thereto under

centum on all other prize-property, calculated on the gross proceeds of each sale; and if, after he has had any prize-property in his custody, and has actually performed labor and incurred responsibility for the care and preservation thereof, the same is taken by the United States for its own use without a sale, or if it is delivered on stipulation to the claimants, he shall, in case the same is condemned, be entitled to one-half the above commissions on the amount deposited by the United States to the order of the courts, or collected upon the stipulation. No charges of the marshal for expenses or disbursement shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated." Comp. St., § 8421. See *supra*, § 418. "§ 4623. The marshal shall safely keep all prize property under warrant from the court, and shall report to the court and cargo or other property that he thinks required to be unladen and stored, or to be sold. He shall insure prize-property, if in his judgment it is for the interest of all concerned. He shall keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize-commissioners or the court. If a sale of property is ordered, he shall sell the same in the manner required by the court, and collect the purchase-money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause; and each marshal shall forward to the Secretary of the Navy, whenever and as often as the Secretary of the Navy may require it, a full statement of the condition of each prize and of the disposal made thereof." Comp. St., § 8402. § 4624. "When ever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if, taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize-property taken for or appropriated to the use of the Government, the Department for whose use it is taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause." Comp. St., § 8403. "§ 4625. If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of

oath. If on the return-day no claim is interposed, a default will be entered, and the property condemned. Suspension of proceedings for a year and a day after the default is allowed only where it is doubtful, upon the evidence, whether the captured property belongs to the enemy or is neutral.[9] Prize property will not be delivered to the claimant on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property, and has given the captors leave to take further proofs, or where the claimant satisfies the court that the property has a peculiar and intrinsic value to him, independent of its market value.

In such a case the court may deliver the property on stipulation or deposit of its value, if satisfied that the rights and interests of the United States and the captors, or of other claimants, will not be prejudiced thereby; but a satisfactory appraisement must first be made, and an opportunity given to the district attorney and the naval prize-commissioner to be heard as to the appointment of appraisers.[10] By consent of the captors and claimants, or upon proof that the cargo is perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same are disproportionate to its value, the court will order a sale by the marshal, the proceeds of which must be

anything taken or appropriated for the use of the United States, shall be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.'' Comp. St., § 8404.

9 The Julia, 2 Spra. 164; The Talcon, Blatchf. Prize Cas. 52.

10 U. S. R. S., § 4626.

deposited with the assistant treasurer nearest to the place of sale, subject to the order of the court.[11]

The decree of the court is either for condemnation or for acquittal and restitution. In case of condemnation the court will order testimony to be taken to show who are entitled to share in the distribution, and upon such testimony will make the final decree. In case of acquittal the court will decree delivery of the property or its proceeds, if it has been sold to the claim-

[11] U. S. R. S., § 4627; The Pioneer, Blatchf. Prize Cas. 61; The Sarah and Caroline, id. 123. U. S. R. S., § 4628. "Upon a sale of any prize-property by order of the court, the Secretary of the Navy shall employ an auctioneer of known skill in the branch of business to which any sale pertains, to make the sale, but the sale shall be conducted under the supervision of the marshal, and the collecting and depositing of the gross proceeds shall be by the auctioneer or his agent. Before any sale the marshal shall cause full catalogues and schedules to be prepared and circulated, and a copy of each shall be returned by the marshal to the court in each cause. The marshal shall cause all sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and he shall, at least five days before the sale, serve notice thereof upon the naval prize-commissioner, and the goods shall be open to inspection at least three days before the sale." Comp. St., § 8507. "§ 4629. Whenever it appears to the court, in the case of any prize-property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same, with proper orders as to the time and manner of selling the same. It shall be the duty of the marshal so to transfer the property, and keep and sell the same in like manner as if the property were in his own district; and he shall deposit the gross proceeds of the sale, subject to the treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending. The necessary expenses attending the insuring, transferring, receiving, keeping, and selling the property shall be a charge upon it and upon the proceeds thereof; and whenever any such expense is paid in advance by the marshal, and he is not repaid from the proceeds, any amount not so repaid shall be allowed to him, as in case of expenses incurred in suits in which the United States is a party. The Secretary of the Navy may, in like manner, either by a general regulation or by special direction in any cause, require a marshal to transfer any prize-property from the district in which the judicial proceedings are pending, to any other district for sale; and the same proceedings shall be had as if such transfer had been made by order of the court." Comp. St., § 8408.

ant, and may award damages against the captors, which will be assessed by commissioners appointed on motion.[12] Where there was probable cause for the seizure, damages are denied.[13] An appeal lies from the final decree of the District court direct to the Supreme Court, irrespective of the amount involved.[14] It must be taken within thirty days after the rendering of the decree.[15]

§ 606. Proceedings on seizures. The Judicial Code provides that the District courts of the United States shall have original jurisdiction "of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States."[1]

Proceedings for the condemnation and sale of goods are *in rem*. Where the seizure is made on land, the court sits as a court of law with a jury;[2] where the seizure is made on water, the court sits as a court of admiralty or as a court with a similar practice. In navigation, customs and revenue cases, it is the safer practice to seize through the marshal the property before

12 The Anna Maria, 2 Wheat. 327, 4 L. ed. 252; The Ambrose Light, 25 Fed. 408, 447. As to costs, see The Olinde Rodrigues, 174 U. S. 510, 43 L. ed. 1065; The Buena Ventura, 175 U. S. 384, 395, 44 L. ed. 206, 211.

13 The Thompson, 3 Wall. 155, 18 L. ed. 55.

14 26 St. at L. 827, § 5; The Paquete Habana, 175 U. S. 677, 44 L. ed. 320.

15 U. S. R. S., § 1009; The Nuestra Senora de Regla, 17 Wall. 29, 21 L. ed. 596. U. S. R. S., § 4636. "The Supreme Court may, if, in its judgment, the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize cases, or allow a prize appeal therein, if it appears that any notice of appeal or of intention to appeal was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein." Comp. St., § 8413. § 4637. "Notwithstanding any appeal to Supreme Court, the district court may make and execute all necessary orders for the custody and disposal of the prize-property; and in case of appeal from a decree of condemnation, may still proceed to make a decree of distribution so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein." Comp. St., § 8414.

§ 606. 1 36 St. at L. 1087, § 24. A statute is constitutional which authorizes the forfeiture of an automobile used in the unlawful transportation of intoxicating liquors. Grant Co. v. U. S., Feb'y 15, 1921, 41 Sup. Ct. 189.

2 U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

the proceedings for the forfeiture thereof are instituted.[3] Where a statute authorizes proceedings both by information or indictment and by libel for seizure, the latter may be instituted before the institution or determination of the former.[4] Proceedings in admiralty for a breach of the revenue, navigation, or other laws of the United States must be brought in the name of the United States.[5] Proceedings for the enforcement of the neutrality laws are under the control of the United States, and one instituted against a vessel seized upon the complaint of an informer cannot be continued if the Government disavows and declines to ratify the seizure.[6]

Proceedings are begun by filing a libel of information in the district in which the property is seized.[7] "All informations and

[3] The Brig Ann, 9 Cranch, 289, 3 L. ed. 734, goods imported in violation of the embargo; Golston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381; The Silver Spring, Fed. Cas. No. 12,858; The Washington, Fed. Cas. No. 17,222; The Fideliter, Fed. Cas. No. 4,755; The Tug May, 6 Biss. 243, Fed. Cas. No. 9,330; The Idaho, 29 Fed. 187, 191; The Josefa Segunda, 10 Wheat. 312, 6 L. ed. 329; Dobbin's Distillery v. U. S., 96 U. S. 395, 24 L. ed. 637; U. S. v. Larkin, C. C. A., 153 Fed. 113, 82 C. C. A. 247; Pelham v. Rose, 9 Wall. 103, 19 L. ed. 602; The Confiscation Cases, 20 Wall. 92, 22 L. ed. 320; U. S. v. Winchester, 99 U. S. 372, 25 L. ed. 479; The Sarah, 8 Wheat. 391, 5 L. ed. 644. This is not the case in proceedings under the Pure Food & Drugs Act. U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405; § 607, *infra*.

[4] The Scow "6-S," 250 U. S. 269, 39 Sup. Ct. 452, 63 L. ed. —; The O. L. Halenbeck, 260 Fed. 554.

[5] U. S. R. S., § 819.

[6] Olivier v. Hyland, C. C. A., 186 Fed. 843. See Act of March 4, 1909, ch. 321, 35 St. at L. 1090 (U. S. Comp. St. Supp. 1909, p. 1393).

[7] Adm. Rule 22. Adm. Rule 59, S. D. N. Y.: "Proceedings *in rem* for a forfeiture, and *in personam* for an offense, fine, penalty or debt, may be joined in one information when having relation to the same transaction." Ibid., Rule 60: "On filing an information *in personam* or *in rem*, the Clerk shall issue process thereon, corresponding as nearly as may be with that employed in the instance Court of Admiralty in similar cases. But process *in personam* may be, in the first instance, a *capias* when allowed, or in attachment against goods to compel an appearance, or a simple monition, at the election of the complainant." Ibid., Rule 61: "No person shall be arrested and held to bail on an information *in personam* without the mandate of a Judge, except where such bail is required or authorized by statute. Upon granting the mandate aforesaid, the Judge shall fix the amount of bail, which may be given before the Clerk." Ibid., Rule 62: "In all informations, whether *in*

libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States,[8] and the district within which the property is brought and where it then is.[9] The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture,[10] and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed." [11]

rem or *in personam*, the practice and procedure of Admiralty shall apply in respect of process, pleading (and exceptions thereto), delivery of property on stipulation, sale of the same if perishable and intervention and appearance of claimants." Ibid., Rule 63: "A special traverse of each cause of forfeiture alleged in the information shall not be required, but the general issue may be pleaded thus: 'That the several goods in the information mentioned did not, nor did any part thereof, become forfeited in manner and form as in the information in that behalf alleged.'" U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

8 Adm. Rule 21: Coffey v. U. S., 116 U. S. 427, 29 L. ed. 681; U. S. v. One Raft, 13 Fed. 796. In U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405, it was held that former rule 22 did not apply to cases under the Pure Food & Drugs' Act of June 30, 1906, ch. 3915, § 10, 34 St. at L. 771, Comp. St., Supp. 1909, p. 1193; The Scow "6-S," 250 U. S. 269; U. S. v. The O. L. Halenbeck, C. C. A., 260 Fed. 554.

9 Adm. Rule 21.

10 Adm. Rule 21.

11 Adm. Rule 21: Daigle v. United States, C. C. A., 237 Fed. 159; Coffey v. U. S., 116 U. S. 427, 435, 29 L. ed. 681, 684. Under the Act of June 14, 1906, ch. 3299, 34 St. at L. 263 (U. S. Comp. St. Supp. 1909, p. 1080), it has been held that the prosecution and conviction of the crew is not an essential prerequisite to the enforcement of the right of the Government against the offending vessel, but that in the same proceeding they can be tried and fines imposed against them and the vessel, which will be a lien against the latter. The Tokai Maru, C. C. A., 190 Fed. 450. A similar ruling has been made under the Act of June 29, 1888, ch. 496, § 4, 25 St. at L. 609, Comp. St., § 9933, concerning illegal dumping in New York Harbor. The "6-S," 247 Fed. 348. A libel for the forfeiture of imports, which charges fraudulent act in a foreign country by the consignor need not allege knowledge or com-

It is safer practice to include in the information, a statement of the place where the violations of the statute were com-

plicity by the consignee. U. S. v. Four Packages of Cut Diamonds, 247 Fed. 354. Such a libel sets forth a sufficient cause for the forfeiture when it alleges that the imports were smuggled and clandestinely brought into the United States with intent to defraud the revenue and without paying an accounting for the duty thereupon. U. S. v. One Blue Taffeta Evening Coat, 237 Fed. 70. It was held that a count was defective which charged that the goods were imported without the production of a duly certified invoice and without an affidavit excusing the failure to produce such an invoice and a sworn statement of the costs. Ibid. It has been said that different counts in the same libel may charge contradictory versions of the same transaction. Such as a count charging that certain goods were part of the claimant's damage combined with other, charging that part of such goods belonged to others. Ibid. The word "mentioned" is an allegation of facts and not a conclusion of law. Ibid. A libel was held to be insufficient when it charged that false oral statements were made to the examiner, without pleading the article of the Customs Regulation and the designation of the merchandise by the collector which showed that it was a function of the examiner to act in relation to the merchandise to which the statements related. U. S. v. One Blue Taffeta Evening Coat, 241 Fed. 926. A libel of the forfeiture of goods because of statements concerning some of them should allege that they were all packed together. Ibid. There can be no exception for a libel for the forfeiture of goods which is insufficient as to part of them but good as to the rest. Ibid. Nor, where the goods were part of a passenger's baggage because of a failure to give over his baggage declaration. Ibid. It is doubtful whether a summary proceeding for an investigation as to the facts which might justify a remission of the forfeiture (U. S. R. S., § 5292, as amended Feb'y 27, 1877, ch. 69, § 1, 19 St. at L. 252, Comp. St., § 10130; Act of June 22, 1874, ch. 391, § 17, 18 St. at L. 189, Comp. St., § 10132) can be maintained before a forfeiture has been adjudicated or its incurrence has been omitted. U. S. v. Morris, 10 Wheat., 23 U. S. 295, 6 L. ed. 314; The Princess, Fed. Cas. No. 11,431; U. S. v. 150 7/12 Dozen Long Gloves, 168 Fed. 1010; United States v. One Certain Six-Passenger, Six-Cylinder, Forty-eight Horse Power Locomobile, 242 Fed. 998. It has been held under the Act of 1874 this may be done. *Re* Beloochistan Rug Weaving Co., 244 Fed. 283. For an information under the insecticide Act of April 26th, 1910, ch. 191, 36 St. at L. 331, which is held to be sufficient and not bad for multifariousness or duplicity although based upon a single set of affidavits containing allegations afterwards distributed among separate counts. See U. S. v. James A. Blanchard Co., 215 Fed. 258. In a libel under the Pure Food and Drugs' Act, a failure to allege the date of the shipment is not fatal. U. S. v. Two Barrels of Desiccated Eggs,

mitted,[12] and to specify the statute.[13] It is unnecessary to state specifically that acts or omissions which are described in the language of the statute were done or omitted "contrary to the form of the statute in such case made and provided."[14]

Upon the filing of the information a monition will issue, and the cause will proceed as in other suits in admiralty. Notice of the seizure and of the substance of the information must be published for fourteen days in a newspaper published near the place of seizure, and must also be posted for the same period at or near the place of trial.[15] Any party charged in the libel with fraud has the right to be heard;[16] and if no opportunity for a

185 Fed. 302, *infra*, § 607. An information for the forfeiture of an oleomargarine plant, under Act Aug. 2, 1886, ch. 840, § 17, 24 Stat. 212 [U. S. Comp. St., 1901, p. 2234], is sufficient, when it charges in the language of the statute that the claimant was engaged in the business of manufacturing olemargarine, and defrauded and attempted to defraud the United States of the tax on the olemargarine produced by it, or a part thereof. U. S. v. Manufacturing Apparatus, etc., of N. J. Melting & Churning Co., 141 Fed. 475. For libels held to be insufficient, see U. S. v. The Haytian Republic, 57 Fed. 508; s. c., C. C. A., 59 Fed. 476; The Idaho, 29 Fed. 187. It has been held under the National Prohibition Act of October 28, 1920, — St. at L. —, § 26, that a vehicle used in the illegal transportation of intoxicating liquor cannot be forfeited until after the conviction of the man in charge. U. S. v. Hydes, 267 Fed. 470. The compromise of a prosecution for a violation of the Revenue Law is a defense to a proceeding to forfeit the property used in such a violation. U. S. v. One Five-Passenger Ford Automobile, 241 Fed. 263.

12 U. S. v. One Raft, 13 Fed. 796.

13 Adm. Rule 21.

14 Adm. Rule 21.

15 U. S. R. S., § 923. Where goods, seized by a collector for violation of the internal revenue law, under U. S. R. S., § 3453 [U. S. Comp. St. 1901, p. 2278], are attached while in his hands by the marshal on process issued in proceedings for their forfeiture, and a bond for their release is thereafter given by the claimant under section 3459 [U. S. Comp. St. 1901, p. 2281], the proviso to said section, requiring notice of the pendency of the proceedings in court to be given to the parties executing the bond, is inapplicable; such notice being intended to take the place of an actual seizure by the marshal where the goods have been returned to the claimant under the bond before such seizure has been made, and unnecessary where the attachment has been made, and the proceeding *in rem* is pending when the bond is given. U. S. v. 59,650 Cigars, C. C. A., 146 Fed. 130, affirming 138 Fed. 166; U. S. R. S., § 939.

16 U. S. v. Two Bales of Rugs, 167 Fed. 689.

hearing is given him, he is entitled to a new trial, when there is no laches upon his part.[17] On a libel by the United States against a distillery for illegal operation, the Government is only required to establish its case by a preponderance of the evidence, and not by proof beyond a reasonable doubt.[18]

By the Revised Statutes, "In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: Provided, That probable cause is shown for such prosecution, to be judged of by the court."[19]

"Whenever seizure is made of any distilled spirits found elsewhere than in a distillery or distillery warehouse, or other warehouse for distilled spirits authorized by law, or than in the store or place of business of a rectifier, or of a wholesale liquor-dealer, or than in transit from any one of said places; or of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which have not been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or of the store-keeper, wholesale dealer, or rectifier, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said spirits, has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with."[20]

Where a default is entered it is not necessary for the government to take proofs; a decree of condemnation and sale may be entered forthwith. Fifteen days' notice of sale is required.[21] Property seized may be bonded by the claimant on notice to the collector of customs and the United States attorney.[22] When judgment is rendered for the claimant, but the court certifies

17 Ibid.

18 Pocahontas Distilling Co. v. U. S., C. C. A., 218 Fed. 782.

19 U. S. R. S., § 909; Comp. St., § 2532.

20 U. S. R. S., § 3333; Comp. St., § 6130.

21 U. S. R. S., § 939.

22 U. S. R. S., §§ 938 and 940.

that there was reasonable cause of seizure, the claimant is not entitled to costs.[23]

In a proper case, a libel of review may be filed by the owner of the property forfeited when the proceeds of the sale are still in the registry of the court, and the forfeiture was ordered through a mistake of facts.[24]

§ 607. Seizures under Pure Food and Drugs Act. The Pure Food and Drugs Act provides: "That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction, contrary to the provisions of this Act or the laws of that jurisdiction: Provided, however, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court

[23] U. S. R. S., § 970. The costs which accrued after the compromise of a criminal prosecution were charged against the claimant upon the consequent dismissal of the libel for the forfeiture of the property used in connection therewith when he had failed to file a supplemental answer immediately after such compromise and to procure a speedy determination of the questions thereby raised. U. S. v. One Five-Passenger Ford Automobile, 263 Fed. 241.

[24] U. S. v. One Case Chemical Compound, 203 Fed. 63.

may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."[1] Other sections are previously quoted.[2]

It is not essential to the forfeiture of the goods that their owner or shipper should have been guilty of a misdemeanor under a previous section of the act.[3] It has been said: "Such articles are liable to seizure and forfeiture under section 10: (1) When in the course of being transported from State to State; (2) when, having been transported, they remain (a) unloaded, or (b) unsold, or (c) in the original packages."[4] The opening of the packages for the removal of samples in order to test their strength, quality and purity, does not constitute a breaking of the original packages within the meaning of the act.[5] An article is not subject to forfeiture unless, at the time of its seizure, it is in the condition forbidden by the statute; although it may, during a previous period of its transportation between two States, have been adulterated or misbranded.[6]

When a district attorney acts upon evidence furnished by a State health officer[7] and when he institutes the proceedings upon his own initiative,[8] no investigation or hearing by the Department is necessary. No seizure by the marshal is essential to the institution of the proceedings for a forfeiture.[9] The marshal has no authority to make a seizure prior to the com-

§ 607. [1] Act of June 30, 1906, 34 St. at L. 768, § 10, Pierce Code, § 4138.

[2] *Supra*, § 506m.

[3] U. S. v. Five Boxes of Asafoetida, 181 Fed. 561, 564.

[4] Ibid.

[5] Ibid., 181 Fed. 561, 567.

[6] Ibid.

[7] U. S. v. Morgan, 222 U. S. 274; U. S. v. Twenty Cases of Grape Juice, C. C. A., 189 Fed. 331, 334.

[8] U. S. v. Morgan, 222 U. S. 274, 56 L. ed. 198; reversing 181 Fed. 587; overruling U. S. v. Twenty Cases of Grape Juice, C. C. A., 189 Fed. 331; U. S. v. Nine Barrels of Olives, 179 Fed. 983. See, also, U. S. v. Fifty Barrels of Whiskey, 165 Fed. 966; U. S. v. Sixty-five Casks Liquid Extracts, 170 Fed. 449, aff'd C. C. A., 175 Fed. 1022, 99 C. C. A. 661; U. S. v. Seventy-Five Boxes of Alleged Pepper, 198 Fed. 934.

[9] U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

mencement of the proceedings.[10] The statute does not authorize a seizure by a private person at any time.[11]

The proceedings are purely statutory and are not within the admiralty jurisdiction of the court although the practice in the court of first instance,[12] except at the trial,[13] which must be by jury,[14] is analogous to the admiralty practice.[15] Criminal proceedings may be instituted by an information, instead of by an indictment.[16]

The libel need not allege any previous examination by the Department.[17] It must specifically charge that the property had been transported from one State, Territory, District, or insular possession to another for sale.[18] In case of misbranding, it must set forth the facts inconsistent with the brand used,[19] and, in the case of adulteration, the nature of the same.[20] It is not fatally defective for a failure to allege the date of the shipment.[21] A libel is not defective for failure to charge that

10 U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302; U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

11 U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

12 *Supra*, § 606.

13 *Supra*, § 582.

14 U. S. v. George Spraul & Co., C. C. A., 185 Fed. 405.

15 Four Hundred and Forty-three Cans of Frozen Egg Product v. U. S., 226 U. S. 172, 57 L. ed. —; U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302. In such case the only pleas allowable are those in abatement, in bar, or the general issue. U. S. v. J. L. Hopkins & Co., 228 Fed. 173.

16 U. S. v. J. Lindsay Wells Co., 186 Fed. 248. Leave to file an information was denied in a doubtful case where the accused had had no previous notice of the decision of the Department and no opportunity to change their labels accordingly. U. S. v. Schurman, 177 Fed. 581. (a) As to judicial notice, see *supra*, § 329a. As to indictment, see *supra*, § 506m.

17 U. S. v. Morgan, 181 Fed. 587, aff'd 222 U. S. 274, 56 L. ed. 198, an indictment.

18 U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

19 U. S. v. Six Hundred and Fifty Cases of Tomato Catsup, 166 Fed 773; U. S. v. St. Louis Coffee & Spice Mills, 189 Fed. 191. In a charge of misbranding tomato catsup, it is insufficient to aver "that said catsup is made in part from tomato pulp screened from peelings and cores, as the offal of tomato canning factories, and not from choice ripe tomatoes, granulated sugar, and selected high grade spices, grain vinegar, as stated in said labels." U. S. v. Six Hundred and Fifty Cases of Tomato Catsup, 166 Fed. 773.

20 U. S. v. St. Louis Coffee & Spice Mills, 189 Fed. 191, an information.

21 U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

articles of food have been transported for sale.[22] A want of a sufficient verification is no ground for exception or demurrer to the substance of the libel.[23]

The proceedings can be reviewed only by writ of error and not by appeal.[24]

No injunction will be granted against an act in pursuance of the statute.[25]

22 U. S. v. 300 Cans of Frozen Eggs, C. C. A., 189 Fed. 351, holding that a consignment by the shipper to himself is forbidden by the act.

23 U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302, 307.

24 Four Hundred and Forty-three Cans of Frozen Egg Product v. U. S., 226 U. S. 172; U. S. v. Hudson Mfg. Co., C. C. A., 200 Fed. 956, where the libel was dismissed after a trial without a jury.

25 Shawnee Milling Co. v. Temple, 179 Fed. 517.

CHAPTER XXXIV.

BANKRUPTCY.

§ 608. Courts of bankruptcy and their jurisdiction. Original jurisdiction in bankruptcy is vested in the District courts of the United States in the several States,[1] the Supreme Court of the District of Columbia,[2] the District courts of the several Territories,[3] The District Court, in the District of Alaska,[4] The District Court of Porto Rico,[5] and The District Court of Hawaii;[6] all of which are courts of bankruptcy.[7] The Bankruptcy Act expressly invests them, "within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States,[8] but have property within their jurisdiction,[9] or who

§ 608. 1 30 St. at L. 544, 545, § 2.

2 Ibid.

3 Ibid.

4 Ibid. Formerly also the United States Court of the Indian Territory, Ibid.; now a part of the district of Oklahoma, 34 St. at L. 267, 276, § 16.

5 31 St. at L. 84.

6 31 St. at L. 158.

7 30 St. at L. 544, 545, § 2.

8 It has been held that the court has jurisdiction of proceedings for an adjudication of involuntary bankruptcy against an alien who has property within the district, provided that there are creditors who are residents of the United States. *Re* Berthoud, 231 Fed. 529.

9 It was held that a deposit in a bank there situated is property in the district although within four months prior to filing the petition the bankrupt had made an assignment for the benefit of creditors. *Re* Berthoud, 231 Fed. 529; not, however, when the deposit was made

have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; and allow such officers additional compensation for such services, as provided in section forty-eight of this Act;[10] (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;[11] (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;[12] (9) confirm or reject compositions between debtors and their creditors, and set aside compensations and reinstate the cases; (10) consider and con-

in trust for a class of creditors. *Re* San Antonio Land & Irrigation Co., 228 Fed. 984.

10 30 St. at L. 544, 546, § 8; as amended by 32 St. at L. 797; 36 St. at L. 838. As to § 48, see *infra*, §§ 663-664.

11 A court of bankruptcy has no jurisdiction upon a creditor's petition in proceedings against a firm to try the question whether a person is a secret partner, without his consent; nor to compel him to file schedules of assets and liabilities. *Re* Samuels, C. C. A., 215 Fed. 845.

12 After discharge it has no jurisdiction to protect the bankrupt against a suit. *Re* Weisberg, 253 Fed. 833.

firm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders by fine or imprisonment or fine and imprisonment;[13] (14) extradite bankrupts from their respective districts to other districts;[14] (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearing and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;[15] (19) transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction of persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy.[16] Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."[17] It has

13 It has been held that when the disobedience by the bankrupt to an order by the referee amounts also to one of the crimes created by the bankruptcy law, the punishment should be no greater than is necessary to compel obedience. *Re* Elias, 240 Fed. 448.

14 See *supra*, §§ 462, 489.

15 See *infra*, § 659.

16 30 St. at L. 544, 546, § 8, as amended by 32 St. at L. 797; 36 St. at L. 838.

17 30 St. at L. 544-546, § 2, as amended in 36 St. at L. 838. "The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) 'A person against whom a petition has been filed' shall include a person who has filed a voluntary petition." This definition has been applied to the General Orders. *Re* Vanoscope Co., C. C. A., 233 Fed. 53, 57. "(2) 'adjudication shall mean the date of the entry of a decree that the de-

been said that courts of bankruptcy are not to be considered as

fendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed.'' The word ''confirmed'' is not synonymous with ''affirmed'' but includes the termination of an appeal by a dismissal without an affirmance. *Re* Lee, 171 Fed. 266; ''(3) 'appellate courts' shall include the Circuit Courts of Appeals of the United States, the Supreme Courts of the Territories, and the Supreme Court of the United States; (4) 'bankrupt' shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) 'clerk' shall mean the clerk of a court of bankruptcy; (6) 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) 'court' shall mean the Court of Bankruptcy in which the proceedings are pending, and may include the referee; (8) 'courts of bankruptcy' shall include the District Courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) 'creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) 'date of bankruptcy,' or 'time of bankruptcy,' or 'commencement of proceedings,' or 'bankruptcy,' with reference to time, shall mean the date when the petition was filed; (11) 'debt' shall include any debt, demand, or claim provable in bankruptcy.'' It has been held: that it may include a claim for damages for false representations which might not be proved, *Re* Harper, 175 Fed. 412, 423; and that the phrase ''owes debts'' includes the debts of an infant, for which his property is legally charged, *Re* Walrath, 175 Fed. 243, ''(12) 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; (13) 'documents' shall include any book, deed, or instrument in writing; (14) 'holiday' shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;'' *Re* Kobre, 224 Fed. 106, held: that the fair valuation of property, real or personal, where no definite market value can be established without expert testi-

mony is the amount which should be realized from the property in the usual course of business sold under ordinary conditions and not what it might go for at a forced sale or auction sale. See Grandison v. Nat. Bank of Commerce, C. C. A., 231 Fed. 800. "(16) 'judge' shall mean a judge of a Court of Bankruptcy, not including the referee; (17) 'oath' shall include affirmation; (18) 'officer' shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) 'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) 'petition' shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) 'referee' shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) 'conceal' shall include secrete, falsify, and mutilate; (23) 'secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) 'States' shall include the Territories, and Indian Territory, Alaska, and the District of Columbia; (25) 'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) 'trustee' shall include all of the trustees of an estate; (27) 'wage-earner' shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things." 30 St. at L. 544, § 1. "It will be noted that some of these definitions in section 1 read 'shall mean,' while others read 'shall include.' It was not intended that definitions of words used in the act which read 'shall include' should exclude other meanings or definitions of the word, or limit the ordinary and well-understood meanings. It was intended, as the words used plainly indicate, to make sure that they would be held to include what is expressed." *Re* Harper, 175 Fed. 412, 423. It has been said that the meaning of the word, "property" is substantially the same that is given thereto in judicial decisions relating to matters of

courts of limited jurisdiction.[18] A Court of Bankruptcy has jurisdiction of property in its possession [19] and over a fund in the court.[20] In a controversy affecting such fund or property the Court of Bankruptcy has power to bring in additional parties and to substitute additional parties whenever either is necessary for a complete determination of the matter.[21] The jurisdiction is not divested because the trustee,[22] or if no trustee has been elected, the receiver [23] in bankruptcy has no interest in the property. No party to such a controversy has the right to a trial by jury.[24] It has jurisdiction of a suit in equity by a stranger to the proceeding to establish a lien upon the property

taxation and attachment. *Re* San Antonio Land & Irrigation Co., 228 Fed. 984. "Whenever time is enumerated by days in this Act or in any proceeding in bankruptcy the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." 30 St. at L. 544, § 31a. This applies to any proceeding in bankruptcy in which the number of days is material, including the application for a discharge. In this the bankrupt consequently has a year and a day from the date of adjudication for his application. *Re* Holmes, 165 Fed. 225. In such computations, unless there is a conflict between two proceedings instituted upon the same day fractions of a day are usually excluded. *Re* Warner, 144 Fed. 987.

18 *Re* Marion Contract & Construction Co., 166 Fed. 618. See Sabin v. Larkin-Green Logging Co., 218 Fed. 984.

19 Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. ed. 327; *Re* Lucius, 124 Fed. 455; Wuerpel v. Commercial Germania Trust & Savings Bank, C. C. A., 238 Fed. 269. Including property seized by the marshal. Le Master v. Spencer, C. C. A., 203 Fed. 210, and property which the possessor thereof has agreed to hold for the benefit of the receiver or trustee. *Re* Schmick Handle & Lumber Co., 233 Fed. 446. The court may take jurisdiction of a petition by a stranger to enforce specific performance by the trustee of his contract with the bankrupt. Dunlop v. Baker, C. C. A., 239 Fed. 193. The possession may have been obtained by consent. *Re* Traunstein, 225 Fed. 317; *Re* Hollingsworth & Whitney Co., C. C. A., 242 Fed. 753, where it was stipulated that the claim should be determined by the court or courts having jurisdiction in all respects as if the agreement had never been made.

20 *Re* Lucius, 124 Fed. 455; *Re* Hollingsworth & Whitney Co., C. C. A., 242 Fed. 753.

21 *Re* National Boat & Engine Co., 216 Fed. 208.

22 Nisbet v. Federal Title & Trust Co., C. C. A., 229 Fed. 644.

23 *Re* Larkey, 214 Fed. 867.

24 *Re* Gibbons, 225 Fed. 420.

of a bankrupt,[25] and, it seems, of any other suit against the trustee which affects the estate.[26] A Court of Bankruptcy has jurisdiction of a suit by a trustee upon the bond of a former trustee in bankruptcy;[27] and of proceedings, to chancer or collect a bond given it by the bankrupt[28] or by a depositary,[29]

25 Cleminshaw v. International Shirt & Collar Co., 165 Fed. 797; *Re* MacDougall, 175 Fed. 400. It has been held that a petition, filed in a court of bankruptcy by a creditor, praying for priority of payment from the proceeds of certain lands sold by the trustee, cannot be considered to be a bill in equity to establish a resulting trust in the same. Teter v. Viquesney, C. C. A., 179 Fed. 655; *Re* Larkey, 214 Fed. 867 (a leasehold and subtenant's rights); *Re* Miller Pure Rye Distilling Co., C. C. A., 214 Fed. 1,189 (the rights of a pledgee); *Re* National Boat & Engine Co., 216 Fed. 208; *Re* Kligerman, 219 Fed. 758 (mechanics' lien); *Re* Gibbons, 225 Fed. 420; *Re* Jamison Bros. & Co., 227 Fed. 30 (the rights of a pledgee); *Re* Wegman Piano Co., 228 Fed. 60; Davis v. Virginia Ry. & Power Co., C. C. A., 229 Fed. 644; *Re* Goldberg & Sagman, 232 Fed. 194 (the assets of a corporation); Petition of Friedlaender, C. C. A., 233 Fed. 250 (rescission of sale); State of Missouri v. Angle, C. C. A., 236 Fed. 644 (assets of private banks where State laws give a preference to depositors); *Re* Robinson, 237 Fed. 102; Roger v. J. B. Levert Co., C. C. A., 237 Fed. 737; *Re* Cobb's Consol. Co., 233 Fed. 459 (the assets of a corporation); Karasik v. People's Trust Co., 241 Fed. 939 (the validity of mortgages); *Re* Gottlieb, 245 Fed. 139. See § 635, *infra*. A court of bankruptcy has jurisdiction of an application by the trustee in possession of land, to determine the validity of the claim of the lessor that the lien has been forfeited by an act of the bankrupt. Gazlay v. Williams, 210 U. S. 41, 53 L. ed. 950. An injunction may be granted by a court of bankruptcy against the prosecution of a suit by a stockholder of the bankrupt, to enforce a cause of action which had been settled in the court of bankruptcy; but not, it was held, of a suit to compel that settler to account for profits made by him through property conveyed to him as a part of the settlement, upon the ground that, being an officer of the bankrupt, he thereby secured an advantage for which he should be required to account. *Re* Swofford Bros. Dry Goods Co., 180 Fed. 549.

26 *Re* McCallum, 113 Fed. 393.

27 U. S. ex rel. Schauffler v. Union Surety & Guaranty Co., 118 Fed. 482.

28 *Re* Appel, 163 Fed. 1002. But see Jaquith v. Rowley, 188 U. S. 620, 47 L. ed. 620.

29 Illinois Surety Co. v. U. S., C. C. A., 226 Fed. 665. It has been held that such a suit must be brought in equity by the persons interested in the name of the United States and that the surety has no right of subrogation to the right of any beneficiary until all those for whose benefit the bond has been given had been paid. Ibid. Such a suit should be brought in equity

or by any party to the proceeding or intervenor therein.[30] A Court of Bankruptcy has jurisdiction of proceedings to determine the exemptions to which the bankrupt is entitled,[31] but not to administer the widow's right to a year's allowance from the estate of a bankrupt, who died after the adjudication.[32] A Court of Bankruptcy has jurisdiction of summary proceedings to compel the surrender of property of the bankrupt in his possession, or in that of his agent, or of a stranger to the proceedings who holds it under a claim of right which is clearly frivolous, or when the property has been taken from the possession of the Court of Bankruptcy or wrongfully surrendered by its receiver.[33] A Court of Bankruptcy has jurisdiction to take possession of property and to determine the title thereto when the State court took possession thereof in proceedings begun within four months of the bankruptcy proceeding,[34] at least when the debtor was insolvent,[35] and when the State court took possession within such four months whilst the debtor was insolvent,[36] or when a trustee in insolvency took possession within that period.[37] After the death of an insolvent before the initiation of proceedings in bankruptcy the Court of Bankruptcy has no jurisdiction to administer his estate[38] unless he is a member

for the benefit of all the depositing trustees and receivers. Ibid.

30 *Re* Regealed Ice Co., 199 Fed. 340, holding that upon an application for the cancellation of such a bond, the court has the power to order the persons for whose benefit the same was given to file their claims within a specified time.

31 McGahan v. Anderson, C. C. A., 113 Fed. 115. See § 650, *infra*.

32 *Re* Seabolt, 113 Fed. 766.

33 *Infra*, § 635.

34 *Re* Knight, 125 Fed. 35, 11 Am. Br. 1, criticised in Remington on Bankruptcy, § 1582.

35 *Re* Rudnick & Co., 158 Fed. 223, replevin.

36 *Re* Francis-Valentine Co., 94 Fed. 793, 2 Am. B. R. 522; Bear v. Chase, C. C. A., 99 Fed. 920, 3 Am. B. R. 746; *Re* Kenney, C. C. A., 105 Fed. 897, 5 Am. B. R. 355; *Re* Tune, 115 Fed. 906, 8 Am. B. R. 285. In one case, the court refused to enjoin a sale under an execution, levied within four months under a judgment obtained several years before. *Re* Shoemaker, 112 Fed. 648, 7 Am. B. R. 437. See also Tennessee Producer Marble Co. v. Grant, C. C. A., 135 Fed. 322, 14 Am. B. R. 288.

37 Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Davis v. Bohle, C. C. A., 92 Fed. 325, 1 Am. B. R. 412; affirming s. c., *sub nom Re* Sievers, 91 Fed. 366, 1 Am. B. R. 117; Leidigh Carriage Co. v. Stengel, C. C. A., 95 Fed. 645, 2 Am. B. R. 383; *Re* Chase, C. C. A., 124 Fed. 753, 10 Am. B. R. 677.

38 *Re* Pierce, 102 Fed. 977; *Re*

of an insolvent firm, one or more of the members of which survive him.[39]

Neither the dissolution of a corporation by a State court for insolvency within four months prior to the filing of a petition for involuntary bankruptcy,[40] nor the appointment of a receiver of its property within or before that period,[41] deprives the District Court of the United States of jurisdiction. A Court of Bankruptcy has no jurisdiction except by a plenary suit to interfere with property which has been in the possession of a State court for more than four months previous to the institution of the bankruptcy proceedings;[42] although it may, perhaps, grant a temporary injunction to preserve the *status quo* until the trustee can intervene in the State court.[43] But where the State court took possession within four months of the bankruptcy proceedings, whilst the debtor was insolvent,[44] or a trustee in insolvency took possession within that period;[45] the

Hicks, 107 Fed. 910. Remington on Bankruptcy, § 96.

39 *Re* Pierce, 102 Fed. 977. *Infra*, § 618.

40 *Re* Storck Lumber Co., 114 Fed. 360.

41 *Re* Sterlingworth Ry. Supply Co., 164 Fed. 591.

42 Metcalf v. Barker, 187 U. S. 165, 47 L. ed. 122; Pickens v. Dent, 187 U. S. 177, 47 L. ed. 128; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. ed. 413; *Re* Kavanaugh, 99 Fed. 928, 3 Am. B. R. 832; National Bank of the Republic of Hobbs, 118 Fed. 626, 9 Am. B. R. 190; Tennessee Producer Marble Co. v. Grant, C. C. A., 135 Fed. 322, 14 Am. B. R. 288. *Cf. supra*, § 52. It has been held that the possession by a sheriff, more than four months prior to the bankruptcy proceedings, under a general writ of execution, which enforces no specific lien upon the property, does not give exclusive jurisdiction to the State court. *Re* Vastbinder, 132 Fed. 718, 13 Am. B. R. 148; *Re* Baughman, 138 Fed. 742, 15 Am. B. R. 23.

43 *Infra*, § 633.

44 *Re* Francis-Valentine Co., 94 Fed. 793, 2 Am. B. R. 522; Bear v. Chase, C. C. A., 99 Fed. 920, 3 Am. B. R. 746; *Re* Kenney, C. C. A., 105 Fed. 897, 5 Am. B. R. 355; *Re* Tune, 115 Fed. 906, 8 Am. B. R. 285. The court refused to enjoin a sale under an execution, levied within four months under a judgment obtained several years before. *Re* Shoemaker, 112 Fed. 648, 7 Am. B. R. 437. See also Tennessee Producer Marble Co. v. Grant, C. C. A., 135 Fed. 322, 14 Am. B. R. 288. See §§ 635, 644, *infra*.

45 Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 5 Am. B. R. 623; Davis v. Bohle, C. C. A., 92 Fed. 325, 1 Am. B. R. 412; affirming s. c., *sub nom Re* Sievers, 91 Fed. 366, 1 Am. B. R. 117; Leidigh Carriage Co. v. Stengel, C. C. A., 95

Court of Bankruptcy has jurisdiction to interfere. Where part of the subject-matter of a petition filed in proceedings in bankruptcy is within the jurisdiction of the court and part is not, so much of the same as prays relief that the court has power to give may be retained and an amendment permitted limiting the petition to a prayer for such relief.[46] Upon the denial of an adjudication in bankruptcy, the jurisdiction of the court terminates and the property becomes subject to the control of any court of competent jurisdiction.[47] The court has no power upon dismissing a petition, to determine the validity of the claim of the petitioning creditor,[48] nor to retain jurisdiction in order to permit a reorganization of a corporation respondent.[49] It has been said that the bankruptcy court has exclusive jurisdiction in any case where property is sequestered by a State court, in proceedings begun within the four months.[50]

§ 608a. Jurisdiction of courts of bankruptcy over attorneys. By the Bankruptcy Act, "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reëxamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."[1] If the contract with the attorney was not made in contemplation of proceedings in bankruptcy there is no jurisdiction summarily to proceed. The words "in contemplation of the filing of a petition by or against him" mean that there must be some relation of cause and effect between the transaction with the attorney and the debtor's

Fed. 645, 2 Am. B. R. 383; *Re* Chase, C. C. A., 124 Fed. 753, 10 Am. B. R. 677.

46 *Re* Newfoundland Syndicate, 196 Fed. 443.

47 Acme Harvester Co. v. Beckman Lumber Co., 222 U. S. 300, 309, 56 L. ed. 208, 214.

48 *Re* Sig. H. Rosenblatt & Co., C. C. A., 193 Fed. 638; Fitch v. Richardson, C. C. A., 147 Fed. 197.

49 Acme Harvester Co. v. Beckman Lumber Co., 222 U. S. 300, 309, 56 L. ed. 208, 214.

50 *Re* Knight, 125 Fed. 35, 11 Am. B. R. 1; criticised in Remington on Bankruptcy, § 1582.

§ 608a. 1 30 St. at L. 544, § 60d. *Re* Porter, C. C. A., 253 Fed. 552.

knowledge that he is in a financial condition which will enable him to file a petition in voluntary bankruptcy or subject him to involuntary proceedings. This is to be ascertained either by what was said when the transfer was made or by the surrounding circumstances, including the character of the services for which the attorney was employed. It has been said that in the latter case in order to justify the summary proceedings the service must be relevant to the bankruptcy and not one which might be performed in the ordinary course of business if no bankruptcy took place. The retainer of an attorney to collect fire insurance policies upon a contingent fee although made five days before the institution of involuntary proceedings in bankruptcy was held not to be subject to such summary examination.[2] Where fees were paid to an attorney by assignees under a general insolvent assignment made by the bankrupt prior to the bankruptcy proceedings it was held that they were not subject to such a reëxamination.[3] It has been held that this section does not apply to a note and chattel mortgage to secure payment to the attorney for his services in arranging a composition with creditors in order to prevent bankruptcy.[4] Independently of the statute the attorney is an officer of the court, and, as such, is always subject to its orders in matters connected with his professional conduct.[5] The court has power in a summary proceeding to set aside the sale by the bankrupt within the four months prior to the filing of the petition in bankruptcy of part of his assets to his attorney for the payment of the amount due the latter for services to the former.[6] It has been held that the Court of Bankruptcy has no jurisdiction over his claim for services independent of the bankruptcy proceedings.[7] Creditors of the bankrupt cannot after a trustee has been appointed institute proceedings against the attorney, unless, at least, the trustee has been requested so to act, and has refused.[8] It seems that this section should be enforced by a summary proceeding, begun by an order to show cause, served upon the attorney,

2 Tripp v. Mitschrich, C. C. A., 211 Fed. 424.

3 *Re* Geller, 216 Fed. 558.

4 *Re* Stolp, 199 Fed. 488; *infra*, § 644.

5 *Re* Alexander, 193 Fed. 749.

6 Ibid.

7 *Re* Iron Clad Mfg. Co., C. C. A., 215 Fed. 877, in which the author was counsel.

8 *Re* Oakley, 215 Fed. 265.

or by some other notice to him.[9] The notice may be served on the attorney outside the jurisdiction of the court.[10] The appearance of the attorney without objection to the jurisdiction, although a consent to the entertainment of the suit by the Court of Bankruptcy, does not justify an order requiring him to pay back money which he has received when there is no allegation that he was paid more than was reasonable.[11]

§ 609. Jurisdiction in bankruptcy by consent. As a general rule, consent will not give a court of the United States any jurisdiction that is not conferred by statute.[1] A petition in voluntary bankruptcy is a submission of the bankrupt's estate to the court for administration and the bankrupt cannot object to a summary proceeding to determine his rights.[2] The Bankruptcy Act, by implication, gives the courts of bankruptcy jurisdiction over suits by the trustees "by consent of the proposed defendant."[3] Consent is given to the jurisdiction of a court of bankruptcy in summary proceedings against an adverse claimant, by his appearance and answer to the merits without raising the jurisdictional objection;[4] but not when he joins in the same answer an objection to the jurisdiction with a defense upon the merits;[5] nor by filing an answer to the merits concurrently with a demurrer to the jurisdiction;[6] nor by an answer and defense on the merits after his objection to the

9 *Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046. But see *Re* Raphael, C. C. A., 192 Fed. 874.

10 *Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046. See *Re* Lewin, 103 Fed. 850; *supra*, § 611.

11 *Re* Raphael, C. C. A., 192 Fed. 874.

§ 609. 1 Fourniquet v. Perkins, How. 160, 12 L. ed. 650; Olds Wagon Co. v. Benedict, C. C. A., 67 Fed. 1, 14 C. C. A. 285.

2 *Re* Brantman, C. C. A., 224 Fed. 101.

3 30 St. at L. 544, 552, § 23, subd. *b*. Such consent "means consent to the tribunal in which the controversy is to be carried on and not to the mode of procedure, which is regulated by general principles of law unless other provision is made." Sinsheimer v. Simonson, C. C. A., 107 Fed. 898, 906; approved *Re* Raphael, C. C. A., 192 Fed. 874, 876.

4 Ryttenberg v. Schefer, 131 Fed. 313; Knapp & Spencer Co. v. Drew, C. C. A., 160 Fed. 413; *Re* Mills, 179 Fed. 409; *Re* Kornit Mfg. Co., 192 Fed. 392; Mitchell Storebuilding Co. v. Carroll, C. C. A., 193 Fed. 616; *Re* Berry, 247 Fed. 700.

5 Wood v. Wilbert, 226 U. S. 384, 57 L. ed. —; overruling Sheppard v. Lincoln, 184 Fed. 182; *Re* Goldstein, C. C. A., 216 Fed. 887. See §§ 169, 170, *supra*.

6 *Re* Michie, 116 Fed. 749.

jurisdiction has been overruled;[7] nor by failing to object to the jurisdiction until after the filing of an amended petition when the original petition alleged no cause of action.[8] A proof of claim[9] or a vote upon the same[10] do not constitute a consent to jurisdiction of the Federal court in a suit[11] or proceeding[12] which relate to matters not involved in such claim. Nor, it has been held, does the filing of a claim for proof give the court jurisdiction upon its rejection to direct the claimant to pay to the estate the difference between the value of security which he holds and the debt due to him.[13] Nor does the appearance of a non-resident in obedience to a *subpœna ad testificandum* make him a party to the proceedings so as to give the court jurisdiction of a suit or proceeding against him.[14] Nor does authority given by a State court to its receiver to appear and oppose the adjudication of bankruptcy surrender its jurisdiction to the Court of Bankruptcy.[15]

The consent need not expressly appear on the record, but may be shown by conduct necessarily implying the same,[16] or be given by estoppel.[17] Consent is also conferred over an adverse claimant by his intervention in the bankruptcy proceedings,[18] or seeking relief therein;[19] by his submitting his rights to the court

7 First Nat. Bank v. Chicago Title & Tr. Co., 198 U. S. 280, 49 L. ed. 1051; Louisville Tr. Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413; *Re* Bacon, C. C. A., 210 Fed. 129; *Re* Gottlieb & Co., 245 Fed. 139.

8 *Re* Hemby-Hutchinson Pub. Co., 105 Fed. 909.

9 Pickens v. Dent, 187 U. S. 177, 47 L. ed. 128; affirming 106 Fed. 653.

10 Tate v. Brinser, 226 Fed. 878.

11 Ibid.

12 Fitch v. Richardson, C. C. A., 147 Fed. 196.

13 Fitch v. Richardson, C. C. A., 147 Fed. 196.

14 *Re* Geller, 216 Fed. 558.

15 Blair v. Brailey, 221 Fed. 1.

16 McEldowney v. Card, 193 Fed. 475, where a plea of set-off claiming affirmative relief was held to be a consent to the jurisdiction of the court of the United States in a plenary suit by the trustee. But see *Re* Gill, C. C. A., 190 Fed. 726, holding that a plea of set-off seeking no affirmative relief was an adverse claim and not a consent to the jurisdiction of the referee in a summary proceeding.

17 *Re* Plymouth Elevator Co., 191 Fed. 633, the surrender of property for sale without objection; *Re* Trayna & Cohen, C. C. A., 195 Fed. 486, attendance or representation at a sale without objection. *Re* Dialogue, 241 Fed. 290.

18 *Re* Emrich, 101 Fed. 231.

19 *Re* Elletson Co., 174 Fed. 859; *Re* Banzai Mfg. Co., C. C. A., 183 Fed. 298; *Re* Jackson Brick & Tile Co., 189 Fed. 636; *Re* Lipman, 201

or referee without raising the jurisdictional objection,[20] by his invoking the affirmative action of the court, by an application for a receiver,[21] or for an injunction,[22] or otherwise,[23] by his acceptance of the benefit of an order of the court,[24] and by a waiver in the Circuit Court of Appeals of the objection, although raised in the District Court.[25] Leave to amend an answer by pleading an objection to the jurisdiction may be denied.[26] It is too late to raise an objection to the jurisdiction for the first time upon appeal.[27]

Consent may give the District Court jurisdiction of a bill of interpleader against the trustee in bankruptcy and another claimant of a fund in the possession of the complainant.[28]

But it has been held that consent cannot give to the Referee jurisdiction of a suit to enforce specific performance of a contract between the bankrupt and a stranger to the proceedings.[29] Nor to the court jurisdiction of an application after the confirmation of a sale and payment of the price to compel the trustee to execute a deed to an assignee of the purchaser.[30]

Fed. 169; Nisbet v. Federal Title & Trust Co., 229 Fed. 644; *Re* Trayna & Cohen, C. C. A., 195 Fed. 486, the abandonment of the application after it had been referred and before the taking of testimony upon the same was held not to be a withdrawal of the consent. See *Re* Traunstein, 225 Fed. 317.

20 *Re* Steuer, 104 Fed. 976; Chauncey v. Dyke Bros., C. C. A., 119 Fed. 1; *Re* Howard Laundry Co., C. C. A., 203 Fed. 445; T. E. Wells & Co. v. Sharp, C. C. A., 208 Fed. 393; *Re* Hopkins, C. C. A., 229 Fed. 378; *Re* Newfoundland Syndicate, C. C. A., 231 Fed. 917; *Re* Valecia Condensed Milk Co., 233 Fed. 173; Alco Film Corp. v. Alco Film Service, C. C. A., 234 Fed. 55; Durand v. Brown, 236 Fed. 609; *Re* Drag, 254 Fed. 474. It has been held that this waived objections to the jurisdiction of the court of bankruptcy, but not the objection that the matter cannot properly be determined upon summary proceedings and should be the subject of a plenary suit. Sinsheimer v. Simonson, C. C. A., 107 Fed. 898. See *Re* Raphael, C. C. A., 192 Fed. 874.

21 *Re* Durham, 114 Fed. 750; *Re* Hadden Rodee Co., 135 Fed. 886.

22 Ibid.

23 *Re* Porterfield, 138 Fed. 192; *Re* Platteville Foundry & Machine Co., 147 Fed. 828.

24 *Re* Noel, 137 Fed. 694.

25 Hatch v. Curtin, C. C. A., 154 Fed. 791.

26 Knapp & Spencer Co. v. Drew, C. C. A., 160 Fed. 413.

27 Boonville Nat. Bank v. Blakey, C. C. A., 107 Fed. 891.

28 *Re* Blake, C. C. A., 150 Fed. 279.

29 *Re* Ballou, 215 Fed. 810.

30 Henrie v. Henderson, C. C. A., 145 Fed. 316.

§ 610. Jurisdiction of courts of bankruptcy over plenary suits. By the Bankruptcy Act: "The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."[1] "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e."[2] This gives the District courts jurisdiction, concurrent with the State courts, of all suits at common law[3] or in equity irrespective of the citizenship of the parties or of the bankrupt, and of the amount involved,[4] which are brought to set aside a preference or to recover the property thereby conveyed or its value,[5] of suits to set aside

§ 610. [1] 36 St. at L. 544, § 23a.

[2] Before the enactment of the Judicial Code, which abolished the circuit courts where the bankrupt might have sued the defendant in a Circuit Court of the United States, the trustee might do so, although his citizenship was the same as that of the defendant. "Citizenship of the trustee is wholly immaterial to the jurisdiction of such a case." Bush v. Elliot, 202 U. S. 477, 484, 50 L. ed. 1114, 1117, 26 Sup. Ct. 668. See Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. 174; Mayer v. Cohrs, 188 Fed. 443. It was held that the jurisdiction of a Circuit Court of the United States over a suit by a creditor of the bankrupt, to recover property fraudulently transferred, was not affected by the bankruptcy law. Frost v. Latham & Co., 181 Fed. 866. Bankruptcy Law, § 23b, as amended 32 St. at L. 797; 36 St. at L. 838.

[3] Kraver v. Abrahams, 203 Fed. 782.

[4] Milkman v. Arthe, 213 Fed. 642; Simpson v. Western Hardware & Metal Co., 227 Fed. 304; Golden Hill Distilling Co. v. Logue, C. C. A., 243 Fed. 342.

[5] Bankruptcy Law, § 60b, as amended by 32 St. at L. 797; 36 St. at L. 838. See *infra*, § 644. Karasik v. People's Tr. Co., 241 Fed. 939; Peninsula Bank v. Wolco, C. C. A., 232 Fed. 69. An action by the trustee against a creditor, who obtained a preference by the purchase of property at an execution sale within four months before the filing of the bankruptcy peti-

transfers or encumbrances of the bankrupt's property, made within four months prior to the filing of the petition with the intent to hinder, delay or defraud his creditors, and all other conveyances or encumbrances, made by him within such four months while insolvent, which are null and void as against his creditors by the laws of the State, territory or district where the property is situated;[6] of suits to set aside any transfer of the bankrupt's property, which any creditor of the bankrupt might have avoided, and to recover the property so transferred or its value from the transferee, irrespective of the date of such conveyance.[7] Such suits may be brought in the district where

tion, is an action at law within the jurisdiction of the bankruptcy court, although the complaint alleges conversion of the property. Grant v. Nat. Bank of Auburn, 197 Fed. 581.

[6] Ibid.; § 66e, as amended by 32 St. at L. 797. It has been held that a Court of Bankruptcy may compel an accounting by an assignee under an assignment for the benefit of creditors made within four months preceding the filing of the petition. *Re* Thompson, C. C. A., 128 Fed. 575. But see Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413. It has been held: that such a suit cannot be brought unless the elements prescribed by section 60b, are shown to exist, *Re* F. M. & S. Q. Carlile, 199 Fed. 612; that the referee has no jurisdiction of a proceeding by the trustee; and that a plenary suit is required when the trustee seeks to recover property pledged within the four months' period, upon the ground that the pledge constitutes a voidable preferenee. Ibid.

[7] Bankruptcy Law, § 23b, as amended, 36 St. at L. 838; Harris v. First National Bank of Mt. Pleasant, 216 U. S. 382, 54 L. ed. 528; Weidhorn v. Levy, 253 U. S. 268, 272; Milkman v. Arthe, C. C. A., 223 Fed. 507; Winslow v. Staab, 233 Fed. 305; Hawkins v. Dannenberg Co., 234 Fed. 752; Trice v. Coolidge Banking Co., 242 Fed. 175; Hall v. Glenn, 247 Fed. 997. Before this amendment, in the last class of cases, such a suit could not have been brought without the consent of the defendant. Wood v. Wilbert, 226 U. S. 384, 57 L. ed. —. See Johnston v. Forsyth Mercantile Co., 127 Fed. 845; Hurley v. Devlin, 149 Fed. 268; Remington on Bankruptcy, §§ 1689, 1670. *Contra*, Gregory v. Atkinson, 127 Fed. 183; Ryttenberg v. Schefer, 131 Fed. 313; Skewis v. Barthell, 152 Fed. 534; Hull v. Burr, C. C. A., 153 Fed. 945; *Re* Heckman, C. C. A., 140 Fed. 859; *Re* Kane, 152 Fed. 587. Such a suit may be brought by the trustee of a bankrupt corporation to recover unearned dividends illegally paid to a stockholder when the corporation was insolvent. Siegmiller v. Day, C. C. A., 249 Fed. 177. Where a bankrupt corporation had expressly or by acquiescence authorized the transfer of its property without consideration to secure an individual indebtedness of its president, it was held that the Court of Bankruptcy

the property is situated,[8] although not where the proceeding in bankruptcy is pending and irrespective of the residence of the trustee, the bankrupt or the defendant.[9] The court may direct process to be served upon the defendant in another district.[10] When the requisite diversity of citizenship exists and the value of the matter in dispute is that essential to the jurisdiction, such a suit when brought in a State court by the trustee may be removed by the defendants.[11]

Such suits can only be instituted in courts of bankruptcy by trustees, and not by creditors, who can only sue in the State courts unless there exists some other ground of Federal jurisdiction;[12] although, when the trustee refuses to sue, they may by leave of the court sue in his name at their own expense upon filing a bond for costs.[13] It has been held that a receiver in bankruptcy cannot institute a suit.[14]

Such plenary suits by trustees are not, like summary applications, "proceedings in bankruptcy;" but they are "controversies" arising out of the bankruptcy proceedings,[15] and under

had jurisdiction of a suit for its recovery although if the property had been misappropriated without the consent of the corporation there would have been no jurisdiction in any Federal Court. Brent v. Simpson, C. C. A., 238 Fed. 285. Where such a proceeding was brought by a trustee in bankruptcy in a District Court as an action at law, and, pending trial, by stipulation, an order was entered referring the cause and certain issues arising upon the pleadings to a designated lawyer, to state and take the evidence and his conclusions of law and fact thereupon to the next term of court for its further action; it was held that this order, in effect, constituted the referee an arbitrator, whose findings would be reviewed only for fraud, misconduct or other recognized legal reasons authorizing the setting aside of an arbitrator's award. Westall v. Avery, 171 Fed. 626; Bankruptcy Law, § 23b, as amended, 36 St. at L. 838.

8 Collett v. Adams, 249 U. S. 545; Lawrence v. Lowrie, 133 Fed. 995, 13 Am. B. R. 297; Remington on Bankruptcy, § 1690. See *supra*, § 608.

9 Collett v. Adams, 249 C. S. 545.

10 Ibid.

11 Ewing v. S. L. Leszynsky & Co., 236 Fed. 811.

12 Viquesney v. Allen, C. C. A., 131 Fed. 21; Remington on Bankruptcy, § 1716. See Brumby v. Jones, C. C. A., 141 Fed. 318; Henrie v. Henderson, C. C. A., 145 Fed. 316. *Contra*, Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. 295.

13 *Re* Bailey, 151 Fed. 753.

14 Boonville Nat. Bank v. Blakey, C. C. A., 107 Fed. 891; Beach v. Macon Grocery Co., C. C. A., 116 Fed. 143; *Re* Kolin, C. C. A., 134 Fed. 557. *Infra*, § 634.

15 Boonville Nat. Bank v. Blakey,

the laws of the United States. They are subject to the general rules regulating pleadings and practice in courts of equity and of common law.[16] They cannot be brought in equity, except in cases which would ordinarily be within the equitable jurisdiction of the court.[17] They cannot be begun before a referee.[18]

C. C. A., 107 Fed. 891; Stelling v. Jones Lumber Co., C. C. A., 116 Fed. 261; McNulty v. Feingold, 129 Fed. 1001; Delta Nat. Bank v. Easterbrook, C. C. A., 133 Fed. 521. It has been held that an adverse claim to property in the possession of the court of bankruptcy should be determined by a proceeding in bankruptcy instead of by a plenary suit. *Re* Seger Bros. Co., 243 Fed. 459. See *infra*, § 635. "There may be controversies arising in the course of bankruptcy proceedings that are so far connected with those proceedings as to be in effect a part of them and capable of summary disposition by the referee under the general order of reference, although because of their nature or because involving a distinct and separable issue they may be reviewable, under the sections cited, by appeal rather than by petition to revise." Weidhorn v. Levy, 253 U. S. 268, 271.

16 Sessler v. Nemeof, 183 Fed. 656. It has been held that the objection that a judgment at law was not obtained before the commencement of the suit in equity cannot be raised by an objection to the jurisdiction but must be set up by proceedings analogous to a demurrer. Hally Glenn, 247 Fed. 997. In a suit by a trustee in bankruptcy to recover possession of property taken under an invalid mortgage by the bankrupt, it was held that the mortgagee could only question the capacity of the trustee to sue by filing a special plea and that by answering to the merits he waived such objection. *Re* Federal Contracting Co., C. C. A., 212 Fed. 685.

17 Sessler v. Nemeof, 183 Fed. 656. There is no presumption in favor of the jurisdiction which might appear upon the face of the plaintiff's bill. Kelley v. Aarons, 238 Fed. 996. A petition by a judgment creditor of a corporation that assets which a bankrupt officer had received from such corporation be applied to the payment of the petitioner's judgment was dismissed because it failed to allege a return of execution unsatisfied. *Re* Goldberg & Sagman, 232 Fed. 194.

18 *Re* Cohn, 98 Fed. 75; *Re* Scheiber, 131 Fed. 121; Horskins v. Sanderson, 132 Fed. 415; *Re* Ballou, 215 Fed. 810; *Re* Weidhorn, 243 Fed. 756. But see *Re* Goldberg & Sagman, 232 Fed. 194; Remington on Bankruptcy, § 1695. It was held that a proceeding was a plenary suit which was begun by a petition by the trustees for the determination of the validity of a claim to a fund in court and the issues raised by an answer thereto referred to a Special Master to take testimony and report findings of fact and conclusions of law. *Re* Hollingsworth & Whitney Co., C. C. A., 242 Fed. 753, 759. That a petition for a decree that the trustee in bankruptcy holds certain land in trust for the petitioner is a summary proceeding. *Re* Snelling, 202 Fed. 258.

They differ in these respects from the summary applications previously described, which are "proceedings in bankruptcy," and are not considered to be controversies at law or in equity.[19]

A plenary suit is necessary whenever it is sought to recover money from, or to take property from, the possession of a person who asserts an adverse claim of title to the same which is not merely colorable.[20] It seems that when a suit is brought by a trustee in bankruptcy because of interference with property after this has been reduced to his possession,[21] or a breach of a contract made with him in his representative capacity,[22] the citizenship of the parties ordinarily determines the jurisdiction, irrespective of the citizenship of the bankrupt.

An answer which contains no objection upon such ground [23] or a plea praying affirmative relief [24] is a consent to the jurisdiction.

The jurisdiction of a Federal court of equity to continue a creditors' bill previously instituted, founded upon a judgment

19 Clay v. Waters, C. C. A., 178 Fed. 385. *Cf.* § 666, *infra*. *Re* Goldberg & Sagman, 232 Fed. 194, 195, 196, *per* Learned Hand, D. J.: "The jurisdiction of this court is unquestionable; and it is confusing to regard the proceedings here as 'summary'—a phrase more technically applicable to proceedings to reduce to the possession of this court property held by others. This is a proceeding strictly analogous to ancillary dependent bills in equity, arising where the court has sequestered corporate assets for distribution. Such bills do not, for example, rest upon an independent diversity of citizenship; they rest upon the custody of the fund. That is the case here; convenience, and that alone, determines whether they shall proceed by petition entitled in the bankruptcy suit, or by 'plenary suit' under the hand of the court. In such a case as this there is no convenience in a 'plenary suit.'"

20 *Re* Gill, C. C. A., 190 Fed. 726; *Re* Mimms & Parham, 193 Fed. 276; *Re* Howe Mfg. Co., 193 Fed. 524; *Re* Spalding Cotton Mills, 193 Fed. 554; *Re* Iron Clad Mfg. Co., 194 Fed. 906; Johnston v. Spencer, C. C. A., 195 Fed. 215. See § 608, *supra*; § 635, *infra*.

21 See Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. ed. 287. The fact that, in order to determine to what extent the defendant's action was justified it was necessary to try a controversy between him, and the bankrupt did not, it was held, make the latter's citizenship affect the jurisdiction. Atherton v. Beaman, 256 Fed. 871.

22 McEldowney v. Card, 193 Fed. 475.

23 Seegmiller v. Day, C. C. A. 249 Fed. 177. See *supra*, § 609.

24 McEldowney v. Card, 193 Fed. 475. See § 169, *supra*.

and execution, returned unsatisfied, is not divested by an adjudication in bankruptcy.[25]

A District court of the United States has jurisdiction of an action by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, since such an action arises under the laws of the United States.[26] Where a bankrupt might have sued the defendant in a court of the United States, the trustee may do so, although the latter's citizenship is the same as that of the defendant.[27] It has been held: that a Federal court of equity has jurisdiction of a suit by an adverse claimant against the trustee in bankruptcy, to determine the right to property in the possession of the trustee; but not where a bill is already pending in such a court, to which the trustee is a party, to enjoin the prosecution of subsequent suits which would interfere with the court's jurisdiction of the former.[28]

But in the absence of the requisite difference of citizenship and value of the matter in dispute, it has no jurisdiction; of a bill by a married woman praying, that an adjudication of her husband's bankruptcy be set aside; that lands belonging to the connubial community which had been sold by the Court of Bankruptcy be resold after a determination as to which of the claims were separate debts of the alleged bankrupt and which were debts of the community and that the bankruptcy proceedings be stayed until the termination of the suit;[29] nor, it has been held, to determine a dispute as to a water right connected

[25] Nat. Bank of the Republic v. Hobbs, 118 Fed. 626.

[26] Reed v. American-German Nat. Bank, 155 Fed. 233. Before the abolition of the Circuit Courts it was held: that where, in such a court, which had jurisdiction by reason of citizenship, judgment was recovered by an adverse claimant against a trustee in bankruptcy for the possession of specific property, and it then appeared for the first time that the defendant had sold part of the property pending the suit, the Circuit Court should order the trustee to pay the proceeds to the plaintiff; and that it was error to remit him to an application to the court of bankruptcy. J. B. McFarlan Carriage Co. v. Solanas, C. C. A., 106 Fed. 145.

[27] Bush v. Elliott, 202 U. S. 477, 484, 50 L. ed. 1114, 1117, 26 Sup. Ct. 668. "The citizenship of the trustee is wholly immaterial to the jurisdiction of such a case."

[28] Kelley v. T. L. Smith Co., C. C. A., 196 Fed. 466.

[29] Gibbons v. Dexter Horton Trust & Savings Bank, 225 Fed. 424.

with land in the trustee's possession when the stream is not in the custody of the court;[30] nor in proceedings against a bankrupt firm of a creditor's petition against a solvent who is charged to be a secret partner praying that such solvent be required to file schedules of his individual assets and liabilities.[31]

A plenary suit to recover a debt due the bankrupt or for other relief *in personam,* where it is not sought to recover a preference given within four months before the filing of the petition for an adjudication of bankruptcy, to recover property transferred in fraud of creditors or the value thereof, is not within the jurisdiction of a Court of Bankruptcy.[32]

Without the consent of the defendant, a court of bankruptcy has no jurisdiction of an action by a trustee to recover damages because of a conspiracy, through which property was bought at less than its true value from the bankrupt, while insolvent.[33] A Federal court of equity has no jurisdiction of a bill in equity to establish a preferential claim to a fund in a court of bankruptcy and to set aside an order of the latter court or of its referee.[34]

§ 611. Extraterritorial jurisdiction of courts of bankruptcy. A court of bankruptcy has generally no extraterritorial juris-

30 Bear Gulch Placer Mining Co. v. Walsh, 198 Fed. 351.

31 *Re* Samuels, C. C. A., 215 Fed. 845.

32 Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114; Hinds v. Moore, C. C. A., 134 Fed. 221; De Frieee v. Bryant, 232 Fed. 233. So held: of a suit to compel a stockholder to pay corporate debts because her shares were issued for property fraudulently overvalued. *Re* Haley, C. C. A., 158 Fed. 74. Of omnibus suits to collect subscriptions due by stockholders of a bankrupt corporation, Kelley v. Gill, 245 U. S. 116, affirming 238 Fed. 996; to compel the issue of stock in a corporation to the trustee of a bankrupt who is entitled thereto, *Re* Ballou, 215 Fed. 810; to recover assets of a bankrupt which had been misappropriated, Park v. Cameron, 237 U. S. 216; of suits for accounting of the transactions of a partnership which had not been adjudicated a bankrupt brought by the trustee in bankruptcy of a member of the firm, Tate v. Brinser, 226 Fed. 878; to establish a secret trust in favor of the bankrupt created more than four months before the filing of the petition, Newcomb v. Biwer, 199 Fed. 529; to recover property which had been taken from bankruptcy by force, Waite v. Gottstein, 224 Fed. 281; to recover property which had been given to the bankrupt, Flanders v. Coleman, 249 Fed. 757.

33 Lynch v. Bronson, 177 Fed. 605.

34 U. S. Fidelity Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055.

diction.[1] It cannot enjoin the prosecution of a suit in another district by a person not served within its own jurisdiction.[2] It cannot order persons outside the district and not there served with any process, unless they are attorneys-at-law,[3] to pay money[4] or to surrender property[5] or papers in their possession.[6] In a proceeding in bankruptcy against a firm within the district it may serve by publication a subpœna *ad respondendum* upon a partner who does not reside within the district.[7] It may sell land situated without the district.[8] It may determine conflicting claims to land,[9] or personal property[10] of which the trustee has possession situated beyond the district, and where the mortgagee can be served within the district, it may summarily determine the validity of a mortgage upon land elsewhere in the possession of the trustee and restrain a sale thereof; although the customary procedure in such a case is to permit the institution of a suit of foreclosure in which the validity of the mortgage can be determined.[11]

Nor it seems has it jurisdiction to control the action of persons out of the district who do not seek relief from the court in the course of its administration of the estate or who have not become parties to the proceeding by voluntary appearance, unless

§ 611. [1] *Re* Wood & Henderson, 210 U. S. 246, 258; *Re* Waukesha Water Co., 116 Fed. 1009; *Re* Williams, 123 Fed. 321; Havens & Geddes Co. v. Pierek, 120 Fed. 244.

[2] Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 311, 56 L. ed. 208, 215; Robeling's Sons Co. v. Federal Storage Co., 185 App. Div. (N. Y.) 430, 434.

[3] *Re* Wood & Henderson, 210 U. S. 246. See *supra*, § 608a.

[4] *Re* Haley, C. C. A., 158 Fed. 74; *Re* Boston-Cerrillos Mines Corp., 206 Fed. 794. It has been held that it has the power to determine whether foreign stockholders of a bankrupt corporation are subject to assessment for the benefit of creditors. *Re* Monarch Corporation, 196 Fed. 252.

[5] *Re* Waukesha Water Co., 116 Fed. 1009; *Re* Geller, 216 Fed. 558.

[6] Ibid.

[7] *Re* J. & M. Schwartz, 204 Fed. 326. It seems that in such a proceeding an adjudication of bankruptcy may be made against him individually as well as against the firm. Ibid.

[8] Robertson v. Howard, 229 U. S. 254; T. E. Wells & Co. v. Sharp, 208 Fed. 393. *Contra, Re* Britannia Min. Co., 197 Fed. 459.

[9] Galbraith v. Robson-Hilliard Grocery Co., C. C. A., 216 Fed. 842.

[10] Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40.

[11] *Re* U. S. Chrysotile Asbestos Co., 253 Fed. 294.

they are partners of a bankrupt firm.[12] It cannot in a plenary suit serve process outside the jurisdiction;[13] except in cases where a court of equity might have authorized substituted service,[14] or service by advertisement, or otherwise,[15] or perhaps except when an order authorizing such a suit has been made upon due service of notice upon the parties without the jurisdiction.[16]

"In case personal service" of a subpœna to answer a petition for involuntary bankruptcy "cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in the courts of the United States,[17] except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."[18] It has been held that, under these statutes, a person may be adjudicated to be an involuntary bankrupt, in a proper case, although he is beyond the territorial limits of the court.[19] A proceeding to determine the validity of a payment in contemplation of bankruptcy, made by a bankrupt to an attorney for legal services to be rendered in the future, may be instituted, when the latter is a non-resident, by the service of an order to show cause, citation or notice of the hearing upon him without the district;[20] although it is doubtful whether the order can be enforced without ancillary proceedings,[21] and although the trustee may not maintain a plenary suit for that purpose against a non-resident attorney upon service of process made outside the district.[22]

§ 612. Ancillary jurisdiction in bankruptcy. By the Act of June 25, 1910, the bankruptcy courts may "exercise ancillary

12 Harris Co., 173 Fed. 735; J. & M. Schwartz, 204 Fed. 326, 329; *Re* Smith Const. Co., 224 Fed. 228.

13 *Re* Wood & Henderson, 210 U. S. 246, 258, 52 L. ed. 1046, 1051; *Re* Smith Const. Co., 224 Fed. 228.

14 *Supra*, § 165.

15 *Supra*, § 166.

16 *Re* Wood & Henderson, 210 U. S. 246, 258, 52 L. ed. 1046, 1051.

17 *Supra*, § 166.

18 30 St. at L. 544, § 18a.

19 Hills v. F. D. McKinniss Co., 188 Fed. 1012.

20 *Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046.

21 Staunton v. Wooden, C. C. A., 179 Fed. 61.

22 *Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046.

jurisdiction of persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any court of bankruptcy.'' [1] Ancillary jurisdiction may be exercised: by directing the filing of a schedule by an officer of the bankrupt, in accordance with an order of the court of primary jurisdiction; [2] by compelling the examination of a witness concerning the property of the bankrupt [3] and the delivery to the trustee of property [4] or books [5] of the bankrupt; by restraining a creditor of a bankrupt from suing an estate outside the jurisdiction of the court of the adjudication; [6] by appointing ancillary receivers; [7] by selling

§ 612. [1] 36 St. at L. 838, ch. 412. Previously to this enactment, the extent of the ancillary jurisdiction was doubtful. In Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402; Elkus, Petitioner, 216 U. S. 115, 54 L. ed. 407, and *Re* Peiser, 115 Fed. 199, such jurisdiction was sustained. *Contra,* As to the right of a receiver thus to apply, see Lovell v. Newman, 227 U. S. 412, 57 L. ed. —. As to the right of foreign receivers to sue generally, see § 93, *supra. Re* Williams, 120 Fed. 38; s. c., 123 Fed. 321; Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 Fed. 403; *Re* Tybo Min. & Reduction Co., 132 Fed. 697; *Re* Granite City Bank, C. C. A., 137 Fed. 818; *Re* Von Hartz, C. C. A., 142 Fed. 726; Hull v. Burr, C. C. A., 153 Fed. 945. See ''Ancillary Receivers in Bankruptcy,'' by L. M. Friedman, Harv. Law Rev., XVIII, 519.

[2] *Re* Brockton Ideal Shoe Co., C. C. A., 200 Fed. 745.

[3] Elkus, petitioner, 216 U. S. 115.

[4] Lazarus v. Prentice, 234 U. S. 263, 267, affirming Musica v. Prentice, C. C. A., 211 Fed. 326, affirming *Re* A. Musica & Son, 205 Fed. 413; *Re* Sage, 224 Fed. 589; Progressive Building & Loan Co. v. Hall, 220 Fed. 45, summary proceedings; Hartman v. Ackoury, 210 Fed. 188, ancillary bill; *Re* J. & M. Schwartz, 204 Fed. 326. But see Scott v. Georges Creek Coal & Iron Co., 202 Fed. 251.

[5] Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, corporate records and stock books.

[6] Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 311, 56 L. ed. 208, 215.

[7] Fidelity Tr. Co. v. Gaskell, C. C. A., 195 Fed. 865. *Infra,* § 634. In *Re* Peiser, 115 Fed. 199, it was held that ancillary jurisdiction might be exercised by compelling the payment of funds of the bankrupt to a receiver appointed in the original jurisdiction, in obedience to an order of the original court of bankruptcy, notice of which had been served upon the holder of such funds in the ancillary jurisdiction. It has been said: that an ancillary receiver's duty is limited to the collection of assets and the custody of the same until the appointment of a trustee; and that in the absence of an application by the receivers in the court of original jurisdiction, he will not be directed to sell the property. *Re* Brockton Ideal Shoe Co., 194 Fed. 233. The

property within the judicial district;[8] by adjudicating the claims to the title to, or to legal equitable liens upon, such property;[9] and then, and after payment of such claimants, to transmit any balance to the court of primary jurisdiction;[10] by granting an order for the examination of a resident witness at the request of a trustee in bankruptcy.[11] It has been held that ancillary jurisdiction may be exercised at the request of a creditor,[12] but that temporary receivers, appointed before adjudication, cannot institute ancillary proceedings in another district to secure a confirmation of their appointment and to be put in possession of property of the corporation there situated.[13]

court appointing the ancillary receiver has the right to settle his accounts and to pay his fees and expenses out of the fund before its transmission. Fidelity T. Co. v. Gaskell, C. C. A., 195 Fed. 865, 874; but should afford the creditors or the trustee an opportunity to object to the same. Loeser v. Dallas, C. C. A., 192 Fed. 909. An application to set aside the appointment of the ancillary receiver, upon the ground that the alleged bankrupt was not insolvent and had committed no act of bankruptcy, was denied for the reason that the question should first be submitted to the original court of bankruptcy. *Re* Hayes, 192 Fed. 1018. For ancillary receivers appointed by courts of equity, see § 304, *supra*.

8 *Re* Britannia Min. Co., 197 Fed. 459.

9 Fidelity Trust Co. v. Gaskell, C. C. A., 195 Fed. 865, 54 L. ed. 407; *Re* Lipman, 201 Fed. 169; De Friece v. Bryant, 232 Fed. 233; Emerson v. Castor, 236 Fed. 29; *Re* Einstein, 245 Fed. 189. But it has been held: that when an ancillary suit is brought to recover assets, intervenors cannot obtain an adjudication that they are entitled to a priority of payment because of trust funds unlawfully obtained by the bankrupt; Knauth, Nachod & Kuhne v. Latham & Co., 242 U. S. 426; affirming S. C., 219 Fed. 721, and Jaffe v. Pyle, 242 Fed. 67; nor that they are entitled to shares of stock in the bankrupt corporation of which they have been fraudulently deprived; West v. Empire Life Ins. Co., 242 Fed. 605; *Re* Farrell, 201 Fed. 338; that the ancillary court has no power to allow an intervention by creditors who wish to bring its decision before a court of review, Babbit v. Read, C. C. A., 240 Fed. 694, and that where the ancillary court has taken possession of the property subject to a mortgage the court of primary jurisdiction alone has the right to decide whether the mortgage shall be permitted to foreclose in another court, *Re* Patterson Lumber Co., 247 Fed. 578.

10 Fidelity Trust Co. v. Gaskell, C. C. A., 195 Fed. 865, 54 L. ed. 407; Lazarus v. Prentice, 234 U. S. 263.

11 Elkus, Petitioner, 216 U. S. 115.

12 *Re* Brockton Ideal Shoe Co., C. C. A., 200 Fed. 745.

13 *Re* Tygarts River Coal Co., 203 Fed. 178.

§ 612a. Effect of bankruptcy upon State insolvency proceedings. The Federal Constitution gives Congress power to establish "uniform laws on the subject of bankruptcies throughout the United States."[1] This and the inhibition against the enactment by the States of laws which impair the obligations of contracts forbids a State from enacting an insolvent law which discharges citizens of other States from debts owed by citizens of the enacting State or from thus discharging debts created before the passage of such a statute.[2] But it does not forbid the enactment by a State of an insolvent law which operates upon its own citizens and discharges indebtedness created subsequent thereto.[3] All such legislation, however, is subject to supersession by a statute of the United States regulating bankruptcy.[4] The Bankruptcy Law now in force makes it an act of bankruptcy to make a general assignment for the benefit of creditors or, being insolvent, to apply for a receiver or trustee of one's own property, or when because of insolvency a receiver or trustee has been put in charge of the bankrupt's property under the laws of a State, or of a Territory or of the United States.[5] The same law invalidates all conveyances or transfers made by a debtor while insolvent within four months prior to the filing of a petition against him.[6] This invalidates all insolvent assignments made within the period of four months even though made by citizens of the United States exempted from the provisions of the Bankruptcy Law.[7] It was said that the assignee in insolvency is charged with notice of the filing of the petition in bankruptcy.[8] A sale by an assignee in insolvency after the filing of the petition is void although made before the adjudication.[9] A decree of the State court approving his accounts when made after the filing of the petition is void.[10] When the amount

§ 612a. 1 Article I, Section 8.

2 Sturges v. Crowninshield, 4 Wheaton 122, 4 L. ed. 529.

3 Odgen v. Saunders, 12 Wheaton 213, 6 L. ed. 606; Baldwin v. Hale, 1 Wallace, 223, 231, 17 L. ed. 531; U. S. v. Fox, 95 U. S. 670, 24 L. ed. 538.

4 Odgen v. Saunders, 12 Wheaton 213, 6 L. ed. 606.

5 30 St. at L. 544, § 3.

6 Ibid, § 67.

7 Closser v. Strawn, 227 Fed. 139 (a farmer); *Contra*, State Nat. Bank of Denison v. Syndicate Co. of Eureka Springs, 178 Fed. 359 (a corporation).

8 *Re* Neuburger, 233 Fed. 701.

9 Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. 557; *Re* Neuburger, 233 Fed. 701.

10 *Re* Neuburger, 233 Fed. 701,

of his compensation has been determined by the State court before the filing of the petition in bankruptcy, the Court of Bankruptcy will not disallow the same provided at least that he has received and spent the amount of such compensation.[11] The Court of Bankruptcy may, by summary proceedings, make the assignee account for a fund still in his hands out of which he claims a right to be paid for fees and expenses.[12] It is customary in the absence of special circumstances to permit the assignee to remain in possession until the election of a trustee or receiver, and ordinarily, when a competent assignee is in possession no receiver should be appointed.[13] An assignment made in accordance with the State law more than four months before the filing of the petition in bankruptcy is not invalidated by the bankruptcy proceedings.[14] State statutes granting resident creditors priority in the distribution of the assets of a foreign corporation transacting business there [15] and forbidding preferential transfers [16] were enforced by Courts of Bankruptcy.

§ 613. Jurisdiction of State courts in cases affecting bankruptcy proceedings. The Bankruptcy Law provides: "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person

It has been held, however, that where the creditors permit the assignee to continue in possession operating the business of the bankrupt he may be relieved from liability from a resulting loss provided he satisfies the court of bankruptcy that he acted in good faith and with sound business judgment, the burden of proof in this respect being upon him. *Re* Karp, 228 Fed. 798.

11 Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. 293; *Re* Stewart, C. C. A., 179 Fed. 222.

12 *Re* Deiswig, 253 Fed. 390, *infra*, § 635.

13 But see *Re* D. & E. Dress Co., 244 Fed. 885.

14 Mayer v. Hellman, 91 U. S. 496, 23 L. ed. 377; *Re* Boner, 169 Fed. 727; *Re* Farrell, C. C. A., 176 Fed. 505; both under the Ohio Statute; Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. ed. 760. Where the State court prior to the bankruptcy entered a decree setting aside such an assignment and directing a sale and distribution of the property among lienors, it was held that the Court of Bankruptcy had no jurisdiction to interfere. Frazier v. Southern Loan & Dr. Co., C. C. A., 99 Fed. 707.

15 *Re* Standard Oak Veneer Co., 173 Fed. 103.

16 Gen. Code Ohio, § 11104; Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. ed. 507; Irwin v. Maple, C. C. A., 252 Fed. 10.

within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved; but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."[1] After declaring that fraudulent conveyances are void when made within four months prior to the filing of the petition in bankruptcy, it expressly provides: that for the purpose of the recovery of property conveyed or encumbered by a bankrupt within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, and all conveyances, transfers or encumbrances, made by him within such four months while insolvent, "any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankrupt had not intervened, shall have concurrent jurisdiction."[2] The State courts have

§ 613. [1] 30 St. at L. 544, § 67, subd. e. See *infra*, § 644. It has been held that where a receiver has been appointed for insolvency more than four months before the filing of the petition in bankruptcy the Court of Bankruptcy has exclusive jurisdiction over the property in the hands of the receiver. Graham Mfg. Co. v. Davy-Pocahontas Coal Co., C. C. A., 238 Fed. 448; *Re* Grafton Gas & Electric Light Co., 253 Fed. 668. *Contra Re* Williams, 240 Fed. 788, 794; Frazier v. Southern Loan & D. R. Co., C. C. A., 99 Fed. 707, where the receiver was appointed because of a fraudulent transfer. The possession of the assets of a bank by a State officer does not give the State court jurisdiction thereof after proceedings in bankruptcy are instituted. State of Missouri v. Angle, C. C. A., 236 Fed. 644. A sale under such an attachment made by a State court subsequent to the appointment of a trustee in bankruptcy is void. De Frieee v. Bryant, 232 Fed. 233.

[2] Ibid. Subd. e, as amended 32 St. at L. 797. See *infra*, § 644.

concurrent jurisdiction of suits by the trustee to recover an unlawful preference,[3] and to set aside a fraudulent transfer,[4] even of an action to set aside a chattel mortgage, which the mortgagee claims to be a lien upon a fund in the possession of the Court of Bankruptcy.[5] But in neither of such suits in a State court can the validity of all other claims against the bankrupt be litigated; nor can it be determined whether others have received voidable preferences and have not been required to surrender them.[6] Such matters must be decided by the Court of Bankruptcy.[7] A State court has jurisdiction of a suit against a trustee in bankruptcy, to reform a contract between the plaintiff and the bankrupt;[8] or an action of trover against a trustee or receiver in bankruptcy;[9] but not of an action of replevin against a trustee or a receiver, at least without leave of the Court of Bankruptcy.[10] A State court has no jurisdiction to restrain from filing a petition of voluntary bankruptcy[11] nor to issue an execution against a trustee in bankruptcy.[12]

A State court has jurisdiction to continue a suit to foreclose a mortgage or other lien upon the bankrupt's property instituted before the filing of the petition in bankruptcy, even if this was instituted during the four preceding months; provided, at least,

This rule was applied to a suit in the State court by the executor of a bankrupt to recover life insurance which he had concealed in the bankruptcy proceedings when the trustee in bankruptcy was made a party thereto. Doolittle v. Mutual Life Ins. Co. of N. Y., 249 Fed. 491.

3 Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596.

4 Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911, in which the author was counsel.

5 Ibid.

6 Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 537, 51 L. ed. 596, 605; New River Coal Land Co. v. Ruffner Bros., C. C. A., 165 Fed. 881.

7 Ibid. *Re* Grafton Gas & Electric Light Co., 253 Fed. 668.

8 Zartman v. First Nat. Bank of Waterloo, 216 U. S. 134, 54 L. ed. 418. It has been held that a State court has jurisdiction of a suit by the member of a firm for an accounting by the trustee of his bankrupt partner. Williams v. Lane, (Cal. 1910) 109 Pac. 873.

9 *Re* Kanter & Cohen, C. C. A., 121 Fed. 984. But see § 633, *infra*.

10 *Re* Russell & Birkett, 104 Fed. 248; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. ed. 327; *Re* Wellmade Gas Mantle Co., 230 Fed. 502; *Re* Stringer, 230 Fed. 177, 183.

11 *Re* Hargadine-M'Kittrick Dry Goods Co., 239 Fed. 155.

12 *Re* Stringer, 230 Fed. 177.

that the lien previously accrued;[13] although the proceedings in such a suit may be stayed by a court of bankruptcy in a proper case.[14] It has been even held that such a suit may be sustained when not instituted until after the adjudication of the mortgagor a bankrupt.[15] The State court retains jurisdiction of an action in replevin or other suit or proceeding, to enforce a claim of ownership in specific property, where the chattels were seized before the petition in bankruptcy was filed,[16] but after the filing

[13] Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Hobbs v. Head & Dowst Co., *Re* New England Breeders' Club, C. C. A., 184 Fed. 409, affirming 175 Fed. 501; *Re* Bach, 212 Fed. 575; *Re* Schmidt, 224 Fed. 814; McLoughlin v. Knop, 214 Fed. 260. Where the trustee claimed that the land had been conveyed in fraud of creditors, it was held that he should apply to the State court for relief; and that in such a case the State court had the power to determine the validity of adverse claims to the property. *Re* Pilcher & Son, 228 Fed. 139.

[14] Hobbs v. Head & Dowst, C. C. A., 184 Fed. 509; affirming 175 Fed. 501; § 633, *infra*. It has been held that the pendency of bankruptcy proceedings, the prosecution of which has been delayed, is no defense to a petition by an intervenor to foreclose a mortgage covering land of which a receiver appointed by a court of equity has previously taken possession. Clark v. Norwalk Steel & Iron Co., 188 Fed. 999.

[15] New River Coal Co. v. Ruffner, C. C. A., 165 Fed. 881, 885, 91 C. C. A. 559, 563; *Re* Daner, C. C. A., 167 Fed. 529, 93 C. C. A. 238. See *infra*, § 649. Where such a suit was instituted more than four months before the filing of the petition it was held that the Court of Bankruptcy had no jurisdiction to order the property to be delivered to the trustee. *Re* Farrell, C. C. A., 201 Fed. 338; *contra*, First Trust & Savings Bank v. Bitter Root Valley Irr. Co., 237 Fed. 733; Heath v. Shaffer, 93 Fed. 647; *Re* Porter, 109 Fed. 111; *Re* San Gabriel Sanatorium Co., C. C. A., 111 Fed. 82. But it has been held that this cannot be done without the consent of the court of bankruptcy although the suit was instituted before the adjudication of bankruptcy. George B. Matthews & Sons v. Joseph Webre Co., 213 Fed. 396; Pugh v. Loisel, 219 Fed. 417.

[16] Linstroth Wagon Co. v. Ballew, 149 Fed. 960. *Contra, Re* Hymes Buggy & Implement Co., 130 Fed. 977; First Trust & Savings Bank v. Bitter Root Valley Irr. Co., 237 Fed. 733. Where an injunction forbidding the institution of a foreclosure suit was vacated and a judgment of deficiency after a foreclosure sale entered in a State court it was held that the mortgagee could not there sue the trustee in bankruptcy to recover the rents collected by him from the mortgaged property after default although the mortgage gave the mortgagee the right to have a receiver of the rents appointed. Rhinelander v. Richards, 184 App. Div. (N. Y.) 67.

of the petition no new proceeding can be instituted in a State court to take possession of the bankrupt's property, either by replevin,[17] detinue,[18] attachment,[19] or otherwise, even prior to the adjudication and before any officer of the Court of Bankruptcy has taken possession. It has been suggested that where the property was reclaimed by the bankrupt prior to the institution of the proceedings, the title might be determined in the Court of Bankruptcy.[20]

Pending suits upon debts which are discharged by a discharge in bankruptcy must be stayed until after an adjudication or the dismissal of the petition and after adjudication they may be stayed until twelve months after the date of such adjudication or if at that time an application for a discharge is pending until the question of the discharge is determined,[21] unless they are brought to enforce a lien, which is not discharged by the bankruptcy law,[22] or to assert a right *in rem;*[23] but a sale of perishable property without notice of the proceedings in bankruptcy was not thereby invalidated although it was seized under an attachment thereby vacated.[24] In a suit to quiet title, a State court has jurisdiction to determine a claim, set up by a trustee in bankruptcy, that the conveyance to the plaintiff is void as an illegal preference;[25] and it has been held that where the trustee there set up his claim by answer, the Federal court should stay a suit subsequently begun therein by him to obtain the same relief.[26] A judgment in a State court against a trustee in bankruptcy cannot be collaterally attacked in the bankruptcy

17 *Re* Wellmade Gas Mantle Co., 230 Fed. 502; *Re* Weinger, Bergman & Co., 126 Fed. 875; *Re* Hymes Buggy & Implement Co., 130 Fed. 977. *Contra,* Re Wells, 114 Fed. 222; Remington on Bankruptcy, § 1585. It has been held that a landlord cannot institute proceedings for distress after the adjudication. *Re* Printograph Sales Co., 210 Fed. 567.

18 Corbett v. Riddle, 209 Fed. 811.

19 *Re* Wellmade Gas Mantle Co., 230 Fed. 502.

20 *Re* Munro, 195 Fed. 817.

21 30 St. at L. 546, § 11a; *Re* Geister, 97 Fed. 322, 3 Am. B. R. 228; *infra,* § 633.

22 Tennessee Producer Marble Co. v. Grant, C. C. A., 135 Fed. 322, 14 Am. B. R. 288; Virginia Iron, Coal & Coke Co. v. Olcott, C. C. A., 197 Fed. 730; *Re* Lusch, 251 Fed. 316 (a garnishee execution against the bankrupt).

23 Ibid.

24 Jones v. Springer, 226 U. S. 148, 57 L. ed. —.

25 Davis v. Planters' Tr. Co., 196 Fed. 970.

26 Ibid.

proceeding;[27] and an order of a court of bankruptcy cannot be reviewed or set aside by a State court,[28] although it is claimed that the former court was without jurisdiction.[29] A State court has no jurisdiction of a suit in equity against trustees in bankruptcy, to require them to pay to complainant the proceeds of property which he claims, but which the defendants sold under an order of a court of bankruptcy as assets of a bankrupt's estate.[30]

§ 614. Jurisdiction in bankruptcy as affected by residence or place of business. The provision of the law authorizing Courts of Bankruptcy to adjudge persons bankrupt, who have had their principal places of business, residence, or domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof imposes jurisdictional conditions.[1] Its waiver by the bankrupt may estop him in in-

27 *Re* Seavey, 195 Fed. 825; *Re* Stringer, 230 Fed. 177. This rule does not apply to an adjudication by the State court upon an intervention by the trustee. George B. Matthews & Sons v. Joseph Webre Co., 213 Fed. 396. See Blair v. Brailey, 221 Fed. 1. It has been held that a judgment of a State court in an action begun against the bankrupt more than four months before the filing of the petition in bankruptcy which establishes a lien against his property cannot be impeached in the Court of Bankruptcy by the trustee for fraud or collusion when he has had an opportunity to intervene in the State court and there set up the fraud. Frazier v. Southern Loan & Dr. Co., C. C. A., 99 Fed. 707.

28 U. S. Fidelity Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055.

29 Hatch v. Curtin, 146 Fed. 200. An order of a State court made in an action at common law against the bankrupt cannot be resettled by the Court of Bankruptcy. *Re* Vanoscope Co., C. C. A., 253 Fed. 53.

30 Treat v. Wooden, 138 Fed. 934. It has been held that bankruptcy proceedings do not suspend the jurisdiction of a State court over proceedings for the dissolution of a corporation, although it is insolvent, *Re* Standard Cordage Co., 184 Fed. 156, nor affect an insolvent assignment, made more than four months prior to their institution, *Re* Boner, 169 Fed. 727; Hoarding v. Havemeyer, N. Y. Sup. Ct. Sp. Tm., Erlanger, J., N. Y. L. J. Nov. 25, 1911; nor supersede a State insolvent law, so far as regards persons who are excepted from the Bankruptcy Act; State Nat. Bank of Denison v. Syndicate Co. of Eureka Springs, 178 Fed. 359; nor supersede provisions in a State insolvency law which give preferential rights to certain creditors. *Re* Standard Oak Veneer Co., 173 Fed. 103. But see Frazier v. Southern Loan Tr. Co., C. C. A., 99 Fed. 707.

§ 614. 1 *Re* Garneau, C. C. A., 127 Fed. 677, 11 Am. B. R. 679; Remington on Bankruptcy, § 30. The residence, domicile or principal

place of business must have been within the division of the district where proceedings were instituted. *Re* Hamrick, 175 Fed. 279; *Re* Lemen, 208 Fed. 80.

A mere clerk, *Re* Lipphart, 201 Fed. 103, although he is attorney in fact of his employer, or a traveling salesman, *Re* Price, 231 Fed. 1001, cannot be considered as having a place of business. When a petitioner in involuntary bankruptcy resided at one district, where he was employed as clerk in a store, but was engaged in trade on his own account as a general merchant in another district, the court of the latter district took jurisdiction of the petition. *Re* Brice, 93 Fed. 942.

In order to give the court jurisdiction, the residence of the bankrupt in the district must be *bona fide;* and the removal of a person from one district to another, for the express purpose of filing a petition in bankruptcy in the latter, with the intention of leaving the same as soon as he obtains his discharge, does not confer jurisdiction upon the court of such district; *Re* Garneau, C. C. A., 127 Fed. 677. But where a person placed in guardianship because of physical disability pending insolvency proceedings in one district changed his residence, with the consent of his guardian, to another and there lived for six months before he filed a voluntary petition in bankruptcy, it was held that the court of the latter had jurisdiction. *Re* Kingsley, 160 Fed. 275. Where the debtor had lived abroad during the greater part of the preceding six months, but had not abandoned his original domicile, the court had jurisdiction where his original domicile was situated. *Re* Williams, 99 Fed. 544. See *Re* Lemen, 208 Fed. 80. An insolvent assignment in the district where a man had been engaged in business before he moved to California for his health and remained there three months was held not to constitute a change of residence. *Re* Davis, 217 Fed. 113. A change of residence to support an action for divorce in another State was held sufficient to constitute a change of residence under the bankruptcy act. *Re* Lipphart, 201 Fed. 103. Payment of poll taxes and voting in a district which he visited only casually, staying with relations, or at a hotel, was held not to be sufficient to constitute a change of residence. *Re* Sedgwick, 223 Fed. 655. The residence of the members of a firm in another district is immaterial when their principal business was carried on in the district where the proceedings are instituted. *Re* Gurler & Co., 232 Fed. 1016; *Re* Flaherty, 265 Fed. 741. Where the partners had been domiciled or transacted business within the district during the greater portion of the six months the court has jurisdiction over the firm although this has been in existence a shorter period of time. *Re* Mitchell & Co., C. C. A., 219 Fed. 690. Where the surviving member of an insolvent firm had sold his interest therein and moved to another district more than three months before the proceedings were instituted, the court of the former district had no jurisdiction to adjudicate him a bankrupt. *Re* Fackelman, 248 Fed. 565.

The disappearance of the bankrupt, who is an absconder, does not change his domicile. *Re* Oldstein, 182 Fed. 409; *Re* Plotke, C. C. A., 104 Fed. 964, where the bankrupt lived without the district, and had

voluntary proceedings,[2] but it will not bind his creditors.[3] It seems that creditors waive such an objection unless they make it promptly by a motion to dismiss the petition or to vacate the adjudication in bankruptcy.[4] The adjudication is not open to collateral attack because of a defect in the territorial jurisdiction.[5] It has been held that "the preceding six months" in this section of the statute relate to the time of the adjudication, and not to that of the filing of the petition.[6] The words are con-

a principal place of business within it until four months before the petition was filed, when she ceased doing business, the court had no jurisdiction. *Re* Plotke, C. C. A., 104 Fed. 964. The following allegation was held to be sufficient to give the court territorial jurisdiction: "That J. Murry Mitchell, Thomas B. McGovern and Frederick B. Alexander are and have been for more than six months next preceding the date of the filing of this petition, engaged principally in the business of stock brokers and that their principal place of business during all of said period has been and now is in the Borough of Manhattan, City of New York, in the Southern District court of New York." *Re* Mitchell, C. C. A., 219 Fed. 690.

2 Long v. Lockman, 14 Am. B. R. 172, 135 Fed. 197, holding that a man, who had obtained the dismissal of bankruptcy proceedings in one district by alleging that he resided in another, was estopped from denying his residence in the latter when proceedings were there instituted. Clark-Herrin-Campbell v. H. B. Claflin Co., 218 Fed. 429, holding that a stipulation to submit to the court a determination of liability of costs and attorneys fees was a waiver of an objection to the jurisdiction. It has been held: that notwithstanding a general appearance the bankrupt may object to the territorial jurisdiction after the adjudication and before other proceedings have been taken. Finn v. Carolina Portland Cement Co., 232 Fed. 815. It has been said: that an adjudication of bankruptcy made upon the bankrupt's default should be vacated upon proof by him that the requisite residence did not exist. *Re* Mitchell, C. C. A., 219 Fed. 690.

3 Fogarty v. Gerrity, 1 Sawyer 233, Fed. Cas. 4,895; *Re* Garneau, C. C. A., 127 Fed. 677, 11 Am. B. R. 679.

4 *Re* Mason, 99 Fed. 256; Allen v. Thompson, 10 Fed. 116; *Re* Worsham, C. C. A., 142 Fed. 121; Finn v. Carolina Portland Cement Co., 232 Fed. 815. An appearance and answer to the merits in a summary proceeding to obtain assets of the bankrupt waives objections to the territorial jurisdiction. Fairbanks Shovel Co. v. Wills, 240 U. S. 642. A creditor, who has proved and filed his claim, participated in the election of a trustee and received a dividend, cannot object to the discharge upon the ground that the proceeding was instituted in the wrong district. *Re* Mason, 99 Fed. 256.

5 Fairbanks Shovel Co. v. Wills, 240 U. S. 642; *Re* Flaherty, 265 Fed. 741; Roszell Bros. v. Continental Coal Corp., 235 Fed. 343.

6 *Re* Tully, 156 Fed. 634. Where, at the time of the adjudication, the

nected by a disjunctive; and there is no requirement of both residence and domicile nor of either of them when there has been the requisite maintenance of a principal place of business within the district.[7] A corporation may be adjudicated bankrupt in a State where its principal place of business is located, although it received its charter from another State.[8]

bankrupt had not been a resident of the district for the statutory period of time, but the petition was filed in good faith, and the bankrupt remained a resident there; it was held that a motion to dismiss the proceeding, made after the bankrupt had remained a resident more than three months, should not be granted; but the order of adjudication was set aside and a new one entered as of a later date. *Re* Tully, 156 Fed. 634. Other cases hold that the six months must precede the filing of the petition. *Re* Plotka, 104 Fed. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *Re* R. H. William, 120 Fed. 34, 9 Am. B. R. 736; Remington on Bankruptcy, § 31.

[7] *Re* Brice, 93 Fed. 942, 2 Am. B. R. 197; Remington on Bankruptcy, § 33.

[8] *Re* United Button Co., 137 Fed. 668; *Re* Alaska American Fish Co., 162 Fed. 498; *Re* Guanacevi Tunnel Co., C. C. A., 201 Fed. 316; Home Powder Co. v. Geis, C. C. A., 204 Fed. 568; *Re* Wenatchee-Stratford Orchard Co., 205 Fed. 964; *Re* Beiermeister Bros. Co., 208 Fed. 145; *Re* E. & G. Theatre Co., 222 Fed. 657; Roszell Bros. v. Continental Coal Corp., 235 Fed. 343; *Re* San Antonio Land & Irrigation Co., 226 Fed. 984; Continental Coal Corp. v. Roszelle Bros., C. C. A., 242 Fed. 243; *Re* Worcester Footwear Co., 251 Fed. 760. Where two petitions are filed against a corporation, one in the State by which it was incorporated and one in the district where it does business, proceedings in the latter district will be usually stayed until a hearing has been had in the court of the domicile, leaving it to such court to determine where the case can be proceeded with for the greatest convenience of the parties in interest; but they will not ordinarily be dismissed until the court of the domicile has determined in which district the proceedings should be conducted. *Re* Tybo Min. & Reduction Co., 132 Fed. 697; *Re* Globe Sec. Co., 132 Fed. 709. See Kyle Lumber Co. v. Bush, C. C. A., 133 Fed. 688. Where one of two manufacturing corporations organized in different States owned practically all of the capital stock of the other and had an office in the State and district where the latter had its place of business; it was held that the Court of Bankruptcy there, which had first appointed a receiver of the property of both, should retain jurisdiction. *Re* Southwestern Bridge & Iron Co., 133 Fed. 568. It has been held that, upon the appointment of receivers in a district, a corporation ceases to do business therein. *Re* Perry Aldrich Co., 165 Fed. 249; *Re* Thomas McNally Co., 208 Fed. 291. In determining whether a corporation has its principal place of business in another State, its failure to obtain the license which the

The Act further provides: "In the event petitions are filed against the same person, or against different members of a partnership in different Courts of Bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of the parties in interest."[9]

The General Orders provide: "In case two or more petitions shall be filed against the same individual in different dis-

State statute there requires is not conclusive. *Re* Duplex Radiator Co., 142 Fed. 906; *Re* Perry Aldrich Co., 165 Fed. 249. The place where the principal business of the corporation is carried on, the seat of its practical rather than of its financial operations, is usually considered to be that where it is for the greatest convenience of those interested that its assets should be administered. *Re* General Metals Co., 133 Fed. 84, 12 Am. B. R. 770; *Re* Tennessee Const. Co., 207 Fed. 203; s. c., C. C. A., 213 Fed. 33; *Re* R. H. Pennington & Co., 228 Fed. 388. But this rule is not always followed, *Re* Tybo Mining & Reduction Co., 132 Fed. 978; *Re* United Button Co., 137 Fed. 668, and the burden of proof in this respect has been said to rest upon those who ask a removal from the district of its domicile. *Re* Tybo Min. & Red. Co., 132 Fed. 978; *Re* Tennessee Const. Co., 207 Fed. 203; s. c., C. C. A., 213 Fed. 33; *Re* R. H. Pennington & Co., 228 Fed. 388. "A corporation closed its manufacturing works in one district five months before the petition was filed, discharging all its employees there except a watchman and a local superintendent who were kept to preserve the property, and in the intervening time carried on a liquidation of its affairs in its general office in another district where its principal officers lived, its directors' meetings were held, its books kept, its banking business transacted and its principal purchases and sales made; the court of the latter district had jurisdiction." *Re* Marine Mach. & C. Co., 91 Fed. 630. So had the court of the former. Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444. It has been held that a mining company is not subject to bankruptcy proceedings in the State where it maintains its principal office when its lands and mines are situated, and its sales made, in another district. *Re* Tygarts River Coal Co., 203 Fed. 178; Continental Coal Corp. v. Rozelle Beis, C. C. A., 242 Fed. 243.

[9] 30 St. at L. 544, 554, § 32; *Re* Sterne & Levi, 190 Fed. 70. It was held further that this section and General Order VI applied not only to a case where two or more involuntary petitions were filed, but also to a case where an involuntary petition was filed in one district and a voluntary one in another. *Re* Waxelbaum, 98 Fed. 589. A partnership is entitled to the benefit of this section of the statute. *Re* Sears, 112 Fed. 58.

tricts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.'' [10] It has been held: that where subsequent to the filing

[10] The word ''individual,'' in the General Order is equivalent to persons and includes a corporation. *Re* R. H. Pennington & Co., 228 Fed. 388; *Re* Vanoscope Co., C. C. A., 233 Fed. 53. Where a bankrupt corporation has its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts have concurrent jurisdiction of involuntary bankruptcy proceedings against it. International Silver Co. v. N. Y. Jewelry Co., C. C. A., 233 Fed. 945; *Re* Continental Coal Corp., C. C. A., 238 Fed. 113, 117. The proximity of a majority in number and claims of the bankrupt's creditors is not conclusive, *Re* United Button Co., 137 Fed. 688; but the preference of such a majority has great influence with the court. Ibid.; *Re* New Era Novelty Co., 241 Fed. 298. The term ''parties in interest'' is not limited to unsecured creditors of the bankrupt, but includes all persons whose pecuniary interests are directly affected by the bankruptcy proceedings, *Re* United Button Co., 137 Fed. 668, including the bankrupt, *Re* Okmulgee Producing & Refining

of a petition for involuntary bankruptcy, a petition for voluntary bankruptcy of the same person is filed in another district, the General Order applies;[11] but that before adjudication notice of the filing of the latter petition must be given to the petitioning creditors in the former proceeding.[12]

§ 615. Practice in bankruptcy proceedings. In general. Courts of bankruptcy are courts of equity with limited and special powers.[1] "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."[2] "All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."[3] In pursuance of the statute, the Supreme Court of the United States has adopted certain general orders and forms in bankruptcy, which are con-

Co., 265 Fed. 736. General Orders VI. Where the debts were all contracted in one district in which the business of the bankrupt obliged him to spend a portion of his time, it was held that it would be "for the greatest convenience of the parties in interest" to proceed there, even if the bankrupt resided elsewhere. *Re* Waxelbaum, 98 Fed. 589; and where the only business transacted by a partnership for more than three months before the petition was filed was a winding up of its affairs within the district, it was held that the court there had jurisdiction. *Re* Blair, 99 Fed. 76. But see *Re* Marine Mach. & C. Co., 91 Fed. 630. So when the bankrupt has resided within the district the greater portion of six months prior to the filing of the petition. Hills v. F. D. McKinniss Co., 188 Fed. 1012; New Era Novelty Co., 241 Fed. 298.

[11] *Re* New Era Novelty Co., 241 Fed. 298.

[12] Ibid. The petition may be filed before the adjudication. *Re* Okmulgee Producing & Refining Co., 265 Fed. 736.

§ 615. [1] *Re* Gillaspie, 190 Fed. 88.

[2] General Order, XXXII.

[3] 30 St. at L. 544, § 30.

tained in the appendix of this work. It has been said that these rules and forms have the force and effect of law.[4] The different courts of bankruptcy have also adopted special rules of practice. The State practice is not followed.[5] Proceedings in bankruptcy are equitable in their nature and, in the absence of expressed provisions in the bankruptcy act or bankruptcy rules to the contrary, they must follow the general principles of equity jurisprudence[6] and of the practice in equity;[7] but the equity rules are not considered to be rules of the bankruptcy court and are not strictly followed.[8] The equity docket is separate and distinct from the docket in actions at common law and suits in

[4] *Re* Gerber, C. C. A., 186 Fed. 693.

[5] *Re* Veler, C. C. A., 249 Fed. 633.

[6] Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40; Clark v. Johnson, C. C. A., 245 Fed. 442.

[7] Westall v. Avery, C. C. A., 171 Fed. 626. It has been held: that the pleadings and practice prescribed by the general equity rules must be followed in proceedings to set aside preferences. Ibid.; *Re* Veler, C. C. A., 249 Fed. 633, 645; that a motion to dismiss should be made in lieu of a demurrer. *Re* Brown, 228 Fed. 533; Pollack v. Meyer Bros. Drug Co., C. C. A., 233 Fed. 861; that there should be no recitals in decrees or orders in controvention of the eighty-sixth equity rule, which then prevailed. *Re* Fischer, C. C. A., 175 Fed. 531; that, pending a motion to dismiss a petition upon the ground that all creditors had been paid, an order may be entered appointing a special master to hear proofs as to the validity and amount of unpaid claims and to dismiss all claims of which no proof is presented within a period of three months, prescribed in the petition. *Re* A. B. Baxter & Co., C. C. A., 152 Fed. 137. Where, pending a motion to dismiss petitions in bankruptcy upon the ground that all creditors had been paid, an order was entered appointing a special master to hear proofs as to the validity and amount of unpaid claims; the court followed the analogy of the equity rules. Where the bankruptcy law and rules failed to regulate appeals, these follow the practice in equity. *Re* Stafford, 240 Fed. 155.

[8] International Harvester Co. v. Carlson, C. C. A., 217 Fed. 736. It has been held that a court of bankruptcy may, in a proper case, order real or personal property to be sold at a private sale. *Re* Edes, 135 Fed. 595; and that it is not bound by the statute, 27 St. at L. p. 751; *supra*, § 394; providing that all sales of real estate made pursuant to the directions of a court of the United States, shall be by public auction after a prescribed notice. *Re* Edes, 135 Fed. 595. Equity Rule 4 directing the clerk to serve notice *ex parte* is not followed. *Re* Stafford, 240 Fed. 155. Neither is Equity Rule 66 limiting the time for filing exceptions to masters' reports. International Harvester Co. v. Carlson, C. C. A., 217 Fed. 736.

equity.[9] The equity order book is not used.[10] Courts of bankruptcy have the same powers to permit amendments which are vested in other Federal courts.[11]

By the Bankruptcy Act, "a. The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence." There is but one continuous term of bankruptcy.[12] An order of the court, except a discharge,[13] may be vacated at any subsequent time at least before the termination of the proceedings;[14] but, in case of unreasonable delay, an application for that purpose may be denied because of laches.[15]

§ 616. Individuals who may become bankrupts. Proceedings in bankruptcy are either voluntary or involuntary. "Petitions of voluntary bankruptcy may be filed by any person who owes debts except a corporation."[1] This provision is constitutional although it permits persons who are not traders to be adjudged bankrupts.[2] A resident alien may file the petition.[3] It has been held: that a minor may become a voluntary bankrupt if he owes debts upon which he is absolutely bound, and which he cannot

9 *Re* Stafford, 240 Fed. 155.

10 Ibid.

11 Morrison v. Rieman, C. C. A., 249 Fed. 97.

12 30 St. at L. 544, as amended 32 St. at L. 279, 34 St. at L. 267, 36 St. at L. 838, § 8a. It has been held that this applies to both voluntary and involuntary proceedings, even when the death occurs before the adjudication, and in such a case the administrator of the bankrupt may file an application for a discharge. *Re* Agnew, 225 Fed. 650; *Re* Ives, 111 Fed. 495; *Re* Jemison, Mercantile Co., C. C. A., 112 Fed. 966; *Re* Henschel, 114 Fed. 968; Tucker v. Curtin, C. C. A., 153 Fed. 91; *Re* Barker Piano Co., C. C. A., 233 Fed. 522. *Supra*, § 65.

13 *Re* Cuthbertson, 202 Fed. 666; *infra*, § 658.

14 *Re* Ives, 111 Fed. 495; *Re* Jemison Mercantile Co., C. C. A., 112 Fed. 966; *Re* Henshel, 114 Fed. 968; Tucker v. Curtin, C. C. A., 153 Fed. 91; *Re* Barker Piano Co., C. C. A., 233 Fed. 522.

15 *Re* Hoyt & Mitchell, 127 Fed. 968; Traub v. Marshall Field & Co., C. C. A., 182 Fed. 622; *Re* Merwin v. Willoughby Co., 208 Fed. 293. See Sandusky v. First Nat. Bank, 23 Wall. 289, 23 L. ed. 155.

§ 616. 1 30 St. at L. 544, 547, § 4.

2 Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113.

3 *Re* Boynton, 10 Fed. 277; Brandenburg on Bankruptcy (2d ed.), 78,

disaffirm;[4] but that he cannot be made an involuntary bankrupt where the debts are such as can be repudiated by him.[5] It is doubtful whether a lunatic can be adjudged an involuntary bankrupt.[6] He cannot be before a committee or guardian *ad litem* has been appointed;[7] nor, it has been held, for an act committed after he has become insane.[8] Married women are subject to bankruptcy proceedings, wherever debts can be collected out of their separate estates by proceedings in equity or otherwise; even in States where a judgment *in personam* cannot be taken against them;[9] but not, it has been said, where their debts cannot be collected in any manner.[10] Insolvency is not essential to voluntary bankruptcy,[11] nor the ownership of property.[12]

It has been held that a single debt will support the voluntary petition,[13] but it must be provable, and that a judgment for a tort which is stayed by security upon an appeal will not.[14]

Petitions for involuntary bankruptcy may be filed by or against any natural person, except a wage-earner,[15] or a person

citing: *Re* Kaiy Chung, 1 N. B. N. 22.

4 *Re* Brice, 93 Fed. 942. See § 617, *infra*. *Contra*, *Re* Duguid, 100 Fed. 274, where the petition was filed by the infant's mother, who was his partner.

5 *Re* Dunnigan, 95 Fed. 428; *Re* Eidemiller, 105 Fed. 595.

6 *Re* Marvin, 1 Dillon, 178; *Re* Funk, 101 Fed. 244; *Re* Burka, 107 Fed. 674. It has been said that he can be. *Re* Kehler, C. C. A., 159 Fed. 55. A voluntary petition was sustained when filed by a man over whose person and estate, by reason of physical disability, a guardian had been appointed upon his own petition in another State. *Re* Kingsley, 160 Fed. 275.

7 *Re* Burka, 107 Fed. 674.

8 *Re* Funk, 101 Fed. 244; *Re* Kehler, C. C. A., 159 Fed. 55, holding that an answer by his committee setting forth an inquisition, which adjudged him to have been insane with lucid intervals since a date prior to the commission of the acts charged, was *prima facie* evidence that he was insane at the time when such acts were committed, and that the petitioning creditors had the burden to show that these acts were performed during a lucid interval.

9 MacDonald v. Tefft-Weller Co., C. C. A., 65 L.R.A. 106, 128 Fed. 381.

10 *Re* Brice, 93 Fed. 942.

11 *Re* Jehu, 94 Fed. 638; *Re* Chappell, 113 Fed. 545.

12 *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155; Blackstone v. Blackstone, C. C. A., 265 Fed. 249.

13 *Re* Schwaninger, 144 Fed. 555. But see § 656, *infra*.

14 *Re* Yates, 114 Fed. 365.

15 A wage-earner, within the meaning of the bankruptcy law, is

engaged chiefly in farming or the tillage of the soil,[16] against any unincorporated company, and any moneyed, business or commercial corporation, except a municipal railroad, insurance or banking corporation; owing debts to the amount of one thou-

"an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 a year." 30 St. at L. 544, § 1. This implies service for another which is substantially exclusive. Virginia-Carolina Chemical Co. v. Shelhorse, C. C. A., 228 Fed. 493. The fact that a person furnishes his own tools or his own team, wagon and plow, does not make him any less a wage-earner, if he otherwise falls within the statutory description. *Re* Yoder, 127 Fed. 894. It has been held that the following persons are not wage-earners: a music teacher, or persons engaged in professional occupations. First Nat. Bank v. Barnum, 160 Fed. 245; the holder of a majority of stock in a corporation, who has a nominal salary of $900 a year, but drew more than that sum from the funds of the company during the year preceding the institution of the proceedings, Carpenter v. Cudd, C. C. A., 174 Fed. 603. See, also, *Re* Wakefield, 182 Fed. 247. A traveling salesman at a salary of $100 a month with board and lodging while on the road, there being proof that this additional payment was worth $40 a month to him. *Re* Hurley, 204 Fed. 126; and a man who, while working independently as a manufacturer and trader, earns wages by working for another in a different corporation, *Re* Naroma Chocolate Co., 178 Fed. 383.

[16] Harris v. Tapp, 235 Fed. 918; *Re* Doroski, 271 Fed. 8. In determining whether a man is chiefly engaged in farming, the court must consider all his activities, the relative amount of time devoted to each, the comparative amount of revenue received and indebtedness in each incurred. *Re* Brown, C. C. A., 253 Fed. 357. The fact, that the greater amount of the indebtedness was incurred in other business, will usually establish that the individual is not exempt. Ibid. *Re* Driver, 242 Fed. 956. But see *Re* Spengler, 238 Fed. 862. It seems that the operation of a packing house creamery and poultry yards is not farming. *Re* Brown, C. C. A., 253 Fed. 357. Neither is the threshing of grain raised by others. Hart-Parr Co. v. Barkley, C. C. A., 231 Fed. 913. Ownership of a farm leased to another, Wulbern v. Drake, C. C. A., 120 Fed. 493; *Re* Matson, 123 Fed. 743; or managed by the party's husband, Re Johnson, 149 Fed. 864, 18 Am. B. R. 74; is not sufficient to exempt a person from involuntary bankruptcy. The statute does not protect a man who engages in farming after the abandonment of a business in which he has committed an act of bankruptcy. *Re* Naroma Chocolate Co., 178 Fed. 383; *Re* Wakefield, 182 Fed. 247. See, also, *Re* Kehler, C. C. A., 159 Fed. 55. The fact that a person, chiefly engaged in farming or tillage of the soil, incidentally conducts a small business, *Re* Terry, 208 Fed. 162; Counts v. Columbus Buggy Co., C. C. A., 210 Fed. 748; Harris v. Tapp, 235 Fed. 918; such as keep-

sand dollars or over.[17] In deciding whether a debtor belongs to the exempt class, his status[18] is usually determined as of the date of the commission of the act of bankruptcy, and the amount of his indebtedness, as of such date.[19] The burden of proof, that a person is not within one of the exempted classes rests upon the petitioner, who must plead facts that show it.[20] It has been held

ing a dairy, where milk is sold at retail, Gregg v. Mitchell, C. C. A., 20 L.R.A. (N.S.) 148, 166 Fed. 725; or buys and sells hogs and cattle, which he has fattened on his farm, *Re* Dwyer, C. C. A., 184 Fed. 880; *Re* Thompson, 102 Fed. 287; at least if he does not buy more feed than is raised on the farm for the use of his cattle, Bank of Dearborn v. Matney, 139 Fed. 482, 12 Am. B. R. 482. But see *Re* Brown, 251 Fed. 365; or keeps a private bank, Couts v. Townsend, 126 Fed. 249; or a store, *Re* Mackey, 110 Fed. 355; Rise v. Bordner, 140 Fed. 566; or a sales agency, Rise v. Bordner, 140 Fed. 566. See Menke v. Sunderman, C. C. A., 186 Fed. 486; or is in the business of an attorney and collector, *Re* Hoy, 137 Fed. 175; does not deprive him of his exemption. The classes of corporations subject to the statute are considered in the next section. The court will administer the estate of a member of a firm who is principally engaged in farming and not individually subject to adjudication. *Re* R. F. Duke & Son, 199 Fed. 199.

17 30 St. at L. 544, 547, § 4. As amended, 36 St. at L. 838.

18 *Re* Luckhardt, 101 Fed. 807; *Re* Burgin, 173 Fed. 726, criticised Harv. Law Rev., March, 1910; *Re* Jacobson, 181 Fed. 870; *Re* Disney, 219 Fed. 294; Virginia-Carolina Chemical Co. v. Shelhorse, C. C. A., 228 Fed. 493.

19 *Re* Jacobson, 181 Fed. 870. When determining the right to an exemption the amount of indebtedness must be determined. Where, subsequent to an assignment for the benefit of creditors and before the filing of a petition in involuntary bankruptcy, the debtor made a settlement with certain creditors and received a release discharging him, in return for the payment of a percentage of their claims, leaving the amount due those who did not agree to the settlement less than $1,000; it was held that he might be adjudicated a bankrupt. Ibid.

20 *Re* Pilger, 118 Fed. 206. See Am. Agricultural Chemical Co. v. Brinkley, C. C. A., 194 Fed. 411. But see *Re* Leland, 185 Fed. 830, where the evidence was held to be insufficient to show an exemption. Ordinarily, the primary burden to show that the alleged bankrupt does not belong to the exempt classes is upon the petitioning creditors. Where it was shown that the debtor had left his farm more than fourteen years previously and engaged in another business, it was held that those opposing the adjudication had the burden to show that he belonged to the exempt class when the acts of bankruptcy were committed or the petition filed. *Re* Luckhardt, 101 Fed. 807; *Re* Burgin, 173 Fed. 726, criticised Harv. Law Rev., March, 1910; *Re* Jacobson, 181 Fed. 870. The exemption is not forfeited by making a gen-

that the objection that a person is exempt from bankruptcy cannot be waived either by himself,[21] or by a creditor;[22] but the allegation is not essential to the jurisdiction, and its omission may be waived by failure duly to object thereto.[23] "The death or insanity of the bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."[24]

§ 617. Corporations who may be bankrupts. A corporation cannot be a voluntary bankrupt.[1] Any unincorporated company and any moneyed business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt;[2] but bankruptcy of a

eral assignment for the benefit of creditors. Olive v. Armour & Co., C. C. A., 21 L.R.A. (N.S.) 109, 167 Fed. 517.

21 *Re* Taylor, C. C. A., 102 Fed. 728.

22 *Re* New England Breeders' Club, 165 Fed. 517. But see *Re* Worsham, C. C. A., 142 Fed. 121; *Re* First Nat. Bank of Belle Fourche, C. C. A., 152 Fed. 64; *Re* Broadway Savings Trust Co., C. C. A., 152 Fed. 152.

23 *Re* Worsham, C. C. A., 142 Fed. 121; *Re* First Nat. Bank of Belle Fourche, C. C. A., 152 Fed. 64; *Re* Broadway Savings Trust Co., C. C. A., 152 Fed. 152.

24 St. at L. 544, 549, § 8.

§ 617. 1 30 St. at L. 544, § 4a; Remington on Bankruptcy, §§ 37, 44; Brandenburg on Bankruptcy, §§ 113-119.

2 30 St. at L. 544, 547, § 4, as amended 32 St. at L. 797, 36 St. at L. 838. Corporations are subject to involuntary bankruptcy when engaged in leasing their own property and collecting rents, *Re* R. L. Radke Co., 193 Fed. 735; and, it has been held, when buying and reselling electricity, *Re* Charles Town Light & Power Co., 183 Fed. 160. *Contra*, *Re* Hudson River El. Power Co., 173 Fed. 934, decided before the last amendment, where the corporation had a franchise to use the streets for the transmission of gas and electricity which it manufactured and sold to customers. It has been said that ordinarily an electric street railway company is not a railroad corporation and is consequently not accepted from the operation of the statute, *Re* Grafton Gas & Electric Light Co., 253 Fed. 668; and that a corporation operating a plant to generate and sell the electricity is not. Ibid. *Contra*, *Re* Wilkes-Barre Light Co., 224 Fed. 248. In the Northern District of New York an Odd Fellow was allowed to file a petition of voluntary bankruptcy. *Re* Carthage

corporation does not release its officers, directors or stockholders, as such, from any liability under the laws of a State or of a Territory or of the United States.[3] The principal business in which the corporation is engaged is that which determines the jurisdiction.[4] Incidental occupation in one of the specified pursuits is not sufficient.[5] Where a corporation is engaged in several different occupations, some of which are within the specified classes, and others not, if its principal business is in several occupations, which subject it to the bankruptcy law; it may be adjudged an involuntary bankrupt, although it is not principally engaged in any single one of them.[6] The test is the actual occupation at the time of the filing of the petition or the commission of the acts of bankruptcy;[7] not the provisions in the charter upon the subject.[8] But the burden of proof is upon the parties who contend that the corporation is not principally engaged in the occupations therein specified.[9] The preparation for work in one of the specified classes is equivalent to engagement in the same, although it has not actually begun the transaction of any of the business.[10] It has been said that, in general, *quasi*-public corporations clothed with the power of eminent domain should not, on grounds of public policy, be adjudged bankrupts.[11] The bankruptcy proceedings are not defeated because the corporation has, before the filing of the

Lodge, No. 365, I. O. O. F., 230 Fed. 694.

3 30 Stat. 544, 547, § 4, as amended 32 St. at L. 797, 36 St. at L. 838.

4 *Re* Culgin-Pace Contracting Co., 224 Fed. 245.

5 *Re* New York & Westchester Water Co., 98 Fed. 711, 3 Am. B. R. 508; *Re* Chicago-Joplin Lead & Zinc Co., 104 Fed. 67, 4 Am. B. R. 712; Philpot v. O'Brien, C. C. A., 126 Fed. 167, 11 Am. B. R. 205, affirming 121 Fed. 139, 10 Am. B. R. 424; McNamara v. Helena Coal Co., 5 Am. B. R. 48; Remington on Bankruptcy, § 85.

6 Burdick v. Dillon, C. C. A., 144 Fed. 737, 16 Am. B. R. 407.

7 *Re* Interstate Paving Co., 171 Fed. 604; Cate v. Connell, C. C. A., 173 Fed. 445.

8 *Re* Chicago-Joplin Lead & Zinc Co., 104 Fed. 67, 4 Am. B. R. 712; *Re* Tontine Surety Co., 116 Fed. 401, 8 Am. B. R. 421; Cate v. Connell, C. C. A., 173 Fed. 445; Remington on Bankruptcy, § 87.

9 Philpot v. O'Brien, C. C. A., 126 Fed. 167, 11 Am. B. R. 205; Remington on Bankruptcy, § 87.

10 White Mountain Paper Co. v. Morse & Co., C. C. A., 127 Fed. 643, 11 Am. B. R. 633; Remington on Bankruptcy, § 87.

11 *Re* Bay City Irrigation Co., 135 Fed. 850, 14 Am. B. R. 370; *Re* Wilkes-Barre Light Co., 224 Fed. 248; Remington on Bankruptcy, § 89.

petition, for any reason ceased the transaction of the business in which it was engaged when it became indebted to the petitioner;[12] although the cease was caused by the appointment of receivers,[13] or by the forfeiture of the corporate franchise,[14] or by State insolvency proceedings which have decreed the dissolution of the corporation but have not yet terminated it.[15] It has been held that an order of a court of bankruptcy appointing a receiver of a corporation which is not subject to bankruptcy is not void for want of jurisdiction.[16]

§ 617a. Bankruptcy of unincorporated associations. An unincorporated company or association may become a bankrupt.[1] So may a fraternal beneficial association with no stock and no substantial assets except assessments paid by its members for death or sick benefits;[2] or a trust association the legal title to the property of which is held by a trustee for the benefit of holders of certificates.[3] It has been held that an association claiming to act as a corporation, which has not been legally incorporated, can be forced into involuntary bankruptcy.[4] The fact that a partnership or unincorporated association was formed under a State statute, to carry on a bank, does not prevent its being adjudged a bankrupt.[5] A partnership is not an unincorporated association within the meaning of the statute.[6]

12 *Re* Storm, 102 Fed. 618, 4 Am. B. R. 601; Schener v. Smith & Montgomery Book & Stationery Co., C. C. A., 112 Fed. 407, 412; *Re* Storck Lumber Co., 114 Fed. 860, 8 Am. B. R. 86; White Mountain Paper Co. v. Morse & Co., C. C. A., 127 Fed. 643; *Re* International Coal Min. Co., 143 Fed. 665, 16 Am. B. R. 309; Robertson v. Union Potteries Co., 177 Fed. 279; Remington on Bankruptcy, § 9.

13 *Re* Moench & Sons' Co., 123 Fed. 965, 12 Am. B. R. 240; Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444.

14 *Re* Double Star Brick Co., 210 Fed. 980.

15 Cresson & Clearfield Coal & Coke Co. v. Stauffer, C. C. A., 148 Fed. 981.

16 *Re* Wilkes-Barre Light Co., 235 Fed. 807.

§ 617a. 1 30 St. at L. 544, 547, § 4, as amended, 36 St. at L. 838; Davis v. Stephens, 104 Fed. 235; *Re* Hercules Atkin Co., 133 Fed. 813; Burkhart v. German-American Bank, 137 Fed. 958; *Re* Seaboard Fire Underwriters, 137 Fed. 987, 13 Am. B. R. 722.

2 *Re* Order of Sparta, C. C. A., 242 Fed. 235, affirming 238 Fed. 437.

3 *Re* Associated Trust, 222 Fed. 1012.

4 Davis v. Stephens, 104 Fed. 235.

5 Burkhart v. German-American Bank, 137 Fed. 958.

6 H. D. Still's Sons v. Am. Nat. Bank, C. C. A., 209 Fed. 749.

§ 618. Partnerships in bankruptcy. "(*a*) A partnership,[1] during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.[2] (*b*) The creditors of the partnership

§ 618. 1 When a partnership is engaged chiefly in farming or in the tilling of the soil, it cannot be adjudged a bankrupt. *Re* Terry, 208 Fed. 162; H. D. Still's Sons v. American Nat. Bank, C. C. A., 209 Fed. 749. See *supra*, § 616. The burden of proof as to the existence of a partnership rests upon the petitioners. Jones v. Burnham, Williams & Co., C. C. A., 138 Fed. 986, 15 Am. B. R. 85. For what is sufficient evidence, see *Re* Keystone Vulcanizing Co., 233 Fed. 171; Remington on Bankruptcy, § 63 and cases cited. A firm in which one partner is a minor may be adjudged a bankrupt where he has taken no action to repudiate the relation. Jennings v. William A. Stannus & Son, C. C. A., 191 Fed. 347. It has been held that a partnership may be adjudged bankrupt in the name of an ostensible partner, under whose name the firm transacted business. Remington on Bankruptcy, § 63, citing: Jones v. Burnham, Williams & Co., C. C. A., 138 Fed. 986, 12 Am. B. R. 453. But in the case of an ostensible partnership, where an individual transacted business under a firm name, the proceedings should be against him individually; and the creditors, whose obligations were incurred in that business, share equally in all his assets with those whose obligations were otherwise incurred by him. *Re* Stein & Co., C. C. A., 127 Fed. 547, 11 Am. B. R. 536; *Re* Gibson, 191 Fed. 665. In such a case, it is within the discretion of the court to permit a petition, filed against such an alleged partnership and its two ostensible members, to be amended by dismissing it as regards the firm and the defendant who is not actually interested in the business. *Re* Richardson, 192 Fed. 50.

2 In either voluntary, *Re* Hirsch, 97 Fed. 571, or involuntary proceedings, Mather v. Coe, 92 Fed. 333; Bank v. Meyer, 92 Fed. 896; *Re* Meyer, C. C. A., 98 Fed. 976. Proceedings may be instituted to declare a partnership a bankrupt at any time, so long as there are any undistributed assets; *Re* Boynton, 10 Fed. 277; Brandenburg on Bankruptcy (2d ed.), 78, citing: *Re* Kaiy Chung, 1 N. B. N. 22; Holmes v. Baker & Hamilton, C. C. A., 160 Fed. 922, or unpaid debts of the firm; *Re* Levy & Richman, 95 Fed. 812, 2 Am. B. R. 21; Holmes v. Baker & Hamilton, C. C. A., 160 Fed. 922. But not, in the case of indebtedness created by estoppel against the partners, because of the transaction of business in the firm name after a dissolution. *Re* Pinson & Co., 180 Fed. 787. The transfer of the firm property to an assignee for the benefit of creditors more than five months prior to the filing of a voluntary petition in bankruptcy, by one or more of the members, is no defense to such petition. *Re* J. M. Ceballos & Co., 161 Fed. 445.

A partnership may be adjudged bankrupt after the death or insanity of a partner, when the survivor has

shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates. (*c*) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.[3] (*d*) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. (*e*) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. (*f*) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in

committed an act of bankruptcy. *Re* Pierce, 102 Fed. 977. The death of one of the partners will not prevent the adjudication of the bankruptcy of the firm, provided, at least, that possession of assets can be obtained from his administrator without force. Ibid.; *Re* Hirsch, 97 Fed. 571, 3 Am. B. R. 344. *Contra, Re* Evans, 161 Fed. 590. Where the surviving partner filed a petition in bankruptcy and was adjudicated a bankrupt, it was held that such adjudication carried with it the entire rights and obligations of the firm as it existed before dissolution by the death of the other copartner. *Re* Stringer, 234 Fed. 454; *Re* Stringer, C. C. A., 253 Fed. 352.

[3] All the partners must be made parties to the proceeding, if they are known. Secret partners may, when discovered, be subsequently brought in. *Re* Altman, 95 Fed. 263, 2 Am. B. R. 407; Remington on Bankruptcy, § 70; but not unless the secret partner is charged to be insolvent or to have committed an act of bankruptcy, *Re* Samuels, C. C. A., 215 Fed. 845; *Re* Kramer, 218 Fed. 138. Unless there is such a charge, a man who denies that he is a partner cannot be required to file schedules of his assets and liabilities, *Re* Samuels, C. C. A., 215 Fed. 845; nor it seems can there be any inquiry as to his membership in the firm or his solvency. *Re* Samuels, C. C. A., 215 Fed. 845. The court may bring in a nonresident of the district, who is alleged to be a member of the firm and may amend the schedules and proceedings for that purpose. *Re* J. & M. Schwartz, 204 Fed. 326.

the proportion of their respective interests in the partnership.[4] (*g*) The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences[5] and secure the equitable

[4] Schall v. Camors, 251 U. S. 239; *Re* Terens, 175 Fed. 495; *Re* Filmar, C. C. A., 177 Fed. 170; *Re* Telfer, C. C. A., 184 Fed. 224; *Re* Effinger, 184 Fed. 728; *Re* Collins, 215 Fed. 247; *Re* Stringer, 234 Fed. 454; *Re* Biehl, 237 Fed. 720; *Re* W. S. Kuhn & Co., 241 Fed. 935; Robinson v. Seaboard Nat. Bank of N. Y., C. C. A., 247 Fed. 667. The same principles are applied when the members of a firm are composed of natural persons in another partnership. The latter is treated as if it were an individual partner in the former firm. *Re* Knowlton & Co., 196 Fed. 837; aff'd C. C. A., 202 Fed. 480. The reduction of the claims to judgment does not change their character and they will be marshaled in accordance with their original equities. *Re* F. J. Hacker & Co., 225 Fed. 869; Cutler Hardware Co. v. Hacker, C. C. A., 238 Fed. 146. Where judgments against a firm, in favor of certain of its creditors, were brought up by one of the partners, who took assignments of the judgments to himself, it was held that he thereby became a creditor of each of his copartners for their respective shares of the money advanced by him in purchasing the judgments, and was entitled to prove a claim for such share against the individual estate of one of the copartners in bankruptcy. *Re* Carmichael, 96 Fed. 594. Where a firm was dissolved by a sale of the interest of one of the partners to the other more than four months before the latter became a bankrupt, and in the meantime firm creditors secured judgments against the firm, these were not permitted to enforce executions against the property which had previously belonged to the partnership, and which had passed into the custody of the bankruptcy court, but were obliged to enforce their rights and equities in the bankruptcy proceedings. *Re* Suprenant, 217 Fed. 470.

[5] A transfer of his interest in the firm by one partner to another does not deprive partnership creditors of their right to a priority in the distribution of the partnership assets. *Re* Filmar, C. C. A., 177 Fed. 170; *Re* Terens, 175 Fed. 495; *Re* Young, 223 Fed. 659; *Re* Fackelman, 248 Fed. 565. It has been held that such a transaction when made for a valuable consideration during the solvency of the partnership relieves the property from the payment of the firm's debts. Rapple v. Dutton, C. C. A., 226 Fed. 430; Stringer v. Stevenson, C. C. A., 240 Fed. 892; but the dissolution of an insolvent partnership and a division of the assets between the partners will be set aside when it gives the individual creditors a preference over the creditors of the firm. *Re* Head, 114 Fed. 489. But see Worrell v. Whitney, 179 Fed. 1014; *Re* L. M. Alleman Hardware Co., C. C. A., 181 Fed. 810; Ryan v. Cavanagh, 238 Fed. 604; *infra*, § 644.

distribution of the property of the several estates.[6] (*h*) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."[7] "Any

[6] Where the firm alone is adjudicated a bankrupt, the assets of the individual members are administered in the same proceeding. *Re* Meyer, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; Dickas v. Barnes, C. C. A., 140 Fed. 849, 15 Am. B. R. 566; *Re* Perlhefter, 177 Fed. 299; *Re* Lattimer, 174 Fed. 824; Menke v. Sunderman, C. C. A., 186 Fed. 486; Francis v. McNeal, C. C. A., 186 Fed. 481, aff'd 228 U. S. 695. Where the partners as well as the firm are so adjudged, the respective assets are marshaled in accordance with equitable principles. *Re* Filmar, C. C. A., 177 Fed. 170. When the State laws grant exemptions out of partnership property they will be followed by the court of bankruptcy. *Re* Solomon & Johnson, 254 Fed. 503; *infra*, § 650.

[7] 30 St. at L. 544, 547, *Re* Solomon & Carvel, 163 Fed. 140; *Re* Levy, 95 Fed. 812; *Re* Teller, C. C. A., 184 Fed. 224. This, it has been said, is limited in its effect to cases in which the partnership is not adjudicated bankrupt and one or more, but not all, of the members are so adjudicated. *Re* Junck & Balthazard, 169 Fed. 481; Francis v. McNeal, C. C. A., 186 Fed. 481; Armstrong v. Fisher, C. C. A., 224 Fed. 97. The trustee in bankruptcy of one of the members of the firm cannot interfere with the firm assets, *Re* Mercur, C. C. A., 122 Fed. 384, but it has been held that he may prove against them the amount of the proceeds of his bankrupt's individual property, previously mortgaged for the payment of a firm debt and appropriated for that purpose. *Re* Effinger, 184 Fed. 728. See § 647, *infra*. But see Sargent v. Blake, C. C. A., 160 Fed. 57, § 644, *infra*. A solvent partner, upon the bankruptcy of his associate, is a creditor to the extent of any balance that would be due him upon an accounting; and he may prove such a claim, *Re* Effinger, 184 Fed. 728; *Re* Hirth, 189 Fed. 926. *Contra*, *Re* Walker, 176 Fed. 455; *Re* Stevens, 104 Fed. 323, but not a claim for reimbursement of the amount expended by him in liquidating the firm debts in excess of his share of the deficiency in the firm assets, *Re* Walker, 176 Fed. 455. See *Re* Tassinari, 249 Fed. 989. Where a partnership and its members are bankrupt and the individual estate of one of these is more than enough to pay his individual indebtedness, the claim of an individual creditor for interest accruing after the filing of the petition in bankruptcy cannot be proved so as to be entitled to a priority as against partnership creditors in the distribution of such individual assets. *Re* Chandler, C. C. A., 184

member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt,[8] shall be entitled to

Fed. 887, that an accounting and settlement of the partnership affairs may be had before the referee in bankruptcy, *Re* Hirth, 189 Fed. 926. A partnership cannot be adjudicated a compulsory bankrupt so long as one of its members is solvent to the extent that he has more than sufficient property to pay his personal debts and those for which he is liable as a member of the firm. *Re* Samuels, C. C. A., 215 Fed. 845, reversing 207 Fed. 195; *Re* Kobre, 224 Fed. 106; see *Re* Harris, 108 Fed. 517, 4 Am. B. R. 132; *Re* Perlhefter, 177 Fed. 299; Francis v. McNeal, C. C. A., 186 Fed. 481; Remington on Bankruptcy, § 62. *Contra*, *Re* Solomon & Carvel, 163 Fed. 140. It has been said, that the same rule applies in a voluntary proceeding. *Re* Hansley & Adams, 228 Fed. 564; but that the firm may be declared a bankrupt without at the same time declaring the bankruptcy of all the partners. Ibid. Where the partnership and all but one of its members were insolvent while the assets of the solvent partner together with the partnership assets, although sufficient in amount at a fair valuation to pay the firm debts as well as his own, appeared to be insufficient for this if administered in bankruptcy; upon his consent the firm and the other partners were adjudicated bankrupts; his individual assets were administered by the court together with those of his partners and of the firm, and he was appointed trustee. *Re* Kobre, 224 Fed. 106. The act of a bankrupt in surrendering to his trustee property belonging to a firm of which he is a member does not enlarge the jurisdiction of the court of bankruptcy so that it may administer the firm assets when the solvent partner does not consent. Marnet Oil & Gas Co. v. Staley, C. C. A., 218 Fed. 45.

[8] All the partners need not join in a voluntary petition of bankruptcy. *Re* Murray, 90 Fed. 600, 3 Am. B. R. 601; *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270, *Re* J. M. Ceballos & Co., 161 Fed. 445; *Re* Hansley & Adams, 228 Fed. 564. When they do not, it has been said that no act of bankruptcy or insolvency need be alleged. *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270; *Re* Forbes, 128 Fed. 137, 11 Am. B. R. 787, 791; Medsker v. Bonebrake, 108 U. S. 66, 27 L. ed. 654, 2 Sup. Ct. 351; *Re* Murray, 96 Fed. 600, 3 Am. B. R. 601; *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270; *Re* Carleton, 131 Fed. 146, 12 Am. B. R. 475; *Re* Junck & Balthazard, 169 Fed. 481; *Re* J. M. Ceballos & Co., 161 Fed. 445. A creditor of a partnership may join in the petition for involuntary bankruptcy against one of the partners individually. *Re* Mercur, 95 Fed. 634. It has been held, that it is not necessary to allege the insolvency of the individual partners, nor that the solvent partners, if any, consent to the adjudication. *Re* Everybody's Grocery & Meat Market, 173 Fed. 492. When a single partner files a petition in bankruptcy against the firm, he must clearly show; that that is the purpose of the petition; that the other partners, if any, are joined; and that he seeks discharge from the firm debts, as well as, if he seeks

resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act;[9] and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."[10]

such relief, from his individual indebtedness. *Re* Russell, 97 Fed. 32, 3 Am. B. R. 91. It has been said that, in such a case, the petition should be treated as involuntary against the partner who fails to join. Medsker v. Bonebrake, 108 U. S. 66, 27 L. ed. 654, 2 Sup. Ct. 351; *Re* Murray, 96 Fed. 600, 3 Am. B. R. 601; *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270; *Re* Carleton, 131 Fed. 146, 12 Am. B. R. 475; but as voluntary so far as the creditors are concerned. *Re* Murray, 96 Fed. 600, 3 Am. B. R. 601; *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270; *Re* Carleton, 131 Fed. 146, 12 Am. B. R. 475. If the other partners, upon notification, join with the petitioners and confess themselves bankrupt, the proceeding is treated as absolutely voluntary. *Re* Murray, 96 Fed. 600, 3 Am. B. R. 601. Upon a petition paying for an adjudication of the bankruptcy of the firm alone, there can be no adjudication of the bankruptcy of any of the individual members, although they are petitioners. *Re* Lenoir-Cross & Co., 226 Fed. 227; but the petition may be amended so as to pray an adjudication of the bankruptcy of one or more of the partners instead of that of the firm and all of them as originally prayed. *Re* Young, 223 Fed. 659.

[9] It has been held that the partners who fail to join can make no defense to the petition, except that of solvency. *Re* Forbes, 128 Fed. 137, 11 Am. B. R. 787, but that they are entitled to a jury trial upon this issue. *Re* Murray, 96 Fed. 600, 3 Am. B. R. 601; *Re* Forbes, 128 Fed. 137, 11 Am. B. R. 787. A creditor cannot intervene to resist the adjudication, upon a petition filed by a single partner. *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270.

[10] General Order VIII. Such a partner must file a schedule of his debts and an inventory of his property within ten days after the adjudication. Armstrong v. Fisher,

In general, the bankruptcy law treats partnerships as distinct entities.[11] It has been held that the firm alone may be adjudged a bankrupt, without any adjudication against the individual members thereof,[12] but the partnership and the individual members may, in the same proceeding, be adjudicated bankrupts, and the partners may then receive a discharge, both individually and as members of the firm.[13] It has been said that this cannot be done in an involuntary proceeding, except so far as concerns individual members who have not committed, nor participated in committing, one of the acts of bankruptcy.[14] In the case of an involuntary petition, the act of bankruptcy charged need not have been committed by all the partners.[15]

C. C. A., 224 Fed. 97; *Re* Hansley & Adams, 228 Fed. 564. Where a partner files a petition in bankruptcy alleging that another member, whom he makes a partner, has refused to join, and praying that they both be adjudged bankrupts; and afterwards the other partner comes in, confesses himself a bankrupt and is so adjudged; it is a case of involuntary bankruptcy. Davis v. Stephens, 104 Fed. 235. As to amendments to petitions in partnership cases, see § 628, notes 3 and 23, *infra*.

11 *Re* Meyer, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; *Re* Perley & Hays, 138 Fed. 927, 15 Am. B. R. 54. It is treated as distinct from other partnerships composed in part of the same members. Fidelity Tr. Co. v. Gaskell, C. C. A., 195 Fed. 865.

12 *Re* Meyer, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; Strause v. Hooper, 105 Fed. 590, 5 Am. B. R. 225; *Re* Sanderlin, 109 Fed. 859, 6 Am. B. R. 384; *Re* Perley & Hays, 138 Fed. 927, 15 Am. B. R. 54. *Contra*, *Re* Carleton, 115 Fed. 246, 8 Am. B. R. 270; *contra*, *Re* Forbes, 128 Fed. 137, 138-140, 11 Am. B. R. 787, a strong opinion by Lowell, J. See *Re* Perlhefter, 177 Fed. 299; Francis v. McNeil, 228 U. S. 695.

13 *Re* Springer, 199 Fed. 294; *Re* Meyer, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559; *Re* Grant Bros., 106 Fed. 496, 5 Am. B. R. 837; *Re* Forbes, 128 Fed. 137, 11 Am. B. R. 787; *Re* Lenoir-Cross & Co., 229 Fed. 227; *Re* Hansley & Adams, 228 Fed. 564; Armstrong v. Norris, C. C. A., 247 Fed. 253.

14 *Re* Meyer, C. C. A., 98 Fed. 976, 979, 3 Am. B. R. 559. Where the application for a discharge from individual debt was made by a partner in the district where involuntary proceedings were pending, but not brought to a hearing; and the partnership had been adjudicated a bankrupt; a subsequent adjudication in another district upon his voluntary petition was set aside and he was not permitted there to apply for a discharge. Armstrong v. Norris, C. C. A., 247 Fed. 253.

15 *Re* Forbes, 128 Fed. 137, 11 Am. B. R. 787; Yungbluth v. Slipper, C. C. A., 185 Fed. 773. Where, subsequent to the dissolution of an insolvent partnership, an execution

§ 619. Creditors who may petition for involuntary bankruptcy. "Three or more creditors who have provable claims [1] against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; [2] or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt." [3] "In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted." [4] Creditors other than original petitioners

was levied upon the firm's property for a partnership debt, it was held that the failure to discharge such levy constituted an individual act of bankruptcy by the retiring partner. Holmes v. Baker & Hamilton, C. C. A., 160 Fed. 922. The filing of a petition in bankruptcy by one member of a firm against the others is not an act of bankruptcy on the part of the firm. *Re* J. M. Ceballos & Co., 161 Fed. 445.

§ 619. [1] The holder of a note upon which the bankrupt is an endorser may join in the petition after presentment of the note for payment, dishonor and due notice to the endorser or the performance of the other conditions requisite for the endorser's liability. *Re* Howell, C. C. A., 215 Fed. 1; Doty v. Mason, 244 Fed. 587.

[2] Emerine v. Tarault, 219 Fed. 68. A petitioning creditor who is secured may after the petition is filed waive his security and if necessary amend his petition to allege such waiver. Morrison v. Rieman, C. C. A., 249 Fed. 97.

[3] 30 St. at L. 544, 561, § 59b.

[4] 30 St. at L. 544, 562, § 59e. A man's wife, or other members of his family, may join in the petition, if otherwise qualified. *Re* Novak, 101 Fed. 800; Perkins v. Dorman, 206 Fed. 858. Where the bankrupt's father, after the original petition was filed, brought a claim against him, which he assigned to a member of the bar for no consideration except services in its collection; it was held that the latter could not be allowed to intervene as a petitioner. *Re* Lewis F. Perry & Whitney Co., 172 Fed. 752, affirmed C. C. A. *Re* Folkstad, 199 Fed. 363, holding that where the debts were contracted in an occupation that was not exempt from bankruptcy, but the act charged as an act of bankruptcy was committed while the bankrupt was a member of an exempt class, he was not subject to an involuntary adjudication. Creditors, Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813, or directors, officers and stockholders of a corporation, when creditors, may be petitioners against it. First Nat. Bank v. Wyoming

may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.[5] The date of the filing of the petition is the time when

Valley Ice Co., 136 Fed. 466. Partnership creditors may petition against the individual partners, as well as against the firm. *Re* Mercur, 95 Fed. 634, 2 Am. B. R. 626; *Re* Hee (D. C. Hawaii), 13 Am. B. R. 8; Remington on Bankruptcy, § 217. The fact that the bankrupt has solicited creditors to file a petition does not make them incompetent petitioners. *Re* Duplex Radiator Co., 142 Fed. 906, 15 Am. B. R. 324. But see *Re* Independent Thread Co., 113 Fed. 998, 7 Am. B. R. 704; *Re* Moench, C. C. A., 130 Fed. 685, 12 Am. B. R. 240; Remington on Bankruptcy, § 216. It has been held that a creditor's claim may not be split up into several claims, in order to create the requisite number of petitioners. *Re* Independent Thread Co., 113 Fed. 998; *Re* Tribelhorn, C. C. A., 137 Fed. 3, 14 Am. B. R. 491; *Re* Halsey El. Generator Co., 163 Fed. 118; Stroheim v. Lewis F. Perry & Whitney Co., C. C. A., 175 Fed. 52. See s. c., below. *Re* Lewis F. Perry & Whitney Co., 172 Fed. 744; and that, when a creditor has purchased several claims, he is to be treated as a single petitioner and a single creditor. *Re* Worcester Co., C. C. A., 102 Fed. 808; *Re* Burlington Malting Co., 109 Fed. 777, 6 Am. B. R. 369; Lowenstein v. McShane Mfg. Co., 130 Fed. 1007, 12 Am. B. R. 601; Remington on Bankruptcy, § 203. But see *Re* Bevins, C. C. A., 165 Fed. 434. The same rule applies to the purchase of a claim for the benefit of a previous creditor when the latter and its representative will be counted as the same creditor. Emerine v. Tarault, 219 Fed. 68.

[5] 30 St. at L. 544, 562, § 59f; *Re* Charles Town Light & Power Co., 183 Fed. 160. After a petition in involuntary bankruptcy has been filed and before adjudication, other creditors may intervene and join in the petition. *Re* John A. Etheridge Furniture Co., 92 Fed. 329. *Cf.* Neustadter v. Chicago Dry Goods Co., 96 Fed. 830. Such an intervention may be made by a single creditor, *Re* Culgin-Pace Contracting Co., 224 Fed. 245, or by creditors who at the time of their intervention would by the lapse of time since the filing of the original petition been barred from originating such a proceeding. *Re* Bolognesi, C. C. A., 223 Fed. 771. Where the original petitioners were estopped from instituting the proceeding other creditors may intervene, *Re* Freeman Cotting Coat Co., 212 Fed. 551; but in such a case it was held that they were barred by the lapse of four months between the act of bankruptcy and their intervention, Despres v. Galbraith, C. C. A., 213 Fed. 190. It has been said that a creditor who files a petition has a right to ask other creditors to intervene, when such intervention becomes necessary to preserve the proceedings. *Re* Smith, 176 Fed. 426; even if the original petitioners have done nothing after the return of the subpœna indorsed "not found," and the period of four months since the commission of the acts of bank-

the number of creditors must be counted, in order to determine how many must join in the petition.[6] No creditors can join who

ruptcy therein alleged has expired. *Re* Stein, C. C. A., 105 Fed. 749. The court cannot compel creditors to join in a petition, *Re* Gillette, 104 Fed. 769; and is not required to notify those who have not joined of a dismissal of the petition for an insufficiency of petitioners, Ibid. But see § 636, *infra*. It has been held that, as the purpose of the Bankruptcy Act was to give the majority of the creditors an option to refrain from instituting proceedings, persons who purchased claims after the filing of the petition in bankruptcy cannot intervene as petitioning creditors. *Re* Kehoe, C. C. A., 233 Fed. 415. It has been said that a creditor may intervene and join the original petitioners at any time prior to the dismissal of the petition. *Re* Lewis F. Perry & Whitney Co., 172 Fed. 744. It has been held that he cannot join after the decision of the court upon the issues raised by an answer to the petition. *Re* Tribelhorn, C. C. A., 137 Fed. 3, 14 Am. B. R. 491, but that they may do so after the court has announced its opinion that a motion to dismiss should be granted when no order of dismissal has actually been made. *Re* C. Jutte & Co., C. C. A., 258 Fed. 422.

[6] *Re* Coburn, 126 Fed. 218, 11 Am. B. R. 212; *Re* Adams, 130 Fed. 788, 12 Am. B. R. 369; Moulton v. Coburn, C. C. A., 131 Fed. 201, 12 Am. B. R. 553. The date of the adjudication is the time to determine whether sufficient creditors have joined. Moulton v. Coburn, C. C. A., 131 Fed. 201, 12 Am. B. R. 553; *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000, 13 Am. B. R. 665; Remington on Bankruptcy, § 201; *Re* Charles Town Light & Power Co., 183 Fed. 160. It has been held that small claims of a few dollars or a few cents, upon current accounts with grocers and small tradesmen should not be counted. *Re* Blount, 142 Fed. 263, 16 Am. B. R. 97. Claims purposely left unpaid in order to bring the number of creditors up to twelve. *Re* Burg, 245 Fed. 173. The purchaser of a claim after the filing of the petition cannot be counted in addition to his assignor who retains another claim still unassigned. Emerine v. Tarault, C. C. A., 219 Fed. 68. When an assignee, for the benefit of creditors, bought with the funds of the estate the claims of several creditors, and then reassigned them to others in order to increase the number to more than twelve; it was held that they were extinguished by the purchase and could not be counted. Leighton v. Kennedy, C. C. A., 129 Fed. 737, 12 Am. B. R. 229. It has been said that the claims of creditors who have received preferences are to be counted, if necessary, to sustain the jurisdiction, Boston West Africa Trading Co. v. Quaker City Morocco Co., C. C. A., 261 Fed. 665. Remington on Bankruptcy, § 205, and citations; but are to be excluded if they defeat it, Stevens v. Nave-McCord Co., C. C. A., 150 Fed. 71, 17 Am. B. R. 610; Leighton v. Kennedy, C. C. A., 129 Fed. 737, 12 Am. B. R. 229; *Re* Blount, 142 Fed. 263, 16 Am. B. R. 97; Remington on Bankruptcy, § 205.

were not such at the time of the commission of the act of bankruptcy alleged, and did not hold their rights against the bankrupt at that time,[7] and whose claims are not payable at the time of filing the petition.[8] It has been held that the claim must

[7] Callison v. Brake, C. C. A., 129 Fed. 196, affirming *Re* Callison, 130 Fed. 987, 12 Am. B. R. 344; Remington on Bankruptcy, § 214. It has been held that an assignee of all the claims of his assignor may join in the petition, *Re* H. E. Paige Motor Car Co., 251 Fed. 318, and that so may the holder of a note as agent or trustee for the true owner. *Re* Veler, C. C. A., 249 Fed. 633.

[8] 30 St. at L. 544, 561, § 59; *Re* Brinckmann, 103 Fed. 65, 4 Am. B. R. 551; *Re* Yates, 114 Fed. 365. A surety who has paid part of the obligation of his principal may be a petitioner, Boyce v. Guaranty Co., C. C. A., 111 Fed. 138, 7 Am. B. R. 6; but, it has been held, that a surety cannot file a petition before he has paid any part of such obligation, Phillips v. Dreher Shoe Co., 112 Fed. 404, 7 Am. B. R. 326; criticised in Remington on Bankruptcy, § 231. It has been held that one of the petitioners may be the holder of a claim for unliquidated damages because of the breach of a contract of sale, when the damages are capable of liquidation, *Re* Stern, C. C. A., 116 Fed. 604, 8 Am. B. R. 569, affirming *Re* Manhattan Ice Co., 114 Fed. 399, 7 Am. B. R. 408. *Contra*, *Re* Big Meadows Gas Co., 113 Fed. 974, 7 Am. B. R. 697; and a claimant for damages because of a breach of warranty upon a sale of personal property. *Contra*, *Re* Morales, 105 Fed. 761, 5 Am. B. R. 425; F. L. Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. ed. 591; affirming *Re* Frederick L. Grant Shoe Co., C. C. A., 130 Fed. 881, 12 Am. B. R. 349. When the claim is provable, liquidation may be ordered subsequent to the filing of the petition, in order to determine whether the petitioner had a right to join in the institution of the proceeding. F. L. Grant Shoe Co. v. Laird, 212 U. S. 445; affirming *Re* Frederick L. Grant Shoe Co., C. C. A., 130 Fed. 881, 12 Am. B. R. 349; a depositor with a claim against the directors of a bank for misappropriation of its funds, *Re* Brown, C. C. A., 164 Fed. 673; the holder of a judgment for negligently causing death, *Re* Putnam, 193 Fed. 464; holders of claims based upon liability as a stockholder, *Re* Smith, 209 Fed. 91. Upon a demurrer to the petition, the debtor cannot claim that a judgment therein pleaded is not final because a motion for a new trial is pending. *Re* Putnam, 193 Fed. 464. It has been said that the amount due each petitioner need not be exactly determined so long as it appears that they are creditors to an amount sufficient to satisfy the statute. *Re* Hughes, 183 Fed. 872. But it was held otherwise when the petition did not show the nature and amount of the claim. *Re* Crafts-Riordon Shoe Co., 185 Fed. 931. It has been held: that the holder of an unliquidated claim for a tort, which has no contractual relation, cannot join in the petition, Beers v. Hanlin, 99 Fed. 695, 3 Am. B. R. 745; *Re* Brinckmann, 103 Fed. 65,

have been provable at the time of the commission of the act of bankruptcy.[9] A creditor who has received an unlawful preference cannot join in the petition unless he offers to surrender this,[10] and in the Southern District of New York, such were compelled to deposit the preference with the clerk of the court as an alternative to the dismissal of their petition.[11] A creditor may be estopped from filing the petition.[12] A creditor may

4 Am. B. R. 551; *Re* Yates, 114 Fed. 365; and that a judgment, entered subsequent to bankruptcy proceedings, upon a claim therein provable, cannot form a basis for a subsequent proceeding in bankruptcy when no application was made for a discharge in those originally instituted. *Re* Schnabel, 166 Fed. 383. The pendency of an action by a petitioner to collect his claim and the interposition therein of a counter-claim by the bankrupt is not the insuperable objection. *Re* Automatic Typewriter & Service Co., C. C. A., 271 Fed. 1. A claim by the assignee of a bankrupt against a petitioning creditor for damages because of a wrongful attachment, cannot be set off against the latter's claim against the bankrupt, when determining the sufficiency of a petition. *Re* Bevins, C. C. A., 165 Fed. 434.

9 Beers v. Hanlin, 99 Fed. 695, 3 Am. B. R. 745; *Re* Brinckmann, 103 Fed. 65, 4 Am. B. R. 551. Criticised in Remington on Bankruptcy, § 214; *Re* Crafts-Riordon Shoe Co., 185 Fed. 931. *Contra*, *Re* Van Horn, C. C. A., 246 Fed. 822; where the claims were provable at the time of the filing of the petition.

10 *Re* Miller, 104 Fed. 764, 5 Am. B. R. 140; Stevens v. Nave-McCord Co., C. C. A., 150 Fed. 71, 17 Am. B. R. 610. Such surrender may be made at any time before the adjudication. *Re* Murphy, 225 Fed. 392; *Re* Automatic Typewriter & Service Co., C. C. A., 271 Fed. 1.

11 *Re* Miller, 104 Fed. 764, 5 Am. B. R. 140; *Re* Gillette, 104 Fed. 769, 5 Am. B. R. 119; *Re* Murphy, 225 Fed. 392.

12 By participation in the act of bankruptcy. *Re* Romanow, 92 Fed. 510; Simonson v. Sinsheimer, C. C. A., 95 Fed. 948; Clark v. Henne & Meyer, C. C. A., 127 Fed. 288, 11 Am. B. R. 583; Lowenstein v. McShane Mfg. Co., 130 Fed. 1007, 12 Am. B. R. 601; Moulton v. Coburn, C. C. A., 131 Fed. 201, 12 Am. B. R. 553; *Re* Hark, 142 Fed. 279, 15 Am. B. R. 460; Lowenstein v. McShane Mfg. Co, 130 Fed. 1007, 12 Am. B. R. 601. This may be by entering a judgment for the purpose of aiding the institution of bankruptcy proceedings. *Re* Taylor House Ass'n, 209 Fed. 924; *Re* McKinnon Co., 237 Fed. 869. When the act of bankruptcy consists in a receivership or insolvent assignment, by assisting in the application for a receivership. *Re* Gold Run Min. & Tunnel Co., 200 Fed. 162. See *Re* McKinnon Co., 237 Fed. 869, where there was also laches, or by assenting to the assignment. *Re* Romanow, 92 Fed. 510; Clark v. Henne & Meyer, C. C. A., 127 Fed. 288, 11 Am. B. R. 583; Moulton v. Coburn, C. C. A., 131 Fed. 201, 12 Am. B. R. 553; *Re* Lewis

withdraw from an involuntary petition by leave of the court;[13] but, it has been held, that this cannot be done when the result

F. Perry & Whitney Co., 172 Fed. 745 (where the assent was by a clerk who had given similar assents in previous instances). Despres v. Galbraith, C. C. A., 213 Fed. 190; Utz & Dunn Co. v. Regulator Co., C. C. A., 213 Fed. 315; *Re* Henry Campe & Co., 240 Fed. 433; (where the assignment was not recorded and the State law was otherwise not complied with.) But it has not been held by consent to a former assignment which did not take effect without the subsequent one made the foundation of the bankruptcy proceedings. Doty v. Mason, 244 Fed. 587, nor when the consent was induced by fraud, Canner v. Webster Tapper Co., C. C. A., 168 Fed. 519; *Re* Curtis, C. C. A., 94 Fed. 630; or the State court had no jurisdiction of the proceedings in insolvency, *Re* Weedman Stave Co., 199 Fed. 948. Nor by the indorsement of their attorneys under peculiar circumstances of the word "seen" upon an order of the State court for the sale of the property assigned. Simonson v. Sinsheimer, C. C. A., 100 Fed. 426, affirming 96 Fed. 579. Nor by selling goods to the assignee. Ibid. Nor by appearing in the State court for the purpose of preventing a distribution of the insolvent estate until the time arrived at which proceedings in bankruptcy could be instituted. Leidigh Carriage Co. v. Stengel, C. C. A., 95 Fed. 637. Nor by attacking in a State court certain preferences in the assignment. Ibid. Nor by joining with the insolvent and his assignee in a petition to the State court for a decree authorizing the conveyance of land to the creditor in part payment of his claim on the promise that he should receive a bond to indemnify him in case he should be required to pay back for the benefit of other creditors part of the proceeds of the land, which bond was never given. *Re* Curtis, C. C. A., 94 Fed. 630. Nor by prosecuting an action in the State court for the recovery of a debt. *Re* Henderson, 10 Fed. 385. Nor by their submission to the assignee, at his request, of an unverified statement of their claims. Simonson v. Sinsheimer, C. C. A., 95 Fed. 948; s. c., C. C. A., 100 Fed. 426. Nor by delaying the institution of proceedings in bankruptcy for about two months at the request of the defendant who represented that he was about to offer a composition to his creditors. Ibid. It has been held that a corporation is not estopped from joining in the petition by the fact that one of its officers in his individual capacity acted as assignee under the assignment, which is attacked as an act of bankruptcy. *Re* Winston, 122 Fed. 187, 10 Am. B. R. 171. They are estopped by accepting dividends from the assignee, Simonson v. Sinsheimer, C. C. A., 95 Fed. 948; or the receiver, Ohio Motor Co. v. Eiseman Magneto Co., C. C. A., 230 Fed. 370; and has been held by delay for four months in opposing the assignment. *Re* Lewis F. Perry & Whitney Co., 172 Fed. 752. See Ohio Motor Co. v. Eiseman Magneto Co., C. C. A., 230 Fed. 370.

[13] *Re* Coburn, 126 Fed. 218, affirmed as Moulton v. Coburn, C. C. A., 12 Am. B. R. 553.

would be to compel the dismissal of the proceeding;[14] nor does the payment of a claim after the filing of the petition defeat the proceedings by reducing the claims below the jurisdictional amount; provided, at least, that other creditors sufficient to supply the jurisdictional amount subsequently join.[15]

§ 620. Acts of bankruptcy. "(*a*) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. (*b*) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment. (*c*) It shall be a complete defense to any proceedings in bankruptcy

[14] *Re* Quincy Granite Quarries Co., 147 Fed. 279.

[15] *Re* Ryan, 114 Fed. 373.

instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision 1 the burden of proving solvency shall be on the alleged bankrupt.'' [1]

§ 621. Fraudulent transfers, concealment, or removal of property as acts of bankruptcy. A fraudulent transfer, conveyance, concealment or removal of property by a debtor, or his permitting the same to be concealed or removed, is an act of bankruptcy.[1] The concealment of property differs from a transfer thereof in that the latter is final and complete when once accomplished, while the former is continuous.[2] It has been said: that the word ''removed'' signifies an actual or physical change in the position or locality of the property;[3] and that

§ 620. [1] 30 St. at L. 544, 546, 547, § 3, as amended by 32 St. at L. 797.

§ 621. [1] 30 St. at L. 544, 546, § 3. The statute provides: that '' 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;'' and that '' 'concealed' shall include secrete, falsify and mutilate.'' 30 St. at L. 544, § 1; *Re* Shapiro, 106 Fed. 495; *Re* Greenberg, 106 Fed. 496; Badders Clothing Co. v. Burnham-Munger-Root D. G. Co., C. C. A., 228 Fed. 47; *Re* Ambrose Matthews & Co., 229 Fed. 309; *Re* Burg, 245 Fed. 173; Morrison v. Rieman, C. C. A., 249 Fed. 97; *Re* M. S. Fersko, Inc., C. C. A., 250 Fed. 357; *Re* Wellesley, 252 Fed. 852; Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, 237 Fed. 763. The transfer may be made by the confession while insolvent more than four months before the filing of the petition. *Re* Irish, 238 Fed. 411. The performance by the bankrupt of services in business carried on for his wife's benefit upon her individual credit, although he seeks to create the impression that he is the owner thereof, is not such a transfer. Rowe v. Drohen, 245 Fed. 684.

[2] Citizens' Bank of Salem v. De Pauw Co., C. C. A., 105 Fed. 926. See *Re* Mingo Valley Creamery Ass'n, 100 Fed. 282. But see § 656, *infra*. Consequently, it has been held that, when an insolvent conceals his property with the intent to hinder, delay or defraud his creditors, they may file a petition against him more than six months after the beginning of the concealment, if it still continues. *Re* Wilmington Hosiery Co., 120 Fed. 179, 9 Am. B. R. 581; Remington on Bankruptcy, § 108.

[3] *Re* Wilmington Hosiery Co., 120 Fed. 179, 9 Am. B. R. 581; Remington on Bankruptcy, § 107.

a man does not "permit" a removal if he has neither the power nor the right to prevent it;[4] nor where the removal was made without his consent or collusion.[5] The intent specified in the statute means an actual design in the mind, which must be proved as a question of fact.[6] It has been held that, in de-

[4] Ibid.

[5] *Re* Belknap, 129 Fed. 646; Remington on Bankruptcy, § 108.

[6] *Re* Drummond, 1 N. B. R. 231; Langley v. Perry, 2 N. B. R. 596; *Re* Goldschmidt, 3 N. B. R. 164; *Re* Wilmington Hosiery Co., 120 Fed. 179, 9 Am. B. R. 581; Lansing Boiler Works v. Ryerson, C. C. A., 128 Fed. 701, 11 Am. B. R. 558; *Re* Belknap, 129 Fed. 646. The intent must be determined by looking at what the debtor says and does and the effect of the same. Ecford v. Greely, 6 N. B. R. 433. The fraud or innocence of the person to whom the transfer is made is immaterial. *Re* Rome Planing Mill, 96 Fed. 812; *Re* Drummond, 1 N. B. R. 231. The presumption is against fraud, Davis v. Stevens, 104 Fed. 235, 4 Am. B. R. 763; Remington on Bankruptcy, § 111; but an intent to defraud will be presumed from the commission of an act, the actual or necessary effect of which is to produce it. Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co., C. C. A., 131 Fed. 215, 12 Am. B. R. 610; Remington on Bankruptcy, § 112; *Re* Glazier, 195 Fed. 1020. It has been held: that the intent may exist and the transfer be voidable, although full consideration was paid, *Re* Pease, 129 Fed. 446, 12 Am. B. R. 66; and that it is not an intent to hinder, delay or defraud creditors, when the intention is to avoid distribution in the Court of Bankruptcy and bring about its distribution in a court of a State, *Re* Wilmington Hosiery Co., 120 Fed. 179, 9 Am. B. R. 581; *contra*, *Re* Salmon & Salmon, 143 Fed. 395, 16 Am. B. R. 122; or to use the proceeds of a cash sale of all the vendor's property to pay certain creditors in preference to others, although this may be a preferential intent, Githens v. Shiffler, 112 Fed. 505, 7 Am. B. R. 453; *Re* Belknap, 129 Fed. 646, 12 Am. B. R. 326. It has been held: that a conveyance by a debtor of all his property, which exceeded in value all his debts, in consideration of an agreement that the grantee should pay the debts and support him for the rest of his life, was not *per se* fraudulent, *Re* Cornwall, 9 Blatchf. 114, 6 N. B. R. 305; nor a sale by an insolvent to raise money to pay off a creditor, who threatened criminal proceedings, although the creditor rejected the payment, *Re* Belknap, 129 Fed. 646, 12 Am. B. R. 326; and that permitting the appointment of a receiver of a corporation by a State court is not a transfer of property for the purpose of defrauding creditors, *Re* Baker-Ricketson Co., 97 Fed. 489. But see *infra*, § 625. Where the debtor gave a fictitious name and procured an attachment thereupon, for the purpose of preventing an attachment by an actual creditor; it was held that a fraud was committed, although his real object was to use the money to pay other creditors. *Re* Williams et al., 1 Lowell 406. Where an insolvent firm was dissolved and the assets

termining whether or not a conveyance is fraudulent, the court of bankruptcy is bound by the decision of the highest court of the State construing the State statute upon the subject.[7] The act, of which complaint is made, must have been committed within four months prior to the filing of the petition.[8] In such cases creditors are not obliged to prove insolvency on the part of the debtor at the time of the transfer;[9] but if the debtor proves solvency at the time of the filing of the petition, it will be dismissed.[10]

§ 622. Transfer of property with the intent to create a preference. A transfer by a debtor, while insolvent, of any portion of his property to one or more of his creditors, with intent to prefer these over any other creditors, is an act of bankruptcy.[1]

transferred to one of the partners, who executed a mortgage thereupon to secure a separate debt; it was held that there was a conveyance to hinder and delay creditors. *Re* Waite, 1 Lowell 207.

7 Johansen Bros. Shoe Co. v. Alles, C. C. A., 197 Fed. 274.

8 30 St. at L. 544, 546, § 3; quoted *supra*, § 620.

9 *Re* Pease, 129 Fed. 446, 12 Am. Br. 66; *Re* Larkin, 168 Fed. 100. See Lansing Boiler Works v. Ryerson, C. C. A., 128 Fed. 701, 11 Am. B. R. 558.

10 30 St. at L. 544, 546, § 3c; quoted *supra*, § 620.

§ 622. 1 30 St. at L. 544, 546, § 3. "A preference is a transfer made or seizure by legal proceedings, procured or suffered by an insolvent debtor, of some part of his property, the effect of which is to enable a creditor to obtain a greater proportion of his debt than some other creditor of the same class of priority." Remington on Bankruptcy, § 120. There must be affirmative action with intent to prefer the creditor. "As the law now is, a creditor who relies on the commission of the second act must show affirmative action on the debtor's part and must prove that it was taken with intent to prefer the creditor. If such showing is made and the effect of what the debtor did was to give a preference, the commission of the second act of bankruptcy has been established. It may be that what is proved constituted a part of a chain of events which culminated in the commission of the third act also. They have features in common. Neither of them can be committed unless the debtor is insolvent nor unless a preference has actually resulted from it. In other respects they are radically different." *Re* Truitt, 203 Fed. 550, 553; Fulkerson v. Shaffer, C. C. A., 217 Fed. 358. A confession of judgment may constitute such an act of bankruptcy. Ibid. *Re* Musgrove Mining Co., 234 Fed. 99. It has been held that a transfer of property by an insolvent with intent to prefer a creditor is not an act of bankruptcy unless the transferor has then some other creditor whose claim could be proven in bankruptcy. Beers v. Hanlin, 99

Fed. 695. The fact that the transfer was made under a threat of criminal prosecution or other coercion does not prevent its being an act of bankruptcy. Remington on Bankruptcy, § 131, citing Clarion Bank v. Jones, 21 Wall. 325, 22 L. ed. 542; Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; Giddings v. Dodd, 1 Dillon 115; Strain v. Gourdin, 2 Woods 380; Arnold v. Maynard, 2 Story 349. Knowledge on the part of the debtor of his insolvency is essential to an intent on his part to make a preference. *Re* Freeman Cotting Coat Co., 212 Fed. 548; Remington on Bankruptcy, § 131. Such knowledge upon his part may be presumed, Wager v. Hall, 16 Wall. 584, 21 L. ed. 504; *Re* Bloch, C. C. A., 109 Fed. 790, 6 Am. B. R. 300; *Re* Gilbert, 112 Fed. 951, 8 Am. B. R. 101; but the presumption is rebuttable, *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; *Re* Bloch, C. C. A., 109 Fed. 790, 6 Am. B. R. 300; *Re* Gilbert, 112 Fed. 951, 8 Am. B. R. 101. And if the debtor establishes his want of knowledge and was influenced to believe that he was solvent, he rebuts the presumption. *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; *Re* Gilbert, 112 Fed. 951, 8 Am. B. R. 101; Merchants' Nat. Bank v. Cole, C. C. A., 149 Fed. 708, 18 Am. B. R. 44. The intent may be shown by circumstantial evidence. Traders' Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832; John Naylon & Co. et al. v. Christiansen Harness Mfg. Co., C. C. A., 158 Fed. 290; *Re* Minard, 156 Fed. 377. The transfer of all a person's property, in order to pay a debt, creates a presumption of an intent to prefer, where there are other creditors unprovided for, Wager v. Hall, 16 Wall. 584, 21 L. ed. 504; Boyd v. Lemmon & Gale Co., C. C. A., 114 Fed. 647, 8 Am. B. R. 81; *Re* Hughes, 183 Fed. 872; and so may be the transfer for similar purposes of a large part of his property, Wager v. Hall, 16 Wall. 584, 21 L. ed. 504; *Re* Pinson & Co., 180 Fed. 787. It has been held that the payment of some creditors in full and the failure to pay others, Johnson v. Wald, C. C. A., 93 Fed. 640, 2 Am. B. R. 84; Rex Buggy Co. v. Hearick, C. C. A., 132 Fed. 310, 12 Am. B. R. 726, or the transfer of property to some creditors without leaving enough to pay others a like proportion of the amounts due them, *Re* McGee, 105 Fed. 895, 5 Am. B. R. 262; or to a trustee for the benefit of certain creditors, thus giving him a preference over the others, Fulkerson v. Shaffer, 217 Fed. 358; when made by a debtor with knowledge of his insolvency is conclusive proof of the intent to prefer. The intent to prefer may also be inferred from the transfer by an insolvent debtor of a large portion of his property to a single creditor, *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123. It was held that a preferential payment first disclosed during the bankruptcy proceedings, nearly seven months after its occurrence, was unavailable as an act of bankruptcy. *Re* Perlhefter, 177 Fed. 299. The payment of small sums to some creditors in the usual course of trade, with the apparent effort to keep the business going, does not raise the presumption of an intent to prefer. *Re* Douglas Coal & Coke Co., 131 Fed. 769, 12 Am. B. R. 539; Macon Grocery Co. v. Beach, 156 Fed. 1009; *Re* Columbia Real

Estate Co., 205 Fed. 677. But see *Re* Foley, 140 Fed. 300; *Re* Stovall Grocery Co., 161 Fed. 882; *Re* Morgan & Williams, 184 Fed. 938; nor, it has been held, the return within one day of money advanced to a corporation to meet its pay-roll. *Re* Brown Commercial Car Co., C. C. A., 227 Fed. 387. The following acts have been held to be transfers with the intent to prefer creditors: A transfer in payment of a debt of personal property sufficient in value to satisfy it in full, Johnson v. Wald, C. C. A., 93 Fed. 640. *Cf. Re* Grant, 106 Fed. 496, 30 St. at L. 544, § 1; the conveyance to a creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, Ibid; the transfer of a merchant's stock in trade to a creditor, part of the consideration being payment by a creditor to a bank to meet the debtor's overdrawn account there, for which the transferee was responsible, Goldman v. Smith, 93 Fed. 182; and the payment of a debt, *Re* Ft. Wayne El. Co., 99 Fed. 400; Strobel & Wilken Co. v. Knost, 99 Fed. 409; First Nat. Bank v. Chicago Title & Tr. Co., 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. 693; or a substantial part thereof, *Re* Perlhefter, 177 Fed. 299; *Re* Condon, C. C. A., 209 Fed. 800; but not the sale of property to a person or creditor and the application of part of the proceeds to the defraying of liens upon the same, such as taxes and arrears of rent upon a leasehold and the expenses of the same, *Re* Pearson, 95 Fed. 425. Nor payment by an insolvent to certain creditors of 25 per cent of their claims, pursuant to an arrangement made by a creditors' committee, approved by most of them, for settlement of all his indebtedness on that basis, where he had secured funds to complete the settlement. *Re* Bloomberg, 253 Fed. 94. An adjudication that an assignment constituted a preference was held not to estop the bankrupt from proving that the property thereby covered was not acquired until thereafter and consequently did not pass to his trustee. *Re* Ghazal, C. C. A., 174 Fed. 809. It has been held that a mortgage of all a debtor's property to secure a few creditors is not a preference, when the equity of redemption is sufficient to provide for the remainder. Lansing Boiler & Eng. Works v. Ryerson, C. C. A., 128 Fed. 701, 1 Am. B. R. 558. "The taking of unusual steps in the transaction or the failure to take the usual steps may indicate intent." *Re* Edelman, C. C. A., 130 Fed. 700, 12 Am. B. R. 238. Thus, the failure to record a mortgage of real estate until several months after its execution was held to be evidence of an intent to prefer. *Re* Edelman, C. C. A., 130 Fed. 700, 12 Am. B. R. 238. The creditors have the burden of proving the insolvency of the debtor. *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; Troy Wagon Works v. Vastbinder, 130 Fed. 232, 12 Am. B. R. 352. See *Re* Donnelly, 193 Fed. 755. As to the effect of a previous verbal agreement, see Jones v. Coates, C. C. A., 196 Fed. 860, where it seems to recognize the validity of the same. *Contra, Re* Donnelly, 193 Fed. 755. The possession which will set the four months running must be as notorious, exclusive or continuous as the nature of the property will permit, and no more than as is usual or ordinary when unaccompanied by

A chattel mortgage may be such a transfer.[2] "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."[3]

acts or conduct tending to conceal the ownership. Jones v. Coates, C. C. A., 196 Fed. 860, holding that, in the case of notes or insurance policies, the notice of the transfer to the creditors of the assignor was not necessary to prevent the time running when the possession of the papers was actually transferred. See § 656, *infra*.

2 *Re* Riggs Restaurant Co., C. C. A., 130 Fed. 691.

3 30 St. at L. 544, 545, § 1; May v. Le Claire, 18 Fed. 164; *Re* Borelli & Callahan, 142 Fed. 296. *Cf.* Anshutz v. Hoerr, 1 Fed. 592; *Re* Baumann, 96 Fed. 946; *Re* Rome Planing Mill, 99 Fed. 937. If the members of a partnership have property worth more than the amount of the firm indebtedness, the partnership does not commit an act of bankruptcy by giving a preference, although the property is less than its debts. Washington Cotton Co. v. Morgan & Williams, C. C. A., 192 Fed. 310. But see *Re* Morgan & Williams, 184 Fed. 938. It has been held, that the fair market value of the assets of a corporation, for the purpose of determining its solvency, under the bankruptcy law, is the value which the company might have realized on them for itself. *Re* Marine Iron Works, 159 Fed. 753. It has been held that property, which is exempt from execution, is to be included in the computation. *Re* Baumann, 96 Fed. 946. A judgment against the bankrupt, entered more than four months before the commission of the act of bankruptcy, is admissible upon the proof of insolvency. *Re* McGowan, 134 Fed. 498, which considers other questions concerning the admissibility of evidence upon this issue. For the commission of this act of bankruptcy no fraudulent intent is required; *Re* Mingo Valley Creamery Ass'n, 100 Fed. 282, 4 Am. B. R. 67; Githens v. Shiffler, 112 Fed. 505, 7 Am. B. R. 453; *Re* Duffy, 118 Fed. 936, 9 Am. B. R. 358; *Re* Belknap, 129 Fed. 646, 12 Am. B. R. 326; Remington on Bankruptcy, § 118. The payment by an insolvent of debts previously incurred for supplies necessary for the support of his family was held to be an act of bankruptcy, although he thought that the exemptions given him by the statutes authorized the same. *Re* Condon, 198 Fed. 947, but there must be an intent to prefer one creditor over another. *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; *Re* Gilbert, 112 Fed. 951, 8 Am. B. R. 101; *Re* Douglas Coal & Coke Co., 131 Fed. 769, 12 Am. B. R. 539; Remington on Bankruptcy, § 129. The intent of the creditor is immaterial. *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; *Re* Wright Lumber Co.,

§ 623. Preferences by legal proceedings as acts of bankruptcy. It is an act of bankruptcy to suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings; and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same.[1] Each of the three elements must exist to constitute the act.[2] Affirmative action by the debtor is not a requisite to his suffering or permitting a creditor to obtain a preference through legal proceedings.[3] The debtor's intent is not an essential element.[4] An actual preference must have been gained by the legal proceedings.[5] The preference

114 Fed. 1011, 8 Am. B. R. 345; Remington on Bankruptcy, § 130; Alter v. Clark, 193 Fed. 153.

§ 623. 1 30 St. at L. 544, 546, § 3. It has been held that suffering an execution to be levied is not an act of bankruptcy if no sale has been made. *Re* R. L. Radke Co., 193 Fed. 735. The term "legal proceedings" covers all process by which a lien is obtained under State laws, *Re* Crafts-Riordon Shoe Co., 185 Fed. 931. The failure of an insolvent debtor to discharge the levy of an execution procured by the attorney for the petitioning creditors, for the purpose of laying the foundation for the bankruptcy proceedings, is not an act of bankruptcy. *Re* Weiss, 142 Fed. 279; Folger v. Putnam, C. C. A., 194 Fed. 793; Johnson Bros. Shoe Co. v. Alles, C. C. A., 197 Fed. 274, affirming *Re* Putnam, 193 Fed. 464.

2 Citizens Banking Co. v. Ravenna Nat. Bank, 234 U. S. 360.

3 Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. 74; *Re* Moyer, 93 Fed. 188; *Re* Cliffe, 94 Fed. 354; *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; Folger v. Putnam, C. C. A., 194 Fed. 793, affirming *Re* Putnam, 193 Fed. 464. A failure to prevent or to discharge such a preference is an act of bankruptcy. Ibid. Even, it has been held, when judgment is entered and a levy made under execution, without the debtor's knowledge, in pursuance of a warrant of levy given, when he was solvent more than four months before. Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147; 22 Sup. Ct. 74; *Re* Moyer, 93 Fed. 188.

4 Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147; *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123. *Re* Truitt, 203 Fed. 550.

5 *Re* Chapman, 99 Fed. 395. *Re* Crafts-Riordon Shoe Co., 185 Fed. 931. Where the levy was made only upon property, as to which the judgment creditor had a previously existing contract lien, it was held that no act of bankruptcy was committed. Ibid. The preference must be over other creditors of the "same class." *Re* Belknap, 129 Fed. 646; Remington on Bankruptcy, § 138. Thus, it has been held that a distraint by a landlord is not a preference, unless there are several landlords injuriously affected thereby. *Re* Belknap, 129 Fed. 646. It has

through legal proceedings means any proceeding in a court of justice, whether interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors;[6] such as an attachment, irrespective of the question whether the attachment was made in time to give the attaching creditor a valid lien.[7] Otherwise the mere failure to prevent the enforcement, within the four months' period, of a lien previously

been said that suffering judgment upon a claim of a laborer, which is preferred by the statute, would not be an act of bankruptcy if there were enough property to pay all similar claims in full, unless it exceeded the limit of the preference, namely, three hundred dollars. *Re* Cement Co., 17 Am. B. R. 375; Remington on Bankruptcy, § 138. Where a person owing the debtor paid what was due to the sheriff holding an execution, *Re* Miller, 104 Fed. 764; or garnishee process, *Re* Harper, 105 Fed. 900; it was held that an act of bankruptcy was immediately committed; and that the limitation of five days did not apply. The consummation of the act of bankruptcy under this section is not the date of the execution sale, but the fifth previous day, if the bankrupt then fails to dissolve the levy. *Re* National Hotel & Cafe Co., 138 Fed. 947. The petition may be then filed, and upon a proper showing the sale may be enjoined; *Re* Rome Planing Mill, 96 Fed. 812, 3 Am. B. R. 123; *Re* Elmira Steel Co., 109 Fed. 456; but this cannot be done unless some time for the sale has been fixed if it has not taken place. *Re* Vetterman, 135 Fed. 443. Where the sale was advertised for August 22nd, it was held that the judgment debtor had the whole of the 17th of that month in which to discharge the execution before it would be guilty of an act of bankruptcy. Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., C. C. A., 154 Fed. 662. Where the sale was under a judgment, confessed by the insolvent, it was held that it was equivalent to a transfer of his property, and that the time within which a petition for that act of bankruptcy might be filed did not begin to run until the sale, although the petition might have been filed within five days before. *Re* Nusbaum, 152 Fed. 835.

[6] *Re* Reichman, 91 Fed. 624; *Re* Fisher, 219 Fed. 638. Not, it has been held liens acquired by legal proceedings more than four months before the petition in bankruptcy was filed, *Re* Ferguson, 95 Fed. 429; Owen v. Brown, C. C. A., 120 Fed. 812; and the recovery of judgment for the foreclosure of a lien more than four months old with a levy upon the land covered thereby, even when the judgment is general, provided that no levy is made upon any property not bound by the lien. *Re* Ferguson, 95 Fed. 429.

[7] Parmenter Mfg. Co. v. Stoever, C. C. A., 97 Fed. 330; *Re* Crafts-Riordon Shoe Co., 185 Fed. 931. It has been held that sufferance of an attachment not followed by a sale did not constitute a preference, see *Re* Windt, 177 Fed. 584. *Re* Murphy, 228 Fed. 1018. It was held that the surety in attachment proceedings could not force the debtor

obtained is not an act of bankruptcy,[8] nor it has been held is a failure to vacate a levy which by the State law is void.[9]

§ 624. General assignments for the benefit of creditors as acts of bankruptcy. A general assignment for the benefit of creditors is an act of bankruptcy,[1] irrespective of the insolvency of the assignor or his good faith, or whether or not he intends to prefer any creditors[2] and irrespective of the validity

into bankruptcy because the latter permitted four months, less five days, to expire without removing the lien. *Re* Windt, 177 Fed. 584.

[8] Ibid.; Citizens Banking Co. v. Ravenna Nat. Bank, 234 U. S. 360; Colston v. Austin Run Min. Co., C. C. A., 194 Fed. 929; *Re* Deer Creek Water & Water Power Co., 205 Fed. 205; *Re* Superior Jewelry Co., 239 Fed. 373; *Re* D. F. Herlehy Co., 247 Fed. 369; *Re* McGraw, C. C. A., 254 Fed. 442. But see Parmenter Mfg. Co. v. Stoever, C. C. A., 97 Fed. 330. Where the sheriff had been instructed by the attorney for the judgment creditors to do nothing until further orders under executions on confessed judgments levied a year before, and the keeper who had been placed in charge was withdrawn, it was held that these executions became dormant and that new executions issued and levied under the same judgments constituted new acts of bankruptcy. *Re* Chapman, 99 Fed. 395. The issue of an alias execution does not affect the lien acquired by the execution previously issued, nor make the failure of the judgment debtor to procure the discharge of the former an act of bankruptcy. *Re* Superior Jewelry Co., C. C. A., 243 Fed. 368.

[9] *Re* Moark-Nemo Consol. Mining Co., 219 Fed. 340; *Re* Vetterman, 135 Fed. 443; Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., C. C. A., 154 Fed. 662; *Re* D. F. Herlehy Co., 247 Fed. 369.

§ 624. [1] As to what is not such an assignment, see *Re* McGraw, 254 Fed. 444; *Re* Ambrose Matthews & Co., C. C. A., 236 Fed. 539; reversing *Re* Ambrose Matthews & Co., 229 Fed. 309. The preparation of a deed or assignment before its execution is not. *Re* Federal Lumber Co., 185 Fed. 926. Such an assignment may be voluntary or statutory. *Re* Berthoud, 231 Fed. 529, made in or without the United States. Ibid. Any act of a debtor by which he parts with the title and possession of all of his property for the benefit of his creditors to be disposed of by a trustee or assignee selected by him independent of the Bankruptcy Law is such an act of bankruptcy. *Re* Heleker Bros. Mercantile Co., 216 Fed. 963; *Re* Cutler & John, 228 Fed. 771. It may be committed in the form of a mortgage, *Re* Heleker Bros. Mercantile Co., 216 Fed. 963, or by an application for a receiver made by a creditor on behalf of the bankrupt, *Re* Muir, 212 Fed. 495, or by a vote of the stockholders to dissolve the corporation which appoints its directors, trustees to liquidate its affairs. Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., C. C. A., 246 Fed. 653.

[2] George M. West Co. v. Lea Bros., 174 U. S. 590, 43 **L. ed.**

of the conveyance.[3] So are a general assignment by the officers of a corporation under the authority of a resolution of its board of directors in pursuance of a vote at a stockholders' meeting, although against the objection of a minority of the stockholders,[4] and a confession of judgment to a trustee for all of the confessed creditors.[5]

§ 625. Appointments of receivers or trustees as acts of bankruptcy. A debtor has committed an act of bankruptcy when, being insolvent,[1] he has applied for a receiver or a trustee of his property;[2] or because of insolvency[3] a receiver or a trustee has

1098, 19 Sup. Ct. 836. *Re* Utley, 235 Fed. 905.

3 Griffin v. Dutton, C. C. A., 165 Fed. 626; Canner v. Webster Tapper Co., C. C. A., 168 Fed. 519; *Re* Courtenay Mercantile Co., 186 Fed. 352, aff'd, C. C. A., 194 Fed. 368; *Re* Federal Lumber Co., 185 Fed. 926; *Re* Ambrose Matthews & Co., 229 Fed. 309; *Re* Berthous, 231 Fed. 529; *Re* Louis Neuburger, C. C. A., 240 Fed. 947.

4 Clark v. American Mfg. & En. Co., C. C. A., 101 Fed. 962.

5 *Re* Green, 106 Fed. 313. See also, Davis v. Stevens, 104 Fed. 235, 241, 242.

§ 625. 1 When the application is made by the debtor, it is not an act of bankruptcy unless he was then insolvent. *Re* Spalding, C. C. A., 139 Fed. 244; Hill v. Western Electric Co., C. C. A., 214 Fed. 243. But if he was then insolvent, the ground for the appointment of a receiver is material. Exploration Mercantile Co. v. Pacific H. & S. Co., C. C. A., 177 Fed. 825. But when the appointment was made at the application of creditors, because of insolvency, it is immaterial whether the debtor actually was insolvent; *Re* Spalding, C. C. A., 139 Fed. 244. When the insolvency of the debtor is the criterion, he must be insolvent in accordance with the definition in the bankruptcy act. *Re* Douglas Coal & Coke Co., 131 Fed. 769, 773, 12 Am. B. R. 539; *Re* Electric Supply Co., 175 Fed. 612, holding that the corporation was insolvent. **The recital** in the order appointing a receiver that the appointment was made because of insolvency is conclusive; Greenwood Gum Co. v. Zimmerman, C. C. A., 240 Fed. 637; although subsequently to the filing of the petition in bankruptcy, the State court modifies its order so as to recite that the appointment was made for another reason. *Re* Wenatchee Heights Orchard Co., 204 Fed. 674.

2 This is the case when the application is made in the name of another at the debtor's instigation. Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813; *Re* Muir, 212 Fed. 495; *Re* Maplecroft Mills, 218 Fed. 661; James Supply & Hardware Co. v. Dayton Coal & Iron Co., C. C. A., 223 Fed. 991; Graham Mfg. Co. v. Davy-Pocahontas Coal Co., C. C. A., 238 Fed. 488. But see *Re* Wm. S. Butler & Co., C. C. A., 207 Fed. 705; *Re* Valentine Bohl Co., C. C. A., 224 Fed. 685; Hansen v. Uniform Seamless Wire Co., C. C. A., 243 Fed. 177; *Re* Big Pines Lime &

been put in charge thereof under the laws of a State or Territory of the United States.[4] Whether the appointment of the receiver was made because of insolvency is to be determined from the record of the court which made it.[5] The appointment of a tempo-

Transportation Co., 257 Fed. 141. It has been held that the consent by a corporation to the appointment of a receiver, upon the application of others, is not equivalent to having "applied for a receiver." *Re* Gold Run. Min. & Tunnel Co., 200 Fed. 162. *Contra,* Exploration Mercantile Co. v. Pacific H. & S. Co., C. C. A., 177 Fed. 825; *Re* Pickens Mfg. Co., 158 Fed. 894. Nor resolutions of the stockholders authorizing the execution of a general assignment by the directors, *Re* Hartwell Oil Mills, 165 Fed. 555, or by an officer of the company, *Re* Federal Lumber Co., 185 Fed. 926. Such an act of bankruptcy is committed by a firm when performed by one of the partners, although the others do not participate in the same. Youngbluth v. Slipper, C. C. A., 185 Fed. 773.

3 The insolvency must be one covered by the definition of the Bankruptcy Law. *Re* Wm. S. Butler & Co., C. C. A., 207 Fed. 705; Maplecroft Mills v. Childs, C. C. A., 226 Fed. 415. See *Re* Rankin, 210 Fed. 528; Stewart Petroleum Co. v. Boardman, C. C. A., 264 Fed. 826. It is not an act of bankruptcy when the appointment of a receiver is made because the corporation is in imminent danger of insolvency. Maplecroft Mills v. Childs, C. C. A., 226 Fed. 416; or because the corporation is unable to pay its current indebtedness as its debts mature, *Re* Edward Ellsworth Co., 173 Fed. 699; *Re* Wm. S. Butler & Co., C. C. A., 207 Fed. 705; *Re* Valentine Bohl Co., C. C. A., 224 Fed. 685; Maplecroft Mills v. Childs, C. C. A., 226 Fed. 415; *Re* Butte Duluth Mining Co., 227 Fed. 334; or because of the failure of the bank with which it had transacted business, Schumert & Warfield v. Security Brewing Co., 199 Fed. 358; or because of mismanagement by the persons in control of the corporation, *Re* Boston & Oaxaca Min. Co., 181 Fed. 422.

4 32 St. at L. 797; quoted *supra,* § 620. Where the application was not made by the debtor, and the appointment was not made on the ground of insolvency, it is not an act of bankruptcy. *Re* Douglas Coal & Coke Co., 131 Fed. 769, 12 Am. B. R. 539; Moss Nat. Bank v. Arend, C. C. A., 146 Fed. 351; *Re* Spalding, C. C. A., 139 Fed. 244, for example, when made in a suit to foreclose a mortgage, *Re* Douglas Coal & Coke Co., 131 Fed. 769, 12 Am. B. R. 539, or to prevent conveyances of property in fraud of a judgment creditor, *Re* Spalding, C. C. A., 139 Fed. 244, or to wind up the affairs of a partnership, there being no insolvency alleged, Moss Nat. Bank v. Arend, C. C. A., 146 Fed. 351.

5 Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813; *Re* Maplecroft Mills, 218 Fed. 659; Greenwood Gum Co. v. Zimmerman, C. C. A., 240 Fed. 637. Where the decree or order states the ground for the appointment such statement is conclusive. Blue Mountain Iron & Steel Co. v. Port-

rary receiver because of insolvency when made at the application of a creditor is an act of bankruptcy.[6] The appointment of receiver or trustee, if it has taken place under the circumstances

ner, C. C. A., 131 Fed. 57; *Re* Spalding, C. C. A., 139 Fed. 244; *Re* Edward Ellsworth Co., 173 Fed. 699. But see *Re* Pickens Mfg. Co., 158 Fed. 894. So where the petition or bill upon which the appointment was made alleges insolvency and the order states that the appointment is made "on consideration of the foregoing petition," Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813; parol evidence is then inadmissible to prove the contrary. Ibid. Where the bill upon which the appointment is made alleges insolvency, it will be presumed that that was a ground for such appointment, although other grounds therefor were named, and the decree does not state specifically which influenced the court; Lowenstein v. McShane Mfg. Co., 130 Fed. 1007; Hooks v. Aldridge, C. C. A., 145 Fed. 865; Beatty v. Andersen Coal Min. Co., C. C. A., 150 Fed. 293; *Re* Kennedy Tailoring Co., 175 Fed. 871; unless insolvency is not a cause for a receivership under the law of the State. *Re* Spalding, C. C. A., 139 Fed. 244. But see Exploration Mercantile Co. v. Pacific H. & S. Co., C. C. A., 177 Fed. 825. Where the definition of insolvency by the State statute is broader than that in the Bankruptcy Act, an appointment for the former reason is not a cause for bankruptcy, unless the facts show that the case falls within the latter law. *Re* Douglas Coal & Coke Co., 131 Fed. 769, 774, 12 Am. B. R. 539; *Re* Golden Malt Cream Co., C. C. A., 164 Fed. 326. Where the appointment was made in fact because of insolvency, although there was no such statement in the pleadings or decrees, it was held that there was an act of bankruptcy. *Re* Beatty, C. C. A., 150 Fed. 293; *Re* Belfast Mesh Underwear Co., 153 Fed. 224. But see *Re* Columbia Real Estate Co., 205 Fed. 677. In such a case, the question whether the receiver was appointed on the ground of insolvency might be for the jury. Blue Mountain Iron & Steel Co. v. Portner, C. C. A., 131 Fed. 57. For example, upon the dissolution and liquidation of the assets of a corporation. *Re* Bennett Shoe Co., 140 Fed. 687; or joint stock company, *Re* Hercules Atkin Co., 133 Fed. 813, without any proceeding in the court. Where a sheriff took possession of the personal property of a corporation under a special writ of *fieri facias*, with statutory authority to distribute the proceeds among all of its creditors, it was held that that was in fact the appointment of a trustee because of insolvency and constituted an act of bankruptcy. *Re* International Coal Min. Co., 143 Fed. 665.

[6] Blue Mountain Iron & Steel Co. v. Portner, C. C. A., 131 Fed. 57; *Re* Wm. S. Butler & Co., C. C. A., 207 Fed. 705. The appointment of a temporary receiver to preserve the property until it can be determined whether insolvency exists is insufficient. Zugalla v. Mercantile Agency, C. C. A., 142 Fed. 927, 16 Am. B. R. 67. See *Re* Hudson River El. Power Co., 173 Fed. 934.

stated in the bankruptcy law, constitutes an act of bankruptcy, although not made by any order or decree of the court.[7]

§ 626. Admission in writing as act of bankruptcy. It is an act of bankruptcy for a debtor to admit in writing his inability to pay his debts and his willingness to be adjudged a bankrupt upon that ground.[1] A written admission of insolvency alone is insufficient.[2] The insolvency of the debtor is immaterial.[3] The admission may be signed by one alone of several partners.[4] The admission may be made by a corporation through an officer expressly empowered by its board of directors to make it, when such board is authorized by the charter so to do,[5] but an officer

[7] *Re* Hercules Atkin Co., 133 Fed. 813.

§ 626. [1] 30 St. at L. 544, 547, § 3. The admission may be made in the course of a previous bankruptcy proceeding, *Re* D. F. Herlehy Co., 247 Fed. 369, as to what is not such an admission, see *Re* Standard Shipyard Co., 262 Fed. 522.

[2] *Re* Wilmington Hosiery Co., 120 Fed. 179; *Re* Berthoud, 231 Fed. 530. But see Brinkley v. Smithwick, 126 Fed. 686.

[3] *Re* Duplex Radiator Co., 142 Fed. 906, 15 Am. B. R. 324; *Re* Moench, C. C. A., 130 Fed. 685, 12 Am. B. R. 240; affirming 123 Fed. 965; s. c., 123 Fed. 977, 10 Am. B. R. 656; criticised, XVII Harv. L. Rev. 131; *Re* Russell Wheel & Foundry Co., 222 Fed. 569; *Re* Wellesley, 252 Fed. 854.

[4] *Re* Kersten, 110 Fed. 929. But not, it has been held, against the consent of the others. *Re* Wellesley, 252 Fed. 854.

[5] *Re* Marine & Conveyor Co., 91 Fed. 630; *Re* Mutual Mercantile Agency, 111 Fed. 152; *Re* Moench, C. C. A., 130 Fed. 685, 12 Am. B. R. 240. It has been held: that in California, *Re* Am. Guarantee & Security Co., 192 Fed. 405, and New York, *Re* Lisk Mfg. Co., 167 Fed. 411; *Re* Moench & Sons Co., C. C. A., 130 Fed. 685, 66 C. C. A., 37; the corporation may make the admission through a resolution of its board of directors. But an admission signed by a majority of its directors individually is ineffective. *Re* Gold Run Min. & Tunnel Co., 200 Fed. 162.

The directors of a New York corporation may authorize an officer to make the statutory admission, if not forbidden by any by-law. *Re* Lisk Mfg. Co., 167 Fed. 411; where there was a failure to notify some of the directors who lived in a distant State, but neither the stockholders, nor a new member subsequently elected, made any attempt for several months to vacate a receivership obtained in the bankruptcy proceedings. See also, *Re* Rollins Gold & Silver Min. Co., 102 Fed. 982, 985; *Re* Moench & Sons Co., 123 Fed. 965, aff'd C. C. A., 130 Fed. 685, 66 C. C. A. 37. It seems that the directors of an Arizona Powder Co. v. Geis, C. C. A., 204 Fed. 565 (where two of the directors, whose presence was required for a quorum, were cred-

cannot do so without express authority.[6] It has been held that ratification of such an unauthorized admission does not make this an act of bankruptcy,[7] and that an answer admitting insolvency with a consent to the appointment of a receiver is not equivalent to a written admission of willingness to be adjudged a bankrupt.[8] Where the admission was made by the directors in violation of an injunction, it was held to be ineffective.[9]

§ 627. Petitions in bankruptcy. "Petitions shall be filed in duplicate, one copy for the clerk and one copy for service on the bankrupt."[1] "All petitions and the schedules filed there-

itors); a California, *Re* American Guarantee & Security Co. of, 192 Fed. 405; Michigan, *Re* Riley, Talbot & Hunt, 15 Am. B. R. 159; *Re* Russell Wheel & Foundry Co., 222 Fed. 569; New Jersey, *Re* Mutual Mercantile Agency, 111 Fed. 152; Rhode Island, *Re* Marine & Conveyor Co., 91 Fed. 630; and Wisconsin, *Re* T. L. Kelly Dry Goods Co., 102 Fed. 748, 4 Am. B. R. 528; corporation may do the same without the consent of the stockholders. See, also, *Re* Riley, Talbott & Hunt, 15 Am. B. R. 159. But that a corporation of Massachusetts, *Re* Bates Mach. Co., 91 Fed. 625; or Oregon, *Re* Quartz Gold Min. Co., 157 Fed. 243; cannot. In the absence of a by-law, a vote by a majority of the board is sufficient, *Re* Marine & Conveyor Co., 91 Fed. 630; and it was held that a failure to give notice of the meeting to three nominal directors, who had never attended since the organization of the board, did not affect the validity of the act, *Re* Marine & Conveyor Co., 91 Fed. 630.

[6] *Re* Burbank Co., 168 Fed. 719; *Re* Southern Steel Co., 169 Fed. 702, holding that a resolution authorizing an attorney to represent the corporation in any bankruptcy proceedings pending or that might be brought, and, in his discretion, to agree to the appointment of receivers, was insufficient. See Baker-Ricketson Co., 97 Fed. 189.

[7] *Re* Bates Mach. Co., 91 Fed. 625; *Re* Burbank Co., 168 Fed. 719.

[8] *Re* Wilmington Hosiery Co., 120 Fed. 179. But see Brinkley v. Smithwick, 126 Fed. 686.

[9] *Re* Hudson River El. Power Co., 173 Fed. 934.

§ 627. [1] 30 St. at L. 544, 561, § 59. An answer to an involuntary petition cannot be treated as a petition in voluntary bankruptcy, *Re* Condon, C. C. A., 209 Fed. 800; but where, subsequent to the institution of involuntary proceedings against a corporation, its directors passed a resolution consenting to the adjudication, it was held that such proceedings became in substance voluntary, although involuntary in form. *Re* New Amsterdam Motor Co., 180 Fed. 943. It has been held that a petition of voluntary, filed subsequent to one of involuntary, bankruptcy will not be sustained, when the result would be to validate certain acts complained of under that first filed. *Re* Dwyer, 112 Fed. 777. The filing of a voluntary petition is not in itself an act of bankruptcy and does not justify an involuntary proceeding.

with shall be printed or written out plainly, without abbreviation or interlineation except where such abbreviation and interlineation may be for the purpose of reference."[2] Forms of the petition are prescribed by the General Orders which must be followed.[3]

Re J. M. Ceballos & Co., 161 Fed. 445; *Re* Lachenmaier, C. C. A., 203 Fed. 32. They must be filed in the clerk's office; not sent immediately to the judge. *Re* Sykes, 106 Fed. 669. The clerk's docket should contain a memorandum of the filing of both copies of the petition. *Re* Stevenson, 94 Fed. 110; *Re* Dupree, 97 Fed. 28. The proceedings in bankruptcy are begun by the filing of the petition; not by the service of process upon the respondent. *Re* Appel, 103 Fed. 931. Where a verified petition accompanied by schedules was, after its filing, in part withdrawn, and a new petition filed with certain portions of the old petition pasted thereon containing also additional schedules and assets it was held that the day when the second petition was filed was the date of filing, and that the filing of the first should be disregarded. *Re* Washburn, 19 Fed. 84. It has been said that the filing of the petition is notice to all the world, and in effect an attachment and an injunction. *Re* Breslauer, 121 Fed. 910. See *infra*, § 643. Where a verified petition accompanied by schedules was, after its filing, in part withdrawn, and a new petition filed with certain portions of the old petition pasted thereon containing also additional schedules and assets it was held that the day when the second petition was filed was the date of filing, and that the filing of the first should be disregarded. *Re* Washburn, 99 Fed. 84. Where upon the filing of the petition without a copy, the clerk made and certified a copy thereof, which was delivered to the marshal and served upon the defendant; it was held that it was a duplicate within the requirement of the statute. Millan v. Exchange Bank, C. C. A., 183 Fed. 753. Where only one copy of the petition was filed, it was held that the court could not permit the filing of a second copy after four months from the commission of the act of bankruptcy therein specified. *Re* Stevenson, 94 Fed. 110. It has been held that such an omission is not waived by a general appearance without objection. *Re* Stevenson, 94 Fed. 110; *Re* Dupree, 97 Fed. 28. *Contra*, *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000; Remington on Bankruptcy, § 284. Where the petition was filed with malice and without probable cause, it may be the subject of an action in the nature of a suit for malicious prosecution. *Re* J. Ito Terusaki, 238 Fed. 934. Averments which were immaterial and impertinent were held to be the ground for an action for libel; but not allegations which were pertinent and material, Lesser, Rt. v. International Trust Co., 175 App. Div. (N. Y.) 12.

[2] General Order V.

[3] Mather v. Coe, 92 Fed. 333; W. A. Gage & Co. v. Bell, 124 Fed. 371; Sabin v. Blake-MeFall Co., C. C. A., 223 Fed. 501. In North Carolina the petitions must be set forth in the prescribed printed forms, Mahoney v. Ward,

100 Fed. 278. When the petitioner had bought the interests of his partner and continued the business in the name of the firm name, a petition signed by him with the name of the partnership by himself was considered as having been instituted by him individually doing business under the firm name. *Re* Baker & Edwards, 224 Fed. 611. Safer practice, for a corporation to annex the corporate seal to the petition. Dodge v. Kenwood Ice Co., C. C. A., 204 Fed. 577. But see *Re* Carthage Lodge, No. 365, I. O. O. F., 220 Fed. 694; the petition must be verified by or on behalf of each petitioner, 30 St. at L. 544, 551, § 18; Green River Deposit Bank v. Craig, 110 Fed. 137, 138; Remington on Bankruptcy, § 281. In the case of a partnership, the affidavit of one of its members is sufficient. Walker v. Woodside, C. C. A., 164 Fed. 680. The affidavit of the attorney for the petitioners might be held to be insufficient, *Re* Simonson, 92 Fed. 904; *Re* Nelson, 98 Fed. 76; *contra*, *Re* Herzikopf, 118 Fed. 101; *Re* Hunt, 118 Fed. 282; *Re* Vastbinder, 126 Fed. 417; except in the case of natural persons who reside outside of the district. Rogers v. De Soto Placer Min. Co., C. C. A., 136 Fed. 407; or perhaps in a case of a corporation; *Re* Chequasset Lumber Co., 112 Fed. 56; *Re* R. L. Radke Col., 193 Fed. 735. It is the safer practice for a corporation to have the affidavit sworn to by its president. Walker v. Woodside, C. C. A., 164 Fed. 680. In the case of voluntary petition the petitioner swears "to the best of my knowledge, information and belief." Form No. 1. The creditors' petition should contain a positive affidavit "that the statements contained in the foregoing petition, subscribed by them, are true." Form No. 3. The difference is important and should be observed. A creditor's petition is insufficient when verified upon knowledge, information and belief, *Re* Farthing, 202 Fed. 558, or upon belief, Sabin v. Blake-McFall Co., C. C. A., 223 Fed. 501, is insufficient. *Contra*, *Re* Ball, 156 Fed. 682. Such a defect however, is not jurisdictional. It may be cured by affidavit. Ibid.; *infra*, § 628. It is waived by an answer without its interposition. Lackawanna Leather Co. v. La Porte Carriage Co., C. C. A., 211 Fed. 318. A petition to transfer the proceeding to another district was held to be sufficient when certified by the petitioner "to the best of his knowledge, information and belief." *Re* Okmulgee Producing & Refining Co., 265 Fed. 736. In the City of New York the affidavit may be made before a Commissioner of Deeds. *Re* Morse, 210 Fed. 900. When a voluntary petition is filed by a corporation, it should set forth a resolution of the board of directors, authorizing this. See *Re* Jefferson Casket Co., 182 Fed. 689; Dodge v. Kenwood Ice Co., C. C. A., 204 Fed. 577. *Contra*, *Re* Kenwood Ice Co., 189 Fed. 525. An objection because of its omission comes too late after adjudication. Dodge v. Kenwood Ice Co., C. C. A., 204 Fed. 577. A statutory prohibition of an assignment, Bell v. Blessing, C. C. A., 225 Fed. 750 (California) or a dissolution, *Re* United Grocery Co., 239 Fed. 1016, without the consent of the stockholders is not such a restriction. Opposition by the corporation and board to the appointment of a receiver by a State court

Several acts of bankruptcy may be joined in the same petition.[4]

The same petition in voluntary bankruptcy may be presented on behalf of a partnership and on behalf of each member individually; provided that the schedules contain the individual debts and assets, as well as those of the firm.[5] A petition cannot join with a prayer for the adjudication of the bankrupt debtor, one for an injunction against third persons, such as attaching creditors;[6] or a receiver of a State court;[7] nor a prayer for the seizure of the property by the marshal.[8] The petition must state the jurisdictional facts.[9] In charging acts of

does not estop them from filing a voluntary petition. *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155. Where one of three directors was hostile to the others and endeavoring to secure a preference, it was held that the resolution was not void because passed at a meeting of which he had no notice. *Re* Kenwood Ice Co., 189 Fed. 525. In the absence of a restrictive provision in the State statutes for the charter, a resolution by the stockholders is not required. *Re* Kenwood Ice Co., 189 Fed. 525 (Minn.); *Re* Guanacevi Tunnel Co., C. C. A., 201 Fed. 316 (New York); *Re* Foster Paint & Varnish Co., 210 Fed. 652 (Pennsylvania); Bell v. Blessing, 225 Fed. 750 (California); Rudebeck v. Sanderson, C. C. A., 227 Fed. 575 (Washington); *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155 (Missouri); *Re* United Grocery Co., 239 Fed. 1016 (Florida); Fitts v. Custer Slide Mining & Development Co., C. C. A., 266 Fed. 864 (Colorado). Creditors have no right to object to a voluntary petition because it was filed without the consent of the stockholders. *Re* United Grocery Co., 239 Fed. 1016. An injunction forbidding interference with the possession of State receivers by the corporation and its officers and forbidding all creditors from taking steps to enforce their claims except in the suit in which the injunction was granted does not prevent the corporation or any of its creditors from instituting proceedings in bankruptcy. *Re* Yaryan Naval Stores Co., C. C. A., 214 Fed. 563. Exhibits attached to the petition are no parts thereof unless it contains a reference to them; but they may be considered upon a motion to amend so as to include them. Doty v. Mason, 244 Fed. 587, 591.

[4] Bradley Timber Co. v. White, C. C. A., 121 Fed. 779; *Re* Nusbaum, 152 Fed. 835; *Re* Ball, 156 Fed. 682.

[5] *Re* Gay, 98 Fed. 870. *Cf. Re* McFaun, 96 Fed. 592.

[6] *Re* Ogles, 93 Fed. 426. As to time of filing amended petition, see *Re* R. L. Radke Co., 193 Fed. 735.

[7] *Re* Ogles, 93 Fed. 426.

[8] Mather v. Coe, 92 Fed. 333; *Re* Ogles, 93 Fed. 426.

[9] *Re* Plotke, C. C. A., 104 Fed. 964, 5 Am. B. R. 171; *Re* Louisell Lumber Co., C. C. A., 209 Fed. 784. *Cf.*, § 655, *infra*. A petition for involuntary bankruptcy must show the occupation of the bank-

bankruptcy, the petition must allege facts; not conclusions of

rupt. *Re* Callison, 130 Fed. 987; Rise v. Bordner, 140 Fed. 566, or that the bankrupt is not within the exceptions to the statute. *Re* Bellah, 116 Fed. 69; *Re* Mero, 128 Fed. 630; *Re* Callison, 130 Fed. 987; *Re* Brett, 130 Fed. 981; Rise v. Bordner, 140 Fed. 566; Edelstein v. U. S., C. C. A., 9 L.R.A. (N.S.) 236, 149 Fed. 636; Woolford v. Diamond State Steel Co., 138 Fed. 582. *Contra, Re* Stern, C. C. A., § 604; Conway v. German, C. C. A., 166 Fed. 67. But it has been held that an omission of such averments is not a jurisdictional defect. Conway v. German, C. C. A., 166 Fed. 66, a case of an individual; *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 284. The allegation that a corporation "is engaged in the business and was incorporated for the purpose of building houses" was held to be sufficient to aver that it was engaged in manufacturing. *Re* Kingston Realty Co., 157 Fed. 299; *Re* White, 135 Fed. 199. So is an averment, that the corporation was engaged in the general retail merchandise business and was neither a municipal, railroad, insurance, nor banking corporation. Sabin v. Blake-McFall Co., C. C. A., 223 Fed. 501. It must show the jurisdictional requirements concerning residence. *Re* Plotke, C. C. A., 104 Fed. 964.

It should show: the nature of the claims of the petitioners, and that they are provable; *Re* Farthing, 202 Fed. 557, holding that an allegation was insufficient which stated: that petitioners owned negotiable notes executed by the alleged bankrupt which were due and owing to them, giving the amount of the notes held by each petitioner, but not stating the dates of execution or maturity, nor the payees therein named, nor whether singly or as jointly with another executed by him as principal or as endorser; in case of a judgment, the nature of the claim that is the foundation thereof should be stated. *Re* R. L. Dadke Co., 193 Fed. 735. It should show that each debt is not barred by the statute of limitations. Ibid.; but this need not be stated with the particularity requisite in the proofs of debt. *Re* Brett, 130 Fed. 981; Remington on Bankruptcy, § 243. See *Re* Pangborn, 185 Fed. 673. That provable claims to the requisite amount exist against the alleged bankrupt. Doty v. Mason, 244 Fed. 587, 589. Where one of the petitioners acquired his claim by assignment after the commission of the act of bankruptcy, a copy of such assignment need not be annexed to the petition. *Re* H. E. Page Motor Car Co., 251 Fed. 318. Since the proceedings date from the filing of the petition, it is sufficient to show that the petitioners were creditors upon that date. *Re* H. E. Page Motor Car Co., 251 Fed. 318. The following averment was held to be sufficient and not repugnant: "Dryer, Bollam & Co., a copartnership, money due on open account from Equal Rights Company, Incorporated, a corporation, upon a stated account rendered July 2, 1914, $80.00." Sabin v. Blake-M'Fall Co., C. C. A., 223 Fed. 501, 504. Where the act of bankruptcy is a general assignment the petition should show the dates when the claims of the

law.[10] Allegations, in the words of the statute, are insufficient;[11]

petitioners were acquired and it is the safer practice to aver that neither they nor their assignors, if any there were, assented thereto, *Re* Farthing, 202 Fed. 557. An involuntary petition must aver that the defendant is insolvent and has committed an act of bankruptcy within the preceding four months, *Re* Lachenmaier, C. C. A., 203 Fed. 32; except where the act of bankruptcy was a general assignment for the benefit of creditors when insolvency need not be averred. Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., C. C. A., 246 Fed. 653; but in voluntary proceedings it need only aver that the petitioner owes debts which he is unable to meet and that he wishes to take the benefits of the act. Ibid. An allegation of insolvency alone was held to be insufficient as a conclusion of law, *Re* Connecticut Brass & Mfg. Corp., 257 Fed. 445. But see Graham Mfg. Co. v. Davy-Pocahontas Coal Co., C. C. A., 238 Fed. 488. For a sufficient allegation of an intent to prefer, see *Re* Heleker Bros. Mercantile Co., 216 Fed. 963.

[10] *Re* Cliffe, 94 Fed. 354; Remington on Bankruptcy, § 252.

[11] *Re* Cliffe, 94 Fed. 354; *Re* Deer Creek Water & Water Power Co., 205 Fed. 205. For allegations concerning the application by a bankrupt for the appointment of the receiver, see Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813; *Re* Valentine Bohl Co., C. C. A., 224 Fed. 685. But see Graham Mfg. Co. v. Davy-Pocahontas Coal Co., C. C. A., 238 Fed. 488.

Where the petition alleges that the debtor suffered creditors to obtain a preference through legal proceedings, it must specify the details of the transaction which constitutes such preference. *Re* Cliffe, 94 Fed. 354; *Re* Pressed Steel Wagon Goods Co., 193 Fed. 811; *Re* McGraw, 254 Fed. 442. The allegations that the defendant committed an act of bankruptcy by confessing a judgment to a certain party, upon which judgment was entered, an execution, attachment and a *fi. fa.* issued, and the goods of the defendant levied upon by the sheriff were held to be insufficient. Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662; *Re* Truitt, 203 Fed. 550; *supra*, § 623. But see *Re* Fineman, 223 Fed. 652; *Re* Musgrove Mining Co., 234 Fed. 99. So was an allegation that an attachment has been made in a legal proceeding, without any statement of the disposition thereof. *Re* Vetterman, 135 Fed. 443.

In partnership cases, where insolvency is an essential element of the act of bankruptcy, the petition must show the insolvency of each partner, as well as the insolvency of the firm. *Re* Blair, 99 Fed. 76; Vaccaro v. Security Bank, C. C. A., 103 Fed. 436. But see *Re* Cliffe, 94 Fed. 354. Form number three of the Appendix to the Bankruptcy Rules should be used *mutatis mutandis* for a petition in involuntary bankruptcy against a partner. Mather v. Coe, 92 Fed. 333; First State Bank of Corwith, Iowa v. Haswell, C. C. A., 174 Fed. 209. Where a preference is charged, the names of the creditors and the times, places and circumstances of the preference must be alleged. *Re*

except those concerning a general assignment, or the appointment of a receiver or a trustee, or an admission in writing;[12] but when the jurisdictional facts are set forth in the language of the statute, such an objection cannot be raised after the adjudication,[13] nor probably after answer.[14]

§ 627a. Schedules. A petition in voluntary bankruptcy must be accompanied by schedules with a reference to the ledger and vouchers showing the names, with their residences, a description of the nature and consideration of the debts of all the creditors, separately specifying those to whom priority is secured by law, those who hold securities with the particulars of the security, and in case of unsecured creditors, whether they hold any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as partner or joint contractor with any other person, and if so, with whom. The schedules must also contain statements of the liabilities of the bankrupt on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers, with specifications of the same; of all accommodation paper signed, accepted, or indorsed by him and unpaid; of all property owned by the bankrupt, with specifications, and separately classified as real estate, personal property, choses in action, property in reversion, remainder, or expectancy,[1] includ-

Nelson, 98 Fed. 76; reversed on another ground, Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. 74; *Re* Pure Milk Co., 154 Fed. 682; *Re* Sig. H. Rosenblatt & Co., C. C. A., 193 Fed. 638; *Re* Pressed Steel Wagon Goods Co., 193 Fed. 811; *Re* Hallin, 199 Fed. 806; *Re* Condon, C. C. A., 209 Fed. 800; unless the names, Chicago Motor Vehicle Co. v. American Oak Leather Co., C. C. A., 141 Fed. 518; or the circumstances, *Re* Bellah, 116 Fed. 69; *Re* Mero, 128 Fed. 630, are stated to be unknown. An averment that preferences had been made by the payments of unknown amounts to unknown creditors was held to be insufficient. *Re* Mason-Seaman Transportation Co., 235 Fed. 944. The petition must show that the act of bankruptcy was committed within the four months preceding. *Re* Lonisell-Lumber Co., C. C. A., 209 Fed. 784. It was held to be sufficient to aver that the debtor owned certain described real estate in a specified county and gave specified creditors a preference by confessing judgments which were docketed there. *Re* Truitt, 203 Fed. 550.

12 Remington on Bankruptcy, § 255.

13 Houghton Wool Co. v. Morris, C. C. A., 249 Fed. 434; *Re* Cliffe, 94 Fed. 354.

14 Ibid.

§ 627a. 1 Pollack v. Meyer Bros. Drug Co., C. C. A., 233 Fed. 861.

ing property held in trust for the debtor, or subject to any power or right to dispose of or to charge; a particular itemized statement of the property claimed as exempt;[2] and a list of all books, papers, deeds and writings relating to the bankrupt business and the estate which are in existence, with the names of the persons who hold them in their possession.[3] "In all cases of involuntary bankruptcy, in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid."[4]

[2] *Infra*, § 650.

[3] General Order XXXVIII. Form 1. See Sellers v. Bell, C. C. A., 94 Fed. 801; *Re* Colaluca, 133 Fed. 255; *Re* Maples, 105 Fed. 919. *Cf. Re* Yates, 114 Fed. 365. A voluntary petition may in the discretion of the court be dismissed when the schedules show no debts that would be barred by a discharge. General Order IX, *infra*, § 636.

[4] General Order IX. If any part of the schedules would necessarily incriminate a bankrupt, the court might refuse to punish him by contempt for a refusal to file such part. See *supra*, §§ 339a, 339b. Such a refusal might however be a ground for denying his application for a discharge, *infra*, § 656. For a case where it was held that the schedules would not necessarily incriminate the bankrupt, see *Re* Podolin, 205 Fed. 563, aff'd Podolin v. Lesher Warner Dry Goods Co., C. C. A., 210 Fed. 97. The filing of the schedules is no waiver of the right to cross-examination tending to show omissions of matters which the bankrupt is required to disclose therein, Arnstein v. McCarthy, 254 U. S. 71. The schedules are admissible in evidence against the bankrupt in a criminal prosecution, Ensign v. Pennsylvania, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. ed. 658; U. S. v. Green, 220 Fed. 973. As to the effect upon the discharge of the bankrupt of the omission of an asset from his schedules, see *infra*, § 656. As to the effect upon the discharge of a debt of its omission from the schedules, see *infra* § 657. A partner who is not a bankrupt may be compelled to file schedules in a proceeding against the firm, Armstrong v. Fisher, C. C. A., 224 Fed. 97; but not when his membership in the firm is a matter of serious dispute, *Re* Samuels, C. C. A., 215 Fed. 845. Schedules filed by one partner are not conclusive evidence against another who has not participated therein. Horner v. Hamner, C. C. A., 249 Fed. 134. The bankrupt may be permitted to amend his schedules, General Order,

§ 628. Amendments to petitions in bankruptcy. "The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules.[1] If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."[2]

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed."[3] The

XI, *Re* Harrell, 222 Fed. 160, *infra*, § 628. Upon his application for such permission he should show the cause of the error which he wishes to correct. *Re* Brincat, 233 Fed. 811.

§ 628. [1] The verification of the petition for leave to file them may be sufficient, International Silver Co. v. N. Y. Jewelry Co., C. C. A., 233 Fed. 945; Hall v. Pullman Co., 253 Fed. 297.

[2] General Order XI. See *infra*, § 637.

[3] General Order VI. This order does not prevent the allegation of subsequent acts of bankruptcy where only one petition has been filed. *Re* Hamrick, 175 Fed. 279. It has been held: that bankruptcy proceedings against a partnership and its members may properly be consolidated with those against a corporation entirely owned by one of the partners, Salt Lake Valley Canning Co. v. Collins, C. C. A., 176 Fed. 91; but that involuntary proceedings against an individual cannot be changed, after testimony has been taken, so as to embrace a proceeding against a partnership of which he was a member, *Re* Kaufman, C. C. A., 176 Fed. 93; that proceedings instituted against individuals, who were also members of a firm, cannot be amended so as to include the partnership, if relief against the

grant [4] or refusal [5] of permission to amend a petition in bankruptcy rests largely in the discretion of the Court of Bankruptcy, and will rarely be interfered with by a court of review; but an order permitting [6] or refusing [7] leave to make an amendment may be set aside by the Circuit Court of Appeals upon a petition to review the same. In order to obtain leave to amend, there must be in the record as it stands the substance of that which is asked for; the right to amend can go no further than to bring forth and make effective that which is in some shape already there.[8] But very general language in the original petition will support an amendment thereto.[9] It has been held, that even jurisdictional allegations may be inserted or corrected by amendment.[10] That a petition which does not show on its face that the petitioner's claims are five hundred dollars or more

firm was not originally prayed; and that the adjudication of a partnership as bankrupt cannot be made *nunc pro tunc* so as to take effect from the date of the adjudication as such of its individual members as bankrupts; but a joint voluntary petition of two members of a firm was amended so as specifically to pray an adjudication of the partnership a bankrupt, when it originally tended to show that such relief was desired, *Re* Mercur, C. C. A., 122 Fed. 384, 10 Am. B. R. 505; Remington on Bankruptcy, § 69; *Re* Mercur, C. C. A., 122 Fed. 384, 10 Am. B. R. 505; *Re* Meyers, 97 Fed. 757, 3 Am. B. R. 260.

4 Armstrong v. Fernandez, 208 U. S. 324, 52 L. ed. 514.

5 Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., C. C. A., 154 Fed. 662; *Re* Sig. H. Rosenblatt & Co., C. C. A., 193 Fed. 638. See *Re* McGraw, 254 Fed. 442.

6 *Re* Sears, C. C. A., 117 Fed. 294; *Re* Haff, C. C. A., 136 Fed. 78.

7 Ogden v. Gilt Edge Consol. Mines Co., C. C. A., 225 Fed. 723.

8 *Re* Mercur, 116 Fed. 655, 657; affirmed in C. C. A., 122 Fed. 384, 388.

9 Chicago Motor Vehicle Co. v. American Oak Leather Co., C. C. A., 141 Fed. 518; *Re* Hark, 142 Fed. 279; *Re* Crenshaw, 156 Fed. 638; Ryan v. Hendricks, C. C. A., 166 Fed. 94; *Re* Pangborn, 185 Fed. 673; *Re* Irish, 228 Fed. 573; *Re* Havens, C. C. A., 255 Fed. 478. Where the petition alleged a preferential transfer in the language of the statute with insufficient specifications, an amendment was allowed although more than four months had then passed since the act of bankruptcy and meanwhile an adjudication or voluntary bankruptcy had been made. International Silver Co. v. N. Y. Jewelry Co., C. C. A., 233 Fed. 945.

10 *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000. Thus, it has been held that amendments may be allowed by inserting the allegations: that the alleged bankrupt is not a wage earner or farmer; Armstrong v. Fernandez, 208 U. S. 324, 52 L. ed. 514; Beach v. Macon Grocery Co., C. C. A., 120 Fed.

may be amended by joining other creditors whose claims are sufficient to make up the jurisdictional amount,[11] and that the allegation that the creditors are less than twelve may be cured by amendment.[12] Other acts of bankruptcy, which occurred within the first four months before the filing of the application for leave to amend, may be added to the petition;[13] provided that they were unknown to the petitioners when the petition was filed;[14] but not, it has been held, acts of bankruptcy which occurred more than four months before the amendment is sought;[15] except in cases of the consolidation of two petitions.[16] It has been held that, in the latter class of cases, an act of bankruptcy cannot be inserted in the first petition by amendment,[17] and that additional acts of bankruptcy cannot be added after the default of the bankrupt.[18] A fraudulent concealment of property is a continuous act which may be added by amendment at any time within four months of its discovery.[19] The

736; *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000; *Re* First Nat. Bank of Belle Fourche, C. C. A., 152 Fed. 64; *Re* Marion Contract & Construction Co., 166 Fed. 618. See *Re* Crenshaw, 156 Fed. 638; or the business in which a respondent corporation is engaged, *Re* First Nat. Bank of Belle Fourche, C. C. A., 152 Fed. 64; *Re* Broadway Sav. Trust Co., C. C. A., 152 Fed. 152; and, where a single creditor filed the petition, that all the creditors are less than twelve in number, *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000; *Re* Mackey, 110 Fed. 355; *Re* Bellah, 116 Fed. 69; *Re* Haff, C. C. A., 136 Fed. 78, 81. *Cf.* Millan v. Exch. Bank, C. C. A., 183 Fed. 753.

11 First State Bank of Corwith, Iowa, v. Haswell, C. C. A., 174 Fed. 209; Milan v. Exchange Bank of Mannington, C. C. A., 183 Fed. 753. *Contra, Re* Stein, 130 Fed. 377; *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000; criticised in Remington on Bankruptcy, § 269.

12 *Re* Mackey, 110 Fed. 355; *Re* Bellah, 116 Fed. 69; *Re* Haff, C. C. A., 136 Fed. 78, 81.

13 *Re* Mercur, 95 Fed. 69; *Re* Haff, C. C. A., 136 Fed. 78, 81.

14 Wilder v. Watts, 138 Fed. 426.

15 *Re* Haff, C. C. A., 136 Fed. 78; *Re* Pure Milk Co., 154 Fed. 682; *Re* Louisell Lumber Co., C. C. A., 209 Fed. 784; *Re* Condon, C. C. A., 209 Fed. 800; *Re* Brown Commercial Car Co., C. C. A., 227 Fed. 387; *Re* Lewis Shoe Co., 235 Fed. 1017; *Re* Triangle S. S. Co., 267 Fed. 303. *Contra*, Hark v. C. M. Allen Co., C. C. A., 146 Fed. 665; *Re* C. W. Bartleson Co., 253 Fed. 296; *Re* Brown Commercial Car Co., C. C. A., 227 Fed. 389.

16 General Order VI, quoted *supra*.

17 *Re* Sears, C. C. A., 117 Fed. 294; criticised in Remington on Bankruptcy, § 298.

18 *Re* Harris, 155 Fed. 216.

19 *Re* Havens, C. C. A., 255 Fed. 478. A misnomer of a bankrupt may be corrected by an amendment.

court may refuse leave to amend when it is not clearly in furtherance of justice.[20] In general, an amendment takes effect as of the date of the filing of the original petition;[21] but not where it sets forth acts of bankruptcy not charged in the original petition.[22] It is the frequent practice to have the court direct that the amendments be made *nunc pro tunc*,[23] but the amendment

Gleason v. Smith, Perkins & Co., C. C. A., 145 Fed. 895. Names of creditors who were preferred, when originally unknown, may be added by amendment. *Re* Hark, 142 Fed. 279. The affidavit annexed to the petition may be amended by adding, to the jurat, the name of the place where the verification was taken. Armstrong v. Fernandez, 208 U. S. 324, 52 L. ed. 514, or by making it upon knowledge instead of upon information and belief. *Re* Farthing, 202 Fed. 557; Sabin v. Blake-McFall Co., C. C. A., 223 Fed. 501. It has been held: that the requisite affidavit may be added by amendment. *Re* Vastbinder, 126 Fed. 417. Where the evidence admitted proves a different act of bankruptcy from that alleged, the petition may be amended to conform to the facts proved. *Re* Miller, 104 Fed. 764; Chicago Motor Vehicle Co. v. Am. Oak Leather Co., C. C. A., 141 Fed. 518. It has been held that, in such a case, "the amendment should be deemed made." *Re* Lange, 97 Fed. 197. An amendment may be allowed after a new trial, to make the petition conform to the facts developed at the former trial. *Re* Hark, 142 Fed. 279; s. c., C. C. A., Hark v. C. M. Allen Co., 146 Fed. 665. It has been held that, when eighteen months have elapsed since the discharge of a bankrupt, he cannot have the proceedings opened in order to amend his schedules by including the name and residence of a creditor omitted therefrom, who had no notice or knowledge of the proceedings, although there are no assets of the estate. *Re* Hawk, C. C. A., 114 Fed. 916, where no notice of the application was given to the creditor; *Re* Spicer, 145 Fed. 431.

20 Wilder v. Watts, 138 Fed. 426; Woolford v. Diamond State Steel Co., 138 Fed. 582. *Re* Farthing, 202 Fed. 557; *Re* Forbes, 235 Fed. 316. An application by a bankrupt, nearly a year after the adjudication, to amend his schedules so as to bring in an omitted creditor was refused. *Re* Kittler, 176 Fed. 655.

21 *Re* Shoesmith, C. C. A., 135 Fed. 684; Ryan v. Hendricks, C. C. A., 166 Fed. 94; *Re* Pangborn, 185 Fed. 673. It was so held of amendments adding creditors to the petition. First State Bank of Corwith, Iowa v. Haswell, C. C. A., 174 Fed. 209; Millan v. Exchange Bank of Mannington, C. C. A., 183 Fed. 753. Consequently, when the court thus corrected a misnomer of the alleged bankrupt in an involuntary proceeding, it was held that the proceedings took precedence of those on a voluntary petition, subsequently filed, and invalidated an adjudication upon the latter, made before the amendment and before service of process upon the bankrupt. Gleason v. Smith, Perkins & Co., C. C. A., 145 Fed. 895.

22 See cases cited in note 15 *supra*.

23 Hark v. C. M. Allen Co., C. C.

must be sworn to. An application to amend a petition in bankruptcy will be denied where the petitioner fails to state a reason for the former omission of the matter which he wishes to add to his petition.[24] The bankrupt should be allowed a reasonable time within which to answer the amendment to the petition.[25] A single day is insufficient.[26]

§ 629. Process and notices to creditors. "Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."[1] "All process, summons and subpœnas shall issue out of the court,

A., 146 Fed. 665. Leave to amend, *nunc pro tunc*, a petition for the adjudication of the members of a partnership as bankrupts, so as to include a prayer for the adjudication of the partnership also as a bankrupt *nunc pro tunc* as of the date of the original petition was denied. *Re* Mercur, C. C. A., 122 Fed. 384. See *supra*, § 618. But, it was held otherwise where the original petition showed that the petitioners intended to have the firm also adjudicated a bankrupt. *Re* Meyers, 97 Fed. 757, 3 Am. B. R. 260. *Re* C. W. Bartleson Co., 253 Fed. 296.

[24] White v. Bradley Timber Co., 116 Fed. 768; Wilder v. Watts, 138 Fed. 426; *Re* Portner, 149 Fed. 799; *Re* Pure Milk Co., 154 Fed. 682. "It must be shown that the petitioners or their attorney had no knowledge of, and could not have ascertained with reasonable diligence, the facts sought to be added by the amendments at the time the original petition was filed, or that the facts were omitted by inadvertence, mistake or other reason which would excuse such omission." White v. Bradley Timber Co., 116 Fed. 768. But, in such a case, leave to renew the application may be allowed. *Re* Portner, 149 Fed. 799.

[25] Lockman v. Lang, C. C. A., 132 Fed. 1; Wilder v. Watts, 138 Fed. 426.

[26] Lockman v. Lang, C. C. A., 132 Fed. 1.

§ 629. [1] 30 St. at L. 544, 551, § 18; 32 St. at L. 797. See *supra*, §§ 163, 165, 166. "Courts of bankruptcy shall by order designate a newspaper published within their

under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees."[2] Service of the subpœna may be waived[3] but such waiver does not deprive creditors of the right to ten days' notice.[4]

respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published." A subpœna may thus be served when the bankrupt has been a resident of the district for the greater part of six months before the filing of the petition and cannot then be found therein. Hills v. F. D. McKinniss Co., 188 Fed. 1012. The omission from the order of publication of a recital that "the subpœna," should be served by publication of the order, together with "the subpœna," was held to be no ground for setting aside the adjudication. Hunter, Walton & Co. v. J. G. Cherry Co., C. C. A., 247 Fed. 458. Service by publication is void when the order does not designate a time for appearance and such order is not published, although there is a publication of the citation. Sidney L. Bauman Diamond Co. v. Hart, C. C. A., 192 Fed. 498. It has been held that, where service is made upon the alleged bankrupt without the district, the court acquires no jurisdiction over his person. *Re* Appel, 103 Fed. 931. But see § 611, *supra*. Where service is made by leaving a copy of the petition and subpœna with an adult, who is a member of, or resident in, the bankrupt's family, that is sufficient. *Re* Norton, 148 Fed. 301. Where the alleged bankrupt is a hotel keeper and usually resides there, it is sufficient service to leave the subpœna and petition with the clerk at the hotel. *Re* Risteen, 122 Fed. 732. In such cases, there is no need of publication. *Re* Norton, 148 Fed. 301. A foreign corporation may be served by service upon the State commissioner of corporations within the district, where he is duly appointed attorney to receive service for the corporation. *Re* Magid Hope Silk Co., 110 Fed. 352. The failure to serve the subpœna before the return day does not terminate the proceedings; but the court has the power to grant an alias subpœna. *Re* Stein, C. C. A., 105 Fed. 749; Gleason v. Smith, Perkins & Co., C. C. A., 145 Fed. 895.

[2] General Order III. For the proof requisite for an order of service by publication of notice to creditors, see *Re* Dvorak, 107 Fed. 76.

[3] *Re* L. Humbert Co., 100 Fed. 439, 440, per Shiras, J. It has been held that, when the bankrupt files an answer upon the merits and takes the stand to prove facts, therein alleged, he waives all objections to the manner of service although a motion to dismiss the petition for a defect in service has previously been filed. *Re* Smith, 117 Fed. 961.

[4] *Re* L. Humbert Co., 100 Fed. 439, 440.

"*a.* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waived notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts. *b.* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. *c.* All notices shall be given by the referee, unless otherwise ordered by the judge."[5]

[5] 30 St. at L. 544, 561, § 58a, as amended 36 St. at L. 838. Where after a petition of involuntary bankruptcy was filed, one of voluntary bankruptcy was presented, it was held that notice of the latter should be given to the former petitioners before an adjudication. *Re* Dwyer, 112 Fed. 777. Notice to the creditors of an application for an adjudication of involuntary, *Re* Billing, 145 Fed. 395, or of voluntary bankruptcy is not required, 30 St. at L. 544, 551, § 18; unless a petition for involuntary bankruptcy has been previously filed in the same or another district in which case notice of the application for an adjudication upon the voluntary petition should be given to the former petitioning creditors, *Re* Dwyer, 112 Fed. 777; International Silver Co. v. New York Jewelry Co., C. C. A., 233 Fed. 945; *Re* Continental Coal Corp., C. C. A., 238 Fed. 113. But see *Re* Vanoscope Co., C. C. A., 233 Fed. 53. Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition has been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and

§ 630. Pleadings by the respondents in bankruptcy. In involuntary bankruptcy, "the bankrupt, or any creditor,[1] may appear and plead to the petition within five days after the re-

in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in case of debtors against whom adjudication of bankruptcy shall be made. General Order VIII. See *Re* Murray, 96 Fed. 600; *Re* Russell, 97 Fed. 32; *Re* Altman, 95 Fed 263. Where a non-resident of the district afterwards alleged to be a partner was not originally joined there can be no adjudication against him until he has been given due notice of the proceeding and afforded an opportunity to answer. *Re* J. & M. Schwartz, 204 Fed. 326.

§ 630. [1] *Re* Cohn, 220 Fed. 956; *Re* Gibney Tire & Rubber Co., 241 Fed. 879. For a case where the status of the respondent as a creditor was held to be conceded, see Johansen Bros. Shoe Co. v. Alles, C. C. A., 197 Fed. 274. A judgment creditor who recovered his judgment within the period of four months may answer the petition. *Re* Carey, 254 Fed. 688. It has been held: that, when a petition for involuntary bankruptcy alleged that a creditor has obtained an unlawful preference, he may be allowed to intervene and defend; Goldman v. Smith, 93 Fed. 182; and that the adjudication in bankruptcy is then conclusive proof of such a preference, *Re* American Brewing Co., C. C. A., 112 Fed. 752; but that he is not obliged to do so. Gratiot County State Bank v. Johnson, 249 U. S. 246; and if he does not the adjudication will not affect his rights. Ibid. That petition to vacate an involuntary adjudication of bankruptcy can be maintained only by the bankrupt or by a creditor with a provable claim, not by a mere equitable lienor upon property claimed to belong to the bankrupt's estate. *Re* Columbia Real Estate Co., C. C. A., 112 Fed. 643. A creditor cannot intervene to oppose a voluntary petition of bankruptcy. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 191, 46 L. ed. 113; *Re* Jehu, 94 Fed. 638, 2 Am. B. R. 498; *Re* Ives, C. C. A., 113 Fed. 911, 7 Am. B. R. 692; Remington on Bankruptcy, § 43; not to oppose a petition by partners for an adjudication of bankruptcy, even when one or more of the partners refuse to join. *Re* Carleton, 115 Fed. 246; Remington on Bankruptcy, §§ 43, 76. That a person who is not a member of a bankrupt firm, although named as such in the petition, cannot object to the adjudication of the firm and the petitioning partner as bankrupt. *Re* Fook Woh & Co., 232 Fed. 483. Stockholders may intervene to oppose a petition of involuntary, Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723; and even one of voluntary bankruptcy. Zeitinger v. Hargadine-McKittrick Dry Goods Co., C. C. A., 214 Fed. 719, reversing 244 Fed. 711. It is the safer practice for them to comply with Equity Rule 27, *supra* §§ 145, 258c; but they need not always do so. Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723. A receiver ap-

turn day,[2] or within such further time as the court may allow."[3]

It has been held that the creditors of a voluntary bankrupt cannot file answers to his petition;[4] nor dispute the insolvency.[5] It has been held that an answer must follow the prescribed form, and that if it responds to multifarious matter in the petition or is unnecessarily defensive, it must be prepared in the official form and refiled as of the original date; the original answer, however, remaining on file.[6] "All pleadings setting

pointed by a State court and in possession of the property of a corporation may resist proceedings to have it adjudged a bankrupt. *Re* Gold Run Min. & Tunnel Co., 200 Fed. 162; Blackstone v. Everybody's Store, C. C. A., 207 Fed. 752.

[2] In computing the time, the first day must be excluded and the last day included. Day v. Beck & Gregg Hardware Co., C. C. A., 114 Fed. 834. The previous filing of a defective pleading does not cut off the right to file a proper pleading within the time. Ibid. It has been held that one day's time, when allowed by the court for the filing of an answer to an amended petition, was insufficient. Lockman v. Lang, C. C. A., 132 Fed. 1.

[3] 30 St. at L. 544, as amended 32 St. at L. 279, § 18b. Where the time has expired an answer cannot be filed without leave of the court. *Re* Mutual Mercantile Agency, 111 Fed. 152. It has been said that such leave should not be given *ex parte* and that notice should be given to all creditors who have appeared in the proceeding. *Re* D. F. Herlehy Co., 247 Fed. 369. See *Re* First Nat. Bank of Belle Fourche, C. C. A., 152 Fed. 64; Blackstone v. Everybody's Store, C. C. A., 207 Fed. 752. A delay of three months has been held to be such laches as to justify a denial of the application. *Re* Marion Contract & Construction Co., 166 Fed. 618; *Re* D. F. Herlehy Co., 247 Fed. 369. But not a delay of six weeks. Altonwood Park Co. v. Gwynne, C. C. A., 160 Fed. 448, or of twenty-nine days, *infra*, § 637a.

[4] *Re* Jehu, 94 Fed. 638; *Re* Carleton, 115 Fed. 246; *Re* R. H. Pennington & Co., 228 Fed. 388.

[5] Ibid.; *supra*, § 619. The default of the bankrupt does not make the proceeding voluntary. Mattoon Nat. Bank v. First Nat. Bank, C. C. A., 102 Fed. 728.

[6] Mather v. Coe, 92 Fed. 333. *Contra*, *Re* Paige, 99 Fed. 538. *Cf.* Bray v. Cobb, 91 Fed. 102. The respondent may demur to the petition. W. A. Gage & Co. v. Bell, 124 Fed. 371. Judge Hammond said: that it was doubtful whether any answer could be filed which did not exactly follow the language of the prescribed Form No. VI; namely, "a brief and simple denial (1) that the defendant debtor has committed the act of bankruptcy, or (2) that he is insolvent, and (3) an averment that he should not be declared a bankrupt for any cause in said petition alleged," W. A. Gage & Co. v. Bell, 124 Fed. 371, 374. But lengthy answers are not un-

usual. Ibid. It has been said: that, when the bankrupt admits his insolvency, his willingness to be adjudged upon that ground may be inferred, Brinkley v. Smithwick, 126 Fed. 686; and that, in such a case, his reservation of a right to move to dismiss the proceedings for irregularities and want of notice is too indefinite to be considered. Ibid. An allegation in an answer that the petitioners at the time of the commission of the alleged act of bankruptcy did not have provable claims which amounted, in excess of the value of securities held by them, to five hundred dollars, does not traverse an allegation in the petition, in accordance with the official form, that the petitioners have provable claims to that amount. *Re* John A. Etheridge & Co., 92 Fed. 329. Where the answer simply denied "that within four months next preceding the date of the filing of said petition * * * he transferred while insolvent a portion of his property * * * for the use of the Bank of Commerce & Trust Company," &c., it was held to be a negative pregnant and insufficient, but that a motion to strike it out was waived by filing a replication thereto. Cummins Grocer Co. v. Talley, C. C. A., 187 Fed. 507. Where the answer averred that a corporation "denies that it has committed any of the acts of bankruptcy set forth in said petition, or that it is insolvent, or at the time of filing such involuntary petition in bankruptcy was insolvent, and that it should not be declared bankrupt for any cause in said petition alleged"; the second negative was treated as an independent denial. Lackawanna Leather Co. v. La Porte Carriage Co., C. C. A., 211 Fed. 318. Where the act of bankruptcy charged was the acknowledgement in writing of inability to pay debts and willingness to be adjudged bankrupt, an answer thus described was held to be insufficient: "The answer is rested upon the general averment upon information and belief that the proceedings are 'collusive,' and that the petition has been filed 'for the purpose of defrauding creditors of the alleged bankrupts.' These general averments are followed by the more specific ones that for some weeks prior to the filing of the petition the alleged bankrupts had admitted their insolvency and were negotiating with their creditors for a settlement, and when admittedly insolvent, and at the very time the negotiations for a compromise settlement with their creditors were pending they had bought largely of new stock. A further averment is made, on the like basis of information and belief, that the petitioners will withdraw the proceedings when a settlement is effected. To these are added averments that some of the petitioning creditors have set forth the amounts of their claims at sums less than is really due them. The usual prayer for the dismissal of the proceeding follows." *Re* Cohn, 220 Fed. 956, 957. It is no defense to a petition in involuntary bankruptcy that the petitioners had previously agreed to release the debtor upon payment of one-half of their claims, when they have not been paid, and one-half of their claims exceed the jurisdictional amount. Simonson v. Sinsheimer, C. C. A., 95 Fed. 948. Nor is the motive of the creditors material, *Re* Simonson, 92 Fed. 904; but see *Re* Harper & Bros., 100 Fed. 266.

up matters of fact shall be verified under oath."[7] "If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."[8]

§ 631. Warrants of seizure. "A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the

Nor in case of voluntary bankruptcy the motive of the petitioner, *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155. A plea was held to be sufficient which set forth that, since the institution of the proceeding, two of the petitioners had colluded to compel the respondent to pay the claim of the third, and that that reduced the number of petitioners to less than was required to sustain the jurisdiction. Cummins Grocer Co. v. Talley, C. C. A., 187 Fed. 507. An answer signed in the name of a corporation by its president is presumed to be filed by the authority of the corporation; and it has been held that none but the corporation, its stockholders and its creditors can claim that it was not authorized. *Re* Columbia R. E. Co., 101 Fed. 965.

[7] 30 St. at L. 544, § 18c, where the petition is verified upon information and belief a similar verification may be annexed to the answer. Lackawanna Leather Co. v. La Porte Carriage Co., C. C. A., 211 Fed. 318. It was sufficient when the notary wrote after the signature of the petitioners and before his official signature and seal, "subscribed and sworn to before me this 22nd day of August, 1914." Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723.

[8] 30 St. at L. 544, 551, § 59d. As to amendments to answers, see *Re* Cleary, 179 Fed. 990; *Re* Harris, 155 Fed. 216.

petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition."[1] "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt."[2] Upon the receipt of the certificate of the clerk stating that the judge is absent, the referee may issue such a warrant.[3] It has been said that such an application is a proceeding in bankruptcy and not a controversy in law or equity.[4] The proceedings should be instituted by a petition,[5] which should be a separate petition from that for the adjudication in bankruptcy.[6] It must be supported by an affidavit containing satisfactory proof of the act of bankruptcy

§ 631. [1] 30 St. at L. 544, § 69. Property claimed adversely, while in the possession of the bankrupt, may be thus seized, although he claims to act as agent or custodian of the adverse claimant. *Re* Bender, 106 Fed. 873; *Re* Moody, 131 Fed. 525. It has been held that property, which is in the actual possession of an adverse claimant, may thus be seized. *Re* Knopf, 144 Fed. 245. *Contra, Re* Rockwood, 91 Fed. 363; *Re* Kelly, 91 Fed. 504; Beach v. Macon Grocery Co., C. C. A., 116 Fed. 143; Lee Master v. Spencer, C. C. A., 203 Fed. 210.

[2] 30 St. at L. 544, § 3e.

[3] *Re* Knopf, 144 Fed. 245, 246.

[4] *Re* Knopf, 144 Fed. 245.

[5] *Re* Knopf, 144 Fed. 245.

[6] *Re* Kelly, 91 Fed. 504.

and the neglect and danger of deterioration of the property which it is sought to seize.[7] It has been held that, in a suit in equity by a trustee in bankruptcy, the court may issue a writ of sequestration to prevent the removal of the property from the district, where the case does not warrant the appointment of a receiver.[8]

§ 632. Arrest of bankrupt. "The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court, or a judge thereof, that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders

[7] *Re* Kelly, 91 Fed. 504. It has been held that an application supported merely by the affidavit of the bankrupt, stating that he waived proof of these facts and waived the required bond and consented to the issue of the warrant, was insufficient. *Re* Sarsar, 120 Fed. 40. The bond protects only the respondents to the application. *Re* Spalding, C. C. A., 150 Fed. 120. If any person subsequently becomes respondent to and desires to be protected, he must move for an additional bond. *Re* Spalding, C. C. A., 150 Fed. 120. The costs, counsel fees and other damages covered under the bond are only those which are strictly incident to the seizure. Selkregg v. Hamilton Bros., 144 Fed. 557. Counsel fees for resisting the petition for bankruptcy are not allowed. *Re* Smith, 113 Fed. 993. Where the property is not seized, but its removal is enjoined, counsel fees are not allowed upon any bond given to secure such injunction. *Re* Hines, 144 Fed. 147; *supra*, § 328. Search of a third person's premises is only permitted as regards specific property charged to belong to the bankrupt. *Re* Iron Clad Mfg. Co., 193 Fed. 781.

[8] Horskins v. Sanderson, 132 Fed. 415.

made in reference thereto."[1] "Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited" from one district within which a District Court has jurisdiction to another.[2] This does not authorize the extradition of a bankrupt, who removed from the district more than four months before the beginning of the proceedings in bankruptcy, nor the issue of a warrant to serve as a basis for such extradition.[3] The warrant of arrest, authorized by these statutes, is analogous to the writ of *ne exeat*.[4] It has been held that a writ[5] or order,[6] in the nature of a *ne exeat*, may also be issued. This is the better practice when there is danger of the bankrupt's absconding with assets.[7] It has been held that the warrant of arrest need not state that the bankrupt is to be brought before the court for examination.[8] It should be issued upon a sworn petition setting forth the necessary facts.[9]

§ 633. Injunctions in aid of bankruptcy proceedings. The Bankruptcy Act authorizes courts of bankruptcy to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."[1] The provision of the Revised Statutes forbidding injunctions to stay proceedings in a court of a State expressly excepts "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."[2] "A suit which is founded upon a

§ 632. [1] 30 St. at L. 544, 549, § 9.

[2] 30 St. at L. 544, 549, § 10a.

[3] *Re* Hassenbusch, C. C. A., 108 Fed. 35.

[4] *Re* Hassenbusch, C. C. A., 108 Fed. 35, 38. This writ is described *supra*, §§ 326-328. See § 471.

[5] *Re* Cohen, 136 Fed. 999; *Re* Berkowitz, 173 Fed. 1012.

[6] *Re* Lipke, 98 Fed. 970.

[7] *Re* Lipke, 98 Fed. 970, 971.

[8] *Re* Lipke, 98 Fed. 970.

[9] *Re* Lipke, 98 Fed. 970.

§ 633. [1] 30 St. at L. 544, as amended 32 St. at L. 279, 34 St. at L. 267, 36 St. at L. 838.

[2] U. S. R. S., § 720. See *supra*, §§ 268, 270. No injunction will be granted to restrain the prosecution of his suit in which the bankrupt's estate has no interest. *Re* Federal Biscuit Co., C. C. A., 203 Fed. 37; *Re* Interocean Trans. Co., 232 Fed. 408; *Re* Buchanan, C. C. A., 219 Fed. 492. See *Re* Bittle, 239 Fed. 191. In a single case, it was held that a Court of Bankruptcy might, before a petition in bankruptcy was filed, issue an in-

claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."[3] Between the time of the filing

junction to preserve the *status quo* until the filing of such petition. Blake v. Francis-Valentine Co., 89 Fed. 691. But see *Re* Ogles, 93 Fed. 426. It has been held that a State court cannot grant such an injunction. Victor v. Lewis, 38 App. Div. (N. Y.) 316, 1 Am. B. R. 667; Clothing Co. v. Hazle, 126 Mich. 262, 6 Am. B. R. 265; Ellis v. Hays Saddlery & Leather Co., 65 Kan. 174, 8 Am. B. R. 109. It seems that this doctrine does not prevent the issue if such an injunction in a suit where the State or Federal court has jurisdiction upon other grounds. Remington on Bankruptcy, § 917.

[3] Ibid., § 11, subd. a.; *Re* Mustin, 165 Fed. 506; *Re* Nuttal, 201 Fed. 557; *Re* Dunfee, 206 Fed. 745; Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40. A Court of Bankruptcy has jurisdiction: to determine whether a debt is of such a character as is released by a discharge in bankruptcy; and to grant an injunction against a prosecution in a State court pending bankruptcy proceedings to collect such a debt; and to enjoin the execution of process issued before or after judgment in such a suit, Knott v. Putnam, 107 Fed. 907. Where it is doubtful whether the claim is dischargeable in bankruptcy, an action to enforce it should be enjoined until the right to a discharge is determined in order that the bankrupt may have an opportunity to plead the discharge if granted, *Re* Nuttall, 201 Fed. 557. Where the pleadings show a dischargeable debt the injunction cannot be vacated upon affidavits showing that it was not dischargeable. *Re* Lusch, 251 Fed. 316. See *Re* Lusch, 251 Fed. 316. A fine imposed by a State court for a civil contempt is not dischargeable, and proceedings to enforce it cannot be enjoined, *Re* Penn Development Co., 220 Fed. 222; People ex rel. Otterstedt v. Sheriff of Kings County, 206 Fed. 566, although if the injunction was void because it infringed a Federal right, the contemnor might be released by *habeas corpus*. See *supra*, §§ 461-461e. Where it is necessary in order to enforce security not affected by the bankruptcy proceedings, the creditor will be allowed to proceed to judgment, although he may be enjoined from enforcing this except against such security. *Re* Mercedes. Import Co., C. C. A., 166 Fed. 427; *Re* Maaget, 173 Fed. 232; Remington Automobile & Motor Co., 119 Fed. 441. The court refused to enjoin the enforcement of an interlocutory judgment directing a bankrupt to account for the infringement of a patent which had been entered prior to his adjudica-

of the petition and the adjudication in bankruptcy, the Court of Bankruptcy may enjoin all persons within its jurisdiction from committing any act that will interfere with the due administration of the estate.[4] Such an injunction may be issued

tion, and refused to direct the receiver or trustee to appear or take any action therein. Am. Graphophone Co. v. Leeds & Catlin Co., 174 Fed. 158; *Re* Leeds & Catlin Co., 175 Fed. 309. The court has no power to stay proceedings in a State court for a longer period than twelve months from the date of the adjudication, unless an application for a discharge is made within such time. *Re* Federal Biscuit Co., C. C. A., 214 Fed. 221. After discharge no injunction will issue to restrain a suit against the bankrupt which will not interfere with property claimed by the trustee, Hellman v. Goldstone, C. C. A., 161 Fed. 913; *Re* Madden, 257 Fed. 581. The pendency of bankruptcy proceedings is no defense to a suit in a State court. Chase v. Farmers' & Merchants' Nat. Bank of Baltimore, C. C. A., 202 Fed. 904. In a proper case the court of bankruptcy may enjoin officers of a State court as well as parties to a suit therein. McLoughlin v. Knop, 214 Fed. 260. The denial of a stay by the State court does not prevent an injunction by the Court of Bankruptcy. New River Coal Land Co. v. Ruffner Bros., C. C. A., 165 Fed. 831.

[4] *Re* Hornstein, 122 Fed. 266, 10 Am. B. R. 308; *Re* Krinsky Bros., 112 Fed. 972, 7 Am. B. R. 535; Beach v. Macon Grocery Co., C. C. A., 116 Fed. 143, 8 Am. B. R. 751; *Re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156; *Re* Weinger, Bergman & Co., 126 Fed. 875, 11 Am. B. R. 424; *Re* Hines, 144 Fed. 147, 16 Am. B. R. 538; Remington on Bankruptcy, § 359. Concerning injunctions against the prosecution of suits in the State courts it was said by Judge Learned Hand, in a case in which the author was counsel: "To stay the suit could only be because of some distrust in the ability of the State court or its loyalty to the act of Congress. Undoubtedly the very existence of any Federal court does presuppose that State courts will not be free from local bias, but it is one thing to provide means to litigants for avoiding that bias and another to intervene for that reason in the very operation of a court already begun. Even the latter power does exist (*Re* Hecox, 164 Fed. 823; Hooks v. Aldridge, 145 Fed. 865; New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881), but its existence does not mean it ought always to be exercised, and in fact it ought to be very sparingly exercised, rather after the analogy of habeas corpus (Ex parte Royall, 117 U. S. 254, 29 L. ed. 872). Indeed, nothing more quickly makes contempt for law than to have judges each catching at jurisdiction, and nothing more quickly breeds confidence than if judges really trust in each other. It shows rather a martial than a judicial vigor to assert such a jurisdiction and unless it be unavoidable, it ought not to be used." *Re* United Wireless Tel. Co., 196 Fed. 153. Since the court of bankruptcy has jurisdiction to marshal

liens upon land within its possession and to sell the same free of encumbrances, it may, in aid thereof, enjoin the prosecution of suits in State courts for the foreclosure of liens brought within four months before the institution of the bankruptcy proceedings, *Re* Dana, C. C. A., 167 Fed. 529; but such an injunction should not extend to the State court or judge, unless in case of imperative necessity, the power to enjoin such court or judge even then being doubtful, Ibid. *Cf.* Virginia I. C. & C. Co. v. Olcott, C. C. A., 197 Fed. 730. For cases in which the court refused to enjoin sales by State receivers, see *Re* Sterlingworth Ry. Supply Co., 165 Fed. 267; *Re* Edward Ellsworth Co., 173 Fed. 699. The court refused an injunction against the conveyance by the bankrupt and his wife of real estate of which they were seized as tenants of the entity, since it had no jurisdiction over the wife and a conveyance by the bankrupt could not affect the title of the trustee. *Re* Beihl, 197 Fed. 870. A Court of Bankruptcy has enjoined replevin proceedings brought in a State court, at about the same hour of the day when the petition in bankruptcy was filed. *Re* Weinger, Bergman & Co., 126 Fed. 875, 11 Am. B. R. 424. A District court may enjoin the prosecution of an action of replevin, White v Schloerb, 178 U. S. 542, 44 L. ed. 1183, or sequestration, *Re* Whitener, C. C. A., 105 Fed. 180, instituted after the adjudication in bankruptcy and the appointment of a referee; and an action of replevin before the adjudication to recover property in the possession of a receiver in bankruptcy, Murphy v. John Hofman Co., 211 U. S. 562, 53 L. ed. 327. It has been held: that an action of replevin, instituted before the filing of the petition, cannot be enjoined, *Re* Neely, C. C. A., 113 Fed. 210; that the plaintiff cannot be obliged to try his title before the referee in bankruptcy, Ibid. See *Re* Rudnick & Co., 158 Fed. 223; and that an action of replevin begun while the goods are in the possession of the bankrupt, after the filing of the petition, but before adjudication, cannot be enjoined, *Re* Wells, 114 Fed. 222; when no receiver has been appointed, *Re* Briskman, 132 Fed. 201. That an action for damages against a receiver individually should not be enjoined, although it is founded upon acts committed by him in his official capacity, *Re* Kalb & Berger Mfg. Co., C. C. A., 165 Fed. 895; that the Court of Bankruptcy will not enjoin an action brought against its receivers, without its permission, for an act or transaction of his in carrying on the business connected with the property in charge, *Re* Kelly Dry Goods Co., 102 Fed. 747; *Re* Kanter & Cohen, 121 Fed. 984, 58 C. C. A. 260; *Re* Smith, 121 Fed. 1014; Act of March 3, 1887, ch. 373, § 2, 24 St. at L. 554; *supra*, § 314; but that, when the receiver does not carry on any business connected with the property in his charge, an action against him, in his official capacity, for an act done in connection with the same should be enjoined, *Re* Kalb & Berger Mfg. Co., C. C. A., 165 Fed. 895; and that such is an act which relates solely to the care and preservation of the property by an arrangement for the storage of machinery of the bankrupt's estate, Ibid. An injunction was granted to restrain an action of trover

against the bankrupt.[5] The court may enjoin litigation in the State court by one who has applied to the Court of Bankruptcy for relief in connection therewith.[6] Injunctions will usually be granted against the enforcement of liens which, it is claimed, are vacated by the bankruptcy proceedings.[7] After the ad-

against a trustee for selling property in obedience to the order of the Court of Bankruptcy, *Re* Mertens, 131 Fed. 507. It has been held that an adverse claimant in possession of the property may be enjoined from interfering with the *status quo* prior to the adjudication in bankruptcy. *Re* Currier, Referee Hotchkiss, 5 Am. B. R. 639; Remington on Bankruptcy, § 365. See *Re* Hornstein, 122 Fed. 266. In an extraordinary case, secured creditors may be enjoined from selling property pledged or mortgaged to them, *Re* Mertens, C. C. A., 144 Fed. 818, 15 Am. B. R. 362, 134 Fed. 101, 14 Am. B. R. 226, 231; Remington on Bankruptcy, § 365; John Matthews, Inc. v. Knickerbocker Tr. Co., C. C. A., 192 Fed. 557; but not ordinarily in the absence of clear proof of fraud or oppression, Hiscock v. Varnick Bank, 206 U. S. 28, 51 L. ed. 945, 18 Am. B. R. 9; s. c., as *Re* Mertens, C. C. A., 144 Fed. 818, 15 Am. B. R. 362, 134 Fed. 101, 14 Am. B. R. 226, 231; *Re* Mayer, C. C. A., 157 Fed. 836; Remington on Bankruptcy, §§ 365, 765, 1913; *Re* Ironclad Mfg. Co., C. C. A., 192 Fed. 318.

[5] *Re* Hines, 144 Fed. 147, 16 Am. B. R. 538; Remington on Bankruptcy, § 364.

[6] Mitchell Storebuilding Co. v. Carroll, C. C. A., 193 Fed. 616.

[7] *Re* Hornstein, 122 Fed. 266, 10 Am. B. R. 308, a judgment within four months; *Re* Donnelly, 188 Fed. 1001, a preferential mortgage; *Re* Ransford, C. C. A., 194 Fed. 658; *Re* Grafton Gas & Electric Light Co., 253 Fed. 668. *Cf. Re* Betsekas, 235 Fed. 1020. A Court of Bankruptcy cannot enjoin a sale under a judgment of a State court, entered more than four months before the adjudication in bankruptcy, where the execution was levied before such adjudication, *Re* Shoemaker, 112 Fed. 648. The court will rarely enjoin: the foreclosure of a lien obtained by mortgage; *Re* Lattimer, 174 Fed. 824; *Re* Rohrer, 177 Fed. 381; *Re* Wagner's Estate, 206 Fed. 364; Pugh v. Loisel, 219 Fed. 417; George v. Matthews & Sons v. Joseph Webre Co., 213 Fed. 396; Broach v. Mullis, 228 Fed. 551; but see *Re* U. S. Chyrysotile Asbestos Co., 253 Fed. 294; the prosecution of a cause of action not dischargeable in bankruptcy, *Re* Monroe, 195 Fed. 817; the enforcement of any lien obtained by judicial process more than four months before the institution of the bankruptcy proceedings, *Re* Shinn, 185 Fed. 990; *Re* Arden, 188 Fed. 475; see New River Coal Land Co. v. Ruffner Bros., C. C. A., 165 Fed. 881; or covering exempt property, *Re* Driggs, 171 Fed. 897; *Re* Sims, 176 Fed. 645; wages previously earned; in the latter case, an injunction was granted against the collection by the judgment creditor of wages earned subsequent to the proceeding; see *Re* Monroe, 195 Fed. 817; or a suit against the bankrupt and strangers to the pro-

judication in bankruptcy, restraining orders may be issued, under circumstances similar to those which would authorize the issue of an injunction in proceedings prior to such adjudication, and also in aid of the collection and sale of the assets.[8]

A Court of Bankruptcy has jurisdiction to grant an injunc-

ceedings, *Re* Bluestone Bros., 174 Fed. 53; *Re* United Wireless Tel. Co., 196 Fed. 153, a stockholders' suit against the bankrupt corporation and its directors, in which the writer was counsel. In a proper case a transfer of property alleged to have been obtained by a preference may be restrained. Hall v. Glenn, 247 Fed. 997; but such an injunction will rarely be granted against a person not alleged to be insolvent, Lyle v. Perry, 250 Fed. 307; nor, solely upon information and belief. Ibid.

[8] White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183; Wall v. Cox, 181 U. S. 244, 45 L. ed. 845; *Re* Pittelkow, 92 Fed. 901, 1 Am. B. R. 472; *Re* Kimball, 97 Fed. 29, 3 Am. B. R. 161; Bear v. Chase, C. C. A., 99 Fed. 920, 3 Am. B. R. 746; *Re* Russell & Birkett, 101 Fed. 248, 3 Am. B. R. 658; *Re* Emslie, C. C. A., 102 Fed. 292, 4 Am. B. R. 126; Hane v. Crown & Keystone Co., 223 Fed. 438; Remington on Bankruptcy, § 1901. Courts of bankruptcy have enjoined interference with the property of the alleged bankrupt by himself, So. L. & Tr. Co. v. Benbow, 96 Fed. 514; by his assignee in insolvency, *Re* Sievers, 91 Fed. 366; Davis v. Bohle, C. C. A., 92 Fed. 325; *Re* Gutwillig, C. C. A., 92 Fed. 337; Rumsey & Sikemier Co. v. Novelty & Mach. Mfg. Co., 99 Fed. 699; by the vendee of his assignee in insolvency, who had bought after the adjudication in bankruptcy, Wall v. Cox, 181 U. S. 244, 45 L. ed. 845; by the vendee of his assignee in insolvency, who had bought under suspicious circumstances within four months before the petition in bankruptcy was filed, and who had thereafter obtained a writ of sequestration from a State court, *Re* Whitener, C. C. A., 105 Fed. 180; by a State sheriff, who had made a levy within four months before the filing of the petition, Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 3 Sup. Ct. 363; affirming *Re* Kenney, C. C. A., 105 Fed. 897; *Re* Michel, 6 Fed. 706; *Re* Gutwillig, 90 Fed. 481; *Re* Vastbinder, 132 Fed. 718. *Contra*, *Re* Easley, 93 Fed. 419. It was held, however, that attaching creditors and a receiver appointed at their instance by State court should not be enjoined before they had been served with process or voluntarily appeared. *Re* Ogles, 93 Fed. 426. and see Tennessee Producer Marble Co. v. Grant, C. C. A., 135 Fed. 322. By a receiver appointed by a State court in proceedings supplementary to execution, several years before the institution of the bankruptcy proceedings, but who had not previously taken possession, So. L. & Tr. Co. v. Benbow, 96 Fed. 514; by a chattel mortgagee, who had taken possession before the bankruptcy proceedings, *Re* Nathan, 92 Fed. 590. It was held otherwise, when the chattel mortgagee had taken possession before the filing of the petition in bankruptcy, and thereafter brought a foreclosure suit against the bankrupt and his

tion against a person who is not a party to the proceedings.[9]

trustee in bankruptcy in a State court. Heath v. Shaffer, 93 Fed. 647. See, also, *Re* Rockwood, 91 Fed. 363. Where a mortgagee of real property had obtained a judgment of foreclosure and sale in a State court before the institution of the proceedings in bankruptcy, and it appeared that there was no surplus, an injunction was refused. *Re* Holloway, 93 Fed. 638; but not by municipal officers engaged in collecting taxes, *Re* Duryee, 2 Fed. 68. Injunctions have been granted to restrain the prosecution by a creditor of proceedings supplementary to execution, *Re* Kletchka, 92 Fed. 901; *Re* William E. De Lany & Co., 124 Fed. 280; *Cf. Re* Cefola, 222 Fed. 171. But see *Re* Monroe, 195 Fed. 817. But see Continuance of such proceedings so far as they relate to exempt property has been allowed. *Re* Driggs, 171 Fed. 897; *Re* Sims, 176 Fed. 645. In *Re* Van Buren, 164 Fed. 883, such proceedings against a bankrupt's salary were enjoined, but the court impounded the percentage to which a creditor would otherwise have been entitled until the right to a discharge had been determined, and of contempt proceedings to enforce a judgment that would be nullified by a discharge in bankruptcy. *Re* Adler, C. C. A., 144 Fed. 659. Against an application to a State court for the appointment of a receiver of a bankrupt corporation with authority to collect money which the trustee claimed constituted assets of the estate, Bothwell v. Fitzgerald, 219 Fed. 408. Against the institution of proceedings to dissolve the bankrupt corporation in which the appointment of a receiver might ensue. Fisk v. Railroad Co., 10 Blatchf. 518; *supra*, § 270a. Injunctions have also been granted against the prosecution in a State court of summary proceedings to oust a tenant in possession. *Re* Schwartzman, 167 Fed. 399; *Re* Kimmel, 183 Fed. 665; *Re* Consumers' Albany Brewing Co., 224 Fed. 235; or a suit of ejectment by a landlord, *Re* Chambers, Calder & Co., 98 Fed. 865. No such injunction should be granted unless it clearly appears that there will be sufficient assets to pay the arrears of rent which accumulate while it is in force. *Re* Elk Brook Coal Co., 261 Fed. 445. A court of bankruptcy has restrained an action of trover against a trustee for selling property in obedience to its order. *Re* Mertens, 131 Fed. 507. It has been held that a Court of Bankruptcy cannot enjoin, even in a plenary suit, an action by a stranger to the proceedings against the marshal for a seizure under a warrant of a Court of Bankruptcy, when the plaintiff at law files an answer disclaiming any interest in the goods held by the trustee and alleging an election to rely upon his remedy in the State court, McLean v. Mayo, 113 Fed. 106. Ordinarily no injunction will be granted against the collection of taxes by municipal or State officers. *Re* Duryee, 2 Fed. 68; but in a proper case the estate will be protected from a fraudulent and excessive assessment, although the court has no power itself to make such an assessment as would be proper. Cross v. Georgia Iron & Coal Co., C. C. A., 250 Fed. 438. See *supra*, § 271b.

[9] Morehouse v. Giant Powder Co., C. C. A., 206 Fed. 24.

A court of bankruptcy has no power to enjoin a stranger to the proceeding who resides outside the jurisdiction and who is not served with process therewith.[10] Under its ancillary jurisdiction, such an injunction can be obtained from the Court of Bankruptcy in the district where such stranger resides or can be served.[11] A person who is granted leave to intervene submits himself to the jurisdiction and may be enjoined from taking proceedings in other courts which amount to an attack on the decrees or orders of the Court of Bankruptcy.[12] A Court of Bankruptcy has jurisdiction upon a summary application to issue an injunction in aid of its jurisdiction.[13]

The referee may issue such an injunction or restraining order in ordinary cases;[14] but he cannot enjoin the proceedings of a court or of an officer thereof.[15] The injunction should be prayed in a petition filed in the proceedings in bankruptcy, which, after adjudication, is usually filed with the referee, except in cases where a court or an officer thereof is to be restrained. Before adjudication, it should be filed with the clerk of the Court of Bankruptcy.[16]

10 Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 311, 56 L. ed. 208, 215; *Re* Isaac Harris Co., 173 Fed. 735.

11 Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 311, 56 L. ed. 208, 215. Prior to the amendment of 1910 (36 St. at L. 838), it was held that a Court of Bankruptcy had no ancillary jurisdiction to issue an injunction in aid of bankruptcy proceedings in another district, except in a plenary suit, of which it otherwise had jurisdiction. *Re* Williams, 120 Fed. 38, 9 Am. B. R. 741; Remington on Bankruptcy, § 1812. Compare Horskins v. Sanderson, 132 Fed. 415, 13 Am. B. R. 101. But see *Re* Peiser, 115 Fed. 199, 7 Am. B. R. 690.

12 *Re* Ohio Copper Mining Co., 241 Fed. 711. A person who is denied leave to intervene does not, although he has addressed the court upon diverse occasions in the proceedings. Ibid.

13 White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183; Wall v. Cox, 181 U. S. 244, 45 L. ed. 845; Remington on Bankruptcy, §§ 359, 1901; Brandenburg on Bankruptcy, § 683.

14 *Re* Booth, 96 Fed. 943, 2 Am. B. R. 770; *Re* Adams, 134 Fed. 142, 14 Am. B. R. 23; Remington on Bankruptcy, § 207. But see *Re* Benjamin, 140 Fed. 320. It has been intimated that a referee cannot enjoin persons from proclaiming their adverse claims to bidders at a sale under the orders of a Court of Bankruptcy, or from threatening proceedings against such purchaser. *Re* Rochford, C. C. A., 124 Fed. 182, 10 Am. B. R. 608.

15 General Order XII; *Re* Steuer, 104 Fed. 976, 5 Am. B. R. 209; *Re* Siebert, 133 Fed. 781, 13 Am. B. R. 348.

16 Remington on Bankruptcy,

§ 634. Receivers in bankruptcy. A Court of Bankruptcy has power to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified," and to "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for said services, but not at a greater rate than in this Act allowed trustees for similar services."[1] Receivers in Bankruptcy are usually appointed by the court through a judge thereof.

§ 1919. It has been held that, if the petition is properly entitled, it need contain no allegations to show that the proceedings in bankruptcy are pending within the district, *Re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156. It should be verified; but the verification may be made by an attorney, where the papers show that the residence of the petitioners is distant and state the reason for the attorney so verifying the same. *Re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156. Under ordinary circumstances, notice of the filing of the petition and of the application should be given to the parties against whom the injunction is sought, *Re* Steuer, 104 Fed. 976, 5 Am. B. R. 209; Beach v. Macon Grocery Co., C. C. A., 116 Fed. 143, 8 Am. B. R. 751; but to avoid irreparable injury, the injunction may be issued without notice, *Re* Steuer, 104 Fed. 976, 5 Am. B. R. 209; Beach v. Macon Grocery, 12 Am. B. R. 626; Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40; Remington on Bankruptcy, § 1921. For the dissolution of an injunction for laches, see *Re* Lederer, 125 Fed. 96; *Re* Latimer, 141 Fed. 655.

§ 634. [1] 30 St. at L. 544, 545. It seems that the applicant for the receivership must file a bond similar to that required of applicants for warrants of seizure. 30 St. at L. 544, § 3c. See *supra*, § 631; *Re* Independent Machine & Tool Corporation, C. C. A., 251 Fed. 48. The bond may be waived by the bankrupt, Ibid., and the courts often do not insist upon compliance with this salutary statutory requirement. Ordinarily, notice of the appointment should be given to the bankrupt, T. S. Faulk & Co. v. Steiner, Lobman & Frank, C. C. A., 165 Fed. 861, 866. Where all the parties in interest are before the court and the case is a proper one for a receivership, an *ex parte* order appointing a receiver will not be vacated. *Re* Standard Cordage Co., 184 Fed. 166. See § 317, *supra;* and to any receiver of his property who has been appointed by the State court, Sidney L. Bauman Diamond Co. v. Hart, C. C. A., 192

The referee may appoint the receiver after the general order of reference to him has been made,[2] and also upon the receipt of the certificate of the clerk that the judge is absent or unable to act.[3] The appointment of a receiver is an extraordinary remedy, and it was the intention of the statute that it should be rarely made.[4] It has been held that a referee has no power to appoint a receiver without a finding as to its necessity.[5]

Fed. 498. In an extraordinary case, the appointment may be made without notice to the bankrupt, *Re* Francis, 136 Fed. 912; affirmed as Latimer v. McNeal, C. C. A., 142 Fed. 451. See *supra*, § 315. Notice to the creditors is not necessary, *Re* Abrahamson & Bretstein, 1 Am. B. R. 44, Referee Moss, New York; Remington on Bankruptcy, § 381.

2 *Re* Florcken, 107 Fed. 241. The courts should not appoint receivers who are selected by the alleged bankrupt; and if named at his instance, upon the discovery of that fact, they should be removed; but, it has been held that that is no ground for the dismissal of the petition. Birmingham Coal & Iron Co. v. Southern Steel Co., 160 Fed. 212.

3 *Re* Kelly Dry Goods Co., 102 Fed. 747.

4 *Re* Rosenthal, 144 Fed. 548; T. S. Faulk & Co. v. Steiner, Lobman & Frank, C. C. A., 165 Fed. 861. As to the appointment of a receiver of a corporation charged to hold assets of the bankrupt, see Sprague v. L. D. Margolis Co., 211 Fed. 171. After adjudication, the necessity for the appointment of a receiver is more easily demonstrated. *Re* Huddleston, 167 Fed. 428.

5 *Re* Rosenthal, 144 Fed. 548. The petition for the appointment must show such necessity, *Re* Rosenthal, 144 Fed. 548; T. S. Faulk & Co. v. Steiner, Lobman & Frank, C. C. A., 165 Fed. 861. Facts which show the necessity must be therein stated. *Re* Rosenthal, 144 Fed. 548; T. S. Faulk & Co. v. Steiner, Lobman & Frank, C. C. A., 165 Fed. 861; *Re* Pilcher & Son, 228 Fed. 139; Badders Clothing Co. v. Burnham-Munger Root Dry Goods Co., C. C. A., 228 Fed. 470. A showing of an application for a voluntary dissolution of the corporation with the division of its assets among the creditors and stockholders and that the plant and factory had been closed to save cost and running expenses when the company was still selling its products in the customary way, was held to be insufficient. *Re* Standard Cordage Co., 184 Fed. 156; and the petition must be sworn to, *Re* Rosenthal, 144 Fed. 548. T. S. Faulk & Co. v. Steiner, Lobman & Frank, C. C. A., 165 Fed. 861, 867. An affidavit merely as to belief was, in one case, held to be insufficient, *Re* Rosenthal, 144 Fed. 548. The consent of the bankrupt to the appointment of a receiver is not sufficient, T. S. Faulk & Co. v. Steiner, Lobman & Frank, C. C. A., 165 Fed. 861. Where property is in the custody of a receiver appointed by a State court, the court of bankruptcy should not, before an adjudication, appoint a re-

The receiver's rights date from the time of the appointment.[6] It is customary to require a bond of the receiver.[7] A receiver in bankruptcy is a mere custodian and has no title to the property of the bankrupt.[8] A receiver in bankruptcy may be sued in

ceiver thereof except under extraordinary circumstances. *Re* Spalding (C. C. A. Second Circuit), May, 1905, reported in *Re* Oakland Lumber Co., C. C. A., 174 Fed. 634, 637; *Re* Desrochers, 183 Fed. 991; *Re* Standard Cordage Co., 184 Fed. 156; Gealey v. South Side Trust Co., C. C. A., 249 Fed. 189; Ingram v. Ingram Dart Lighterage Co., 226 Fed. 58; *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155. See §§ 52, 55, 59, *supra*. Where the property is in the custody of an assignee appointed in insolvency proceedings under a State statute, no receiver should be appointed over it, except under extraordinary circumstances. *Re* Rosenthal, 144 Fed. 548, 549; *Re* Oakland Lumber Co., C. C. A., 174 Fed. 634; *Re* Wentworth Lunch Co., C. C. A., 191 Fed. 821. *Contra*. *Re* D. & E. Dress Co., 244 Fed. 885; *Re* Federal Mail & Express Co., 233 Fed. 691; *Re* Resnek, 243 Fed. 417. After an adjudication of bankruptcy, a receiver appointed by the State court may be ordered to deliver possession to a receiver in bankruptcy. *Re* Diamond, 259 Fed. 70; *Re* J. W. Zeigler Co., 189 Fed. 259. The court refused to punish the State receiver for refusal to deliver possession of the property to the receiver in bankruptcy, when the former had acted under the advice of counsel. See *Re* Hecox, C. C. A., 164 Fed. 823.

6 *Re* Erie Lumber Co., 150 Fed. 817; *Re* Alton Mfg. Co., 158 Fed. 367.

7 *Re* Alton Mfg. Co., 158 Fed. 367.

8 *Re* Kelly Dry Goods Co., 102 Fed. 747; Boonville Nat. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43; *Re* J. C. Winship Co., C. C. A., 120 Fed. 93; *Re* Kolin, C. C. A., 134 Fed. 557; *Re* Benedict, 140 Fed. 55. It has been said that a temporary receiver of a bankrupt has authority only to inventory and receive and retain the assets, and that he cannot employ custodians. *Re* Tisch, 202 Fed. 1018, nor employ an expert accountant to examine the books, nor employ an attorney, without special permission of the court. *Re* Leonard, 177 Fed. 503. The attorney for one of the petitioners in a proceeding in involuntary bankruptcy should not be employed as attorney for the receiver, except under special circumstances. *Re* Strobel, 160 Fed. 916; *Re* T. E. Hill Co., C. C. A., 159 Fed. 73, 77. Ordinarily, the court will not interfere with the discretion of the receiver in the selection of his attorney. *Re* Champion Wagon Co., 193 Fed. 1004. Such a receiver cannot sue to recover a preference, Boonville Nat. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43; Frost v. Latham & Co., 181 Fed. 866 nor to set aside a fraudulent transfer of the bankrupt's property, Guaranty Title & Trust Co. v. Pearlman, 144 Fed. 550. But see *Re* Fixen & Co., 96 Fed. 748. It has been held that he may, in defensive proceedings, attack the validity of a chattel mortgage, because of a failure to

a State court for trover, without the permission of the Court

file the same as required by the State statute. *Re* Schmidt, C. C. A., 181 Fed. 73, 76. But see *Re* Dempster, C. C. A., 172 Fed. 353, 357; nor can he institute proceedings to take property held adversely by a stranger to the proceeding; *Re* Kolin, C. C. A., 134 Fed. 557; Beach v. Macon Grocery Co., C. C. A., 116 Fed. 143. But see *Re* Dempster, C. C. A., 172 Fed. 353. It has been said that it is clearly within the jurisdiction of the court appointing a receiver in bankruptcy to authorize him to institute necessary actions for the recovery of the bankrupt's property, *Re* Fixen & Co., 96 Fed. 748, 754; per Wellborn, J. In one case, he has been authorized to take possession of property held adversely pending a plenary suit to be subsequently instituted by the creditors or trustee to recover the same, *Re* Haupt Bros., 153 Fed. 239. See Dokken v. Page, C. C. A., 147 Fed 438. See *Re* Schoenfield, 190 Fed. 53. The court will grant an application by him for the surrender of property not held adversely in cases similar to those in which such relief is given to the trustee, *Re* Muncie Pulp Co., C. C. A., 139 Fed. 546; *Re* Rosenblatt, 143 Fed. 663; *infra*, 635. It was held that an alleged bankrupt could not, by the mere claim that they would tend to incriminate him without averring any facts tending to support the same, prevent an order for the delivery of his account books to a receiver appointed to carry on his business. *Re* Rosenblatt, 143 Fed. 663. For the denial of a motion to compel a State District Attorney to surrender books and papers of the bankrupt to the latter's receiver, *Re* Mandel, 224 Fed. 642. As to moneys taken by an unlawful search and seizure, see Le Master v. Spencer, C. C. A., 203 Fed. 210; *Re* A. Musica & Son, 205 Fed. 413. Relief of this character will not be granted to a receiver in a case where a trustee would not be entitled thereto. *Re* Greenberg, C. C. A., 175 Fed. 1020. Contempt proceedings for refusal to surrender property to an agent of the receiver will ordinarily be dismissed, unless the demand is made by a person who presents written evidence of his authority. Skubinsky v. Bodek, C. C. A., 172 Fed. 340. A dispute between a receiver in bankruptcy and a stranger to the proceeding as to whether a contract was made between them for the purchase by the latter of property of the estate, is a "controversy arising in bankruptcy proceedings," and an order made therein is reviewable by appeal, *Re* J. Jungmann, Inc., C. C. A., 186 Fed. 302. *Cf. Re* C. M. Burkhalter & Co., 179 Fed. 403. But see *Re* Vogt, 159 Fed. 317, in which the author was counsel. Where a receiver took possession of goods, which it was claimed that the bankrupt had transferred to a third person, it was held that the Court of Bankruptcy might, by consent, take jurisdiction of an intervention by the claimant and determine his title to the goods. Dokken v. Page, C. C. A., 147 Fed. 438. Where a receiver had deposited money in a designated depository, it was held that the court of bankruptcy had no summary jurisdiction to compel repayment thereof, *Re* Bologh, 185

Fed. 825. A receiver may have a summary examination of the bankrupt or any other person concerning the former's acts, conduct or property, U. S. v. Cameron, 231 U. S. 710; Skubinsky v. Bodek (C. C. A. Third Circuit), 172 Fed. 332. *Contra*, *Re* Fixen & Co., 96 Fed. 748; U. S. v. Liberman, 176 Fed. 161. *Infra*, §§ 638a, 638b. It has been said that receivers in bankruptcy, prior to an adjudication, cannot adjust claims nor properly defend suits upon the same, *Re* Heim Milk Product Co., 183 Fed. 787. The receiver may be authorized to carry on the business of the bankrupt for a limited period, *Re* Richards, 127 Fed. 772. It has been held that such an order is administrative, and to a large extent discretionary, and should not be collaterally attacked. *Re* Isaacson, C. C. A., 174 Fed. 406; but, it has been held, that the expense of continuing the business may not be paid out of the fund in preference to a lienor thereupon, *Re* Bourlier Cornice & Roofing Co., 133 Fed. 958; *Re* Clark Coal & Coke Co., 173 Fed. 658. For a case where a receiver was charged with part of the loss, see *Re* Consumers' Coffee Co., 162 Fed. 786; unless the latter consented to the continuance of the business, *Re* Erie Lumber Co., 150 Fed. 817. It was held that a lienor was not estopped where it had no notice of the order, although its attorney acted for the receiver and trustee in procuring the same, and its officers had knowledge that the business was being continued, but not that it was being continued at a loss. *Re* Clark Coal & Coke Co., 173 Fed. 658; but, it has been held that a receiver may reject a lease, Plaut v. Gorham Mfg. Co., 174 Fed. 852. In an action by the clerk of the court upon the bond running to him as payee, for the benefit of an estate in bankruptcy, it is immaterial whether the recovery is for the benefit of a receiver, as alleged in the declaration, or of some other person representing the estate. American Bonding Co. v. Allison, C. C. A., 182 Fed. 810. By permission of the court he may adjust a controversy concerning the title to property claimed to belong to the estate, Ommen v. Talcott, 175 Fed. 261. Where property is wrongfully surrendered by the receiver, the court of bankruptcy has summary jurisdiction to compel the return of them. Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778; *Re* Schermerhorn, C. C. A., 145 Fed. 341; *Re* McMahon, C. C. A., 147 Fed. 684; *infra*, § 635. A receiver cannot sell property which is not perishable or rapidly depreciating in value, unless he is authorized to conduct the business of the bankrupt, *Re* Becker, 98 Fed. 407; *Re* Kelly Dry Goods Co., 102 Fed. 747, 749; *Re* Desrochers, 183 Fed. 991. The sale of a liquor license has been authorized. *Re* Becker, 98 Fed. 407. It was held: that the sale of a lease by a receiver without the direction of the court conveyed no title; that the defect could not be cured by a motion to confirm the sale and the equity of the adverse claimants to the property sold. *Re* Fulton, 153 Fed. 664. A receiver may be ordered to sell perishable assets. General Order XVIII, *infra*, § 641a. Such an order may be made by the referee upon the certificate by the clerk of the judge's absence or disability, *Re* Kelly Dry Goods Co., 102 Fed. 747. It was held that an order author-

of Bankruptcy";[9] but, without such permission, an action of replevin cannot be maintained against him.[10] A suit against the receiver or bankrupt upon a claim provable in bankruptcy will ordinarily not be authorized.[11] Receivers may be authorized to

izing the receiver of a bankrupt to sell perishable property, consisting of produce in storage, "at public or private sale within his discretion, at current rates without notice," was broad enough to justify a sale in bulk of all of the property in the hands of a warehouse company after it had been offered in car load lots. Smithson v. Emmerson, C. C. A., 166 Fed. 96. The receiver may be authorized by the court, at least after adjudication, to consent to a sale of the property held by an adverse claimant with a stipulation concerning the ultimate determination of their respective claims to the proceeds of the same, Ommen v. Talcott, 175 Fed. 261. A receiver may be authorized to take possession from the mortgagee of property in the possession of the bankrupt when the petition was filed and to sell this subject to all valid liens, Charak v. Durphee, 252 Fed. 885. See *supra* § 633, *infra*, § 641a. The Court of Bankruptcy may, by summary proceedings, compel the completion by the purchaser of a contract of sale, Mason v. Wolkowich, C. C. A., 10 L.R.A. (N.S.) 765, 150 Fed. 699. Under the amendment of 1910, he might apply to the court of another district for ancillary relief, 36 St. at L. 838. See § 612, *supra*. Before that statute, it was held that a receiver in bankruptcy had no power outside of the jurisdiction which appointed him *Re* Schrom, 97 Fed. 760; *Re* Benedict, 140 Fed. 55. Whether without an ancillary appointment he can sue in another district is a doubtful question. It has been held that he cannot do so before adjudication, *Re* Schrom (E. D. Ia.), 97 Fed. 760; *Re* Benedict (E. D.) Wisconsin) 140 Fed. 55; *Re* Dunseath & Son Co., 168 Fed. 973. See *Re* National Mercantile Agency (E. D. Pa.), 128 Fed. 639; Remington on Bankruptcy, Supp. 1910, § 1708, p. 1055. *Contra, Re* Dempster, C. C. A., 172 Fed. 353.

[9] *Re* Kanter & Cohen, C. C. A., 121 Fed. 984; *Re* Spitzer, C. C. A., 130 Fed. 879; *Re* Spechler Bros., 185 Fed. 311; 25 St. at L., p. 436; *supra*, § 314, 633.

[10] Russell and Birkett, 104 Fed. 248.

[11] *Re* Heim Milk Product Co., 183 Fed. 787, *supra*, § 633; but, it has been held, that the owner of a chattel mortgage should be allowed the right to foreclose the same, although the property must remain in the possession of the receiver pending the litigation, *Re* Victor Color & Varnish Co., 175 Fed. 1023. And where a receiver had not been made a party to a suit against the bankrupt for an infringement of a patent, he was not required to furnish an account, which had been decreed prior to his appointment, although it was said that he might be required by subpœna to produce the books before the master, Am. Graphophone Co. v. Leeds & Catlin Co., 174 Fed. 158. Upon the determination of the claim of a stranger to a certificate of stock in the possession of the receiver, the court

borrow money and to issue receivers' certificates.[12] Accountings by receivers in bankruptcy follow the analogies of the accounts of receivers appointed by courts of equity.[13] The compensation

ordered the latter to examine the books of the bankrupt and see whether there were any preferred such customer, to whom he was obligated to deliver certificates of the same stock, and that they and no other creditors should be given an opportunity to be heard upon the application, *Re* R. O. Brown & Co., 171 Fed. 254.

[12] Edinburgh Coal Co. v. Humphreys, C. C. A., 134 Fed. 839; *Re* Erie Lumber Co., 150 Fed. 817, *Re* Consumers' Albany Brewing Co., 216 Fed. 988. It has been held that such permission should not be granted by a referee, Bray v. Johnson, C. C. A., 166 Fed. 57. The receiver may be authorized to borrow money for the purposes of any business which he has been directed to continue, *Re* C. M. Burkhalter & Co., 182 Fed. 353. See §§ 307, 309, *supra*. Where the court has authorized him to borrow a specific sum and he borrows more, it has been said that creditors for the excess are not entitled to any preference and are bound to show that the proceeds of the loan were used for the purposes of the receivership, *Re* C. M. Burkhalter & Co., 182 Fed. 353. Where a receiver in bankruptcy, in order to prevent the abandonment of work, paid employees of a sub-contractor with the bankrupt their wages less the amounts they owed another for supplies, which it was the custom of the sub-contractor to withhold and pay to the supply man; it was held that he did not thereby incur any liability to the latter for the amounts due him. *Re* Ferguson Contracting Co., C. C. A., 187 Fed. 940.

[13] *Supra* §§ 320-322. In the absence of evidence as to value, it was held that a receiver's account should not be surcharged with the difference between the appraisement of property and the amount for which the same was sold. *Re* Consumers' Coffee Co., 162 Fed. 786. And that a receiver should not be surcharged with a loss upon a sale, caused by the purchase of claims of the creditors, which prevented them from bidding at the sale. *Re* Schoenfeld, C. C. A., 183 Fed. 219. The receiver's counsel should only be paid for services rendered for the benefit of the entire estate and not for those rendered in the interest of creditors whom they represented. *Re* Ketterer Mfg. Co., 156 Fed. 719. Where two petitions in involuntary bankruptcy were successively filed in different districts, a receiver appointed in the former and an adjudication made in the latter, to which the proceedings were transferred because the bankrupt was there domiciled; it was held that the court in the former district had jurisdiction to fix the compensation of the receiver and his counsel, although payment could only be made on order of the court in the latter district, which had custody of the estate. *Re* Isaacson, C. C. A., 174 Fed. 406. A court of bankruptcy may, of its own motion, direct that the net proceeds of a sale under its decree be paid to a receiver in bankruptcy appointed in the same district, who had not appeared in admiralty, for the satisfaction of his allowance and expenses, and that the libellant should share only in what was left; al-

of receivers is subsequently discussed.[14]

§ 635. Summary orders for the payment of money or delivery of property. The Court of Bankruptcy may by summary proceedings, without the institution of a suit, compel the delivery of property,[1] or the payment of money,[2] which has been taken

though they who were the sole parties to the proceeding had stipulated that the money be divided between them. Hudson Oil & Supply Co. v. Booraem, 216 U. S. 604, 54 L. ed. 636. An order passing the accounts of receivers, in which they have credited themselves with property surrendered to third persons, who claimed the same, is not an adjudication which will prevent the trustee from recovering the property from such persons. It has been said, that upon the election or appointment of a trustee, the receiver may properly retain a sufficient sum to cover the probable expenses of the receivership, but any surplus should be immediately turned over to the trustee, Matter of College Clothes Shop, 192 Fed. 80. He may be allowed the expense of an appraisal, although the trustee was dissatisfied therewith and ordered another one made. *Re* Kyte, 158 Fed. 121. Premiums paid by him for fire insurance should be allowed him; but not, it has been held, unpaid premiums upon policies issued to him, since those must be settled by the trustee. Ibid. Ordinarily, when a receivership is dissolved by the reversal of the order of appointment, or by the dismissal of the bankruptcy proceedings, the costs and expenses of the receivership should be charged against the petitioning creditors. *Re* Ward, 203 Fed. 769; see *supra*, § 324; Beach v. Macon Grocery Co., C. C. A., 125 Fed. 513; *Re* Lacov, C. C. A., 142 Fed. 960; *Re* Desrochers, 183 Fed. 991. *Contra*, *Re* De Lancey Stables Co., 170 Fed. 860; *Re* Wentworth Lunch Co., 189 Fed. 831; *Re* Independent Machine & Tool Corporation, C. C. A., 25 Fed. 484. See *Re* Ward, 203 Fed. 769; § § 659, 664, *infra*. It has been held that where the receiver was not connected with the application for his appointment his fees may be paid in the first instance, out of the fund, with a reservation of the right subsequently to charge the same against the petitioners. *Re* T. E. Hill Co., C. C. A., 159 Fed. 73; *Re* Wentworth Lunch Co., C. C. A., 191 Fed. 821, and payment of the same may be enforced by contempt proceedings, *Re* Lacov, C. C. A., 142 Fed. 960. Criticized in Remington on Bankruptcy, § 398. But an adjudication in voluntary proceedings does not avoid the appointment of a receiver upon a prior involuntary application, and all rights under such prior proceedings, including the liability for costs and expenses, may be fully protected by an order of the court, *Re* New Chattanooga Hardware Co., 190 Fed. 241. It has been held: that exceptions to a receiver's account should be verified; but that such an omission may be cured by amendment. *Re* Ketterer Mfg. Co., 156 Fed. 719.

14 *Infra*, § 664.

§ 635. 1 *Re* Briskman, 132 Fed. 201. See Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778.

2 Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269; *Re*

from a person whom the proceedings have subjected to its jurisdiction,[3] including what has been taken from the possession of an office of the court,[4] or has been wrongfully surrendered by its receiver,[5] or is in the possession [6] or control [7] of the bankrupt,[8]

D. Levy & Co., C. C. A., 142 Fed. 442; *Re* Friedman, 153 Fed. 939.

3 Mound Mines Co. v. Hawthorne, C. C. A., 173 Fed. 882; Rathman v. Booth, C. C. A., 183 Fed. 913; *Re* Denson, 195 Fed. 854; *Re* Weedman Stave Co., C. C. A., 199 Fed. 948. See § 608, *supra*.

4 Murphy v. John Hofman Co., 211 U. S. 562, 53 L. ed. 327; where the fact that it was claimed that the receiver, after his appointment, had accepted possession as bailee of another claimant to the property, was held not to oust the Federal court of jurisdiction; *Re* Briskman, 132 Fed. 201; *Re* Alton Mfg. Co., 158 Fed. 367; where chattels were replevied between the appointment and qualification of the receiver, *Re* Walsh Bros., 159 Fed. 560, where a sheriff holding property under an attachment, who had been requested by the referee to hold the property for him until a trustee could be appointed, the attachment having been dissolved by the adjudication, was held to be a custodian of the court, so that a seizure from him was an interference with the court's custody of the property. But see *Re* Mid-Valley Coal Co., 251 Fed. 815. It has been held that the court had no power upon a summary application to compel a depositary, which has passed into the hands of a State officer for liquidation, to pay deposits made by receivers and trustees in bankruptcy. *Re* Bologh, 185 Fed. 825.

5 Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778; *Re* Schermerhorn, C. C. A., 145 Fed. 341; *Re* McMahon, C. C. A., 147 Fed. 684.

6 *Re* Purvine, C. C. A., 96 Fed. 192; *Re* Smith, 100 Fed. 795; *Re* Alexander, 193 Fed. 749; *Re* Lipman, 201 Fed. 169; Cohen v. Nixon & Wright, 236 Fed. 407; Gibbons v. Goldsmith, C. C. A., 222 Fed. 826 (community property); Lawhead v. Monroe, C. C. A., 252 Fed. 758. A claim of a set off against a bank deposit made by the bankrupt after the filing of the petition will not prevent the court from entertaining summary proceedings for payment of the money to the trustee. Reed v. Barnett Nat. Bank of Jacksonville, C. C. A., 250 Fed. 983.

7 *Re* Cole, C. C. A., 144 Fed. 392, 16 Am. B. R. 302; Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40; *Re* Gottlieb, 245 Fed. 139. The bankrupt may be ordered to execute such assignments, *Re* Loveland, C. C. A., 200 Fed. 136, or applications to a stock exchange, *Re* Granite City Bank, C. C. A., 137 Fed. 818, 14 Am. B. R. 407; O'Dell v. Boyden, C. C. A., 150 Fed. 751, 17 Am. B. R. 751; *Re* Wiesel, 173 Fed. 718; or other papers or licenses as are necessary to confer the title to his property. Neither a bankrupt, nor any other party, can be ordered to deliver the manual possession of property which is not in his physical control. *Re* Nisenson, 182 Fed. 912; *Re* Denson, 195 Fed. 854; *Re* Loveland, C. C. A., 200 Fed. 136.

8 *Re* Purvine, C. C. A., 96 Fed.

or that of his agent,[9] attorney [10] or bailee,[11] or assignee in insolvency in proceedings invalidated by the bankruptcy,[12] or of a receiver,[13] sheriff,[14] constable,[15] or other officer of a State court in proceedings thus abrogated, or even when in the possession of a stranger, who asserts a claim of right thereto, which is

192; *Re* Smith, 100 Fed. 795; *Re* Rosser, C. C. A., 101 Fed. 562; Ripon Knitting Works v. Schreiber, 101 Fed. 810; s. c., C. C. A., 104 Fed. 1006; *Re* Miller, 105 Fed. 57; *Re* Muncie Pulp Co., C. C. A., 139 Fed. 546; *Re* Gottlieb, 245 Fed. 139.

9 Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269; *Re* Fogelman, 188 Fed. 755; *Re* Kernit Mfg. Co., 192 Fed. 392. So of officers of bankrupt corporations. *Re* Alphin & Lake Cotton Co., 131 Fed. 824; *Re* Royce Dry Goods Co., 133 Fed. 100; *Re* Muncie Pulp Co., C. C. A., 139 Fed. 546; *Re* Weber Co., C. C. A., 200 Fed. 404. The director of a bankrupt corporation. *Re* Famous Clothing Co., 179 Fed. 1015; Courtney v. Shea, C. C. A., 225 Fed. 358; *Re* Cantelo Mfg. Co., 201 Fed. 158; *Re* Auto Safety Signal Lamp Co., 237 Fed. 299, where the officer claimed a set-off because of an alleged indebtedness to him; *Re* Joseph R. Marquette, Jr., Inc., C. C. A., 254 Fed. 419.

10 *Re* Ellis Bros. Printing Co., 156 Fed. 430; *Re* Alexander, 193 Fed. 749.

11 *Re* Rodgers, C. C. A., 125 Fed. 169; *Re* Muncie Pulp Co., C. C. A., 139 Fed. 546; *Re* Holbrook Shoe & Leather Co., 165 Fed. 973; *Re* Famous Clothing Co., 179 Fed. 1015; *Re* Belfast Mesh Underwear Co., 185 Fed. 834; Johnston v. Spencer, C. C. A., 195 Fed. 215; Courtney v. Shea, C. C. A., 225 Fed. 358.

12 Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. 557; Davis v. Bohle, C. C. A., 92 Fed. 325; *Re* Stewart, C. C. A., 179 Fed. 222; *Re* McCrum, C. C. A., 214 Fed. 207; *Re* Colwell Lead Co., 241 Fed. 922; *Re* Reiswig, 253 Fed. 390.

13 *Re* Williams, 240 Fed. 788. *Contra* Brown v. Crawford, 254 Fed. 146. See also *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155.

14 Clark v. Larremore, 188 U. S. 486, 47 L. ed. 555, affirming *Re* Kenney, C. C. A., 105 Fed. 897; *Re* Francis Valentine Co., C. C. A., 94 Fed. 793; *Re* Hecox, C. C. A., 164 Fed. 823; Orr v. Tribble, 158 Fed. 897; Staunton v. Wooden, C. C. A., 179 Fed. 61; *Re* L. Popkin & Co., Inc., 240 Fed. 848. But see *Re* Andre, C. C. A., 135 Fed. 736. Where, after the filing of the petition in bankruptcy and before the adjudication or the appointment of a receiver a sheriff sold property under executions issued within four months before and the proceeds were paid to the judgment creditors; it was held: that summary proceedings would not lie to compel payment thereof to the trustee by the sheriff or the creditors' attorneys. *Re* Cox-Rackley Co., 245 Fed. 367.

15 *Re* O. L. Ward & Co., 242 Fed. 999.

frivolous or merely colorable.[16] When an adverse claim is asserted, the court has jurisdiction to determine whether it is merely colorable.[17] It has been held that it may, and in a proper case should, take evidence for that purpose,[18] and if the only disputed question is one of law, determine this.[19] When, however, a party in possession sets up a claim of right, which is not merely colorable,[20] or as trustee or assignee in insolvency asserts a claim to compensation for monies paid by him for expenses or for his fees which he has expended,[21] or a court officer asserts a

16 *Re* Moore, 104 Fed. 869 (the bankrupt's wife); *Re* Kane, 131 Fed. 386 (a bank deposit); *Re* Briskman, 132 Fed. 201; O'Dell v. Boyden, C. C. A., 150 Fed. 731 (a stock exchange holding the proceeds of the sale of the bankrupt's seat); *Re* Friedman, 153 Fed. 939. For cases where the formation of a corporation to which the assets had been transferred was held to be merely colorable and it was directed to transfer them to the receiver or trustee in bankruptcy, see *Re* Berkowitz, 173 Fed. 1013; *Re* Shaffer & Stern, 185 Fed. 549 See, also *Re* Muncie Pulp Co., C. C. A., 13 Fed. 546; *Re* Iron Clad Mfg. Co., C. C. A., 191 Fed. 831; s. c., 194 Fed. 906; *Re* Kernit Mfg. Co., 192 Fed. 392; *Re* Holbrook Shoe & Leather Co., 165 Fed. 973; W. A. Liller Bldg. Co. v. Reynolds, C. C. A., 247 Fed. 90.

17 *Re* Ellis Bros. Printing Co., 156 Fed. 430; *Re* Holbrook Shoe & Leather Co., 165 Fed. 973; *Re* Friedman, C. C. A., 161 Fed. 260; *Re* Norris, 177 Fed. 598; *Re* Logan, 196 Fed. 678; *Re* Franklin Suit & Skirt Co., 197 Fed. 591; *Re* Resnek, Shapiro & Co., 246 Fed. 879.

18 *Re* Iron Clad Mfg. Co., C. C. A., 191 Fed. 831, s. c., 194 Fed. 906; *Re* Logan, 196 Fed. 678; *Re* Franklin Suit & Skirt Co., 197 Fed. 591.

19 *Re* Michaelis & Lindeman, 196 Fed. 718; *Re* Midtown Contracting Co., 238 Fed. 871.

20 *Re* Andre, C. C. A., 135 Fed. 736; *Re* Teschmacher & Mrazay, 127 Fed. 728; *Re* Scherber, 131 Fed. 121; *Re* New York Car Wheel Works, 132 Fed. 203; *Re* Davis Tailoring Co., 144 Fed. 285; *Re* Sunseri, 156 Fed. 103; *Re* Bertenshaw, C. C. A., 17 L.R.A. (N.S.) 886, 157 Fed. 363; *Re* Midtown Contracting Co., C. C. A., 243 Fed. 56; *Re* Resnek, Shapiro & Co., 246 Fed. 879; *Re* Phoenix Planing Mill, 250 Fed. 898. The fact that property was delivered by the bankrupt to a creditor the day before the filing of the petition in bankruptcy does not alone justify summary proceedings against the latter where he claims the property as purchased although he knew that proceedings in bankruptcy were about to be instituted. *Re* Lummis, 214 Fed. 891.

21 Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. 293; *Re* Stewart, C. C. A., 179 Fed. 222. It has been held that the Court of Bankruptcy may by summary proceedings make the assignee account for a fund still in his hands out of which he claims a right to be paid for fees and expenses. *Re* Reiswig, 253 Fed. 390. See also cases cited *supra*.

claim for fees,[22] and he resists the jurisdiction of the court; the Court of Bankruptcy will not interfere, except by a plenary suit in cases where it has jurisdiction thereof.[23] Consent will give jurisdiction of the court to determine the validity of such an adverse claim;[24] but it is doubtful whether an appearance, without objection, will waive the objection that the proceedings should be instituted by a plenary suit, instead of a summary proceeding.[25] It has been held, that, without his consent, the individual assets of a member of a firm, who is not in bankruptcy, cannot be thus summarily obtained for administration by the trustee of the bankrupt partnership.[26] Where the respondent, prior to notice of the application, has spent the money or the proceeds of the property, the application will be denied.[27] It has been held that a preference can be set aside only by a plenary suit;[28] unless the property is in the possession or control

22 *Re* Andre, C. C. A., 135 Fed. 736. It has been so held of a receiver not appointed because of insolvency. Loveless v. Southern Grocer Co., C. C. A., 159 Fed. 415. But see § 649, *infra*.

23 *Re* Horgan, C. C. A., 158 Fed. 774; *Re* L. Rudnick & Co., C. C. A., 160 Fed. 903; *Re* Squier, 165 Fed. 515; *Re* Rosneck, 167 Fed. 574; *Re* Driggs, 171 Fed. 897; *Re* Hersey, 171 Fed. 998; Cooney v. Collins, C. C. A., 176 Fed. 189; *Re* Mills, 179 Fed. 409; Copeland v. Martin, C. C. A., 182 Fed. 805; *Re* Lineberry, 183 Fed. 338; *Re* L. B. Pickens & Bro., 184 Fed. 954; *Re* Tarbox, 185 Fed. 985; *Re* Iron Clad Mfg. Co., 193 Fed. 781; s. c., 194 Fed. 906; Johnston v. Spencer, C. C. A., 195 Fed. 215; *Re* Bacon, 196 Fed. 986; First Nat. Bank v. Hopkins, C. C. A., 199 Fed. 873. *Supra*, § 608. *Re* Rathman, C. C. A., 183 Fed. 913; *Re* Boston-Cerrillos Mines Corp., 206 Fed. 794; *Re* Bacon, C. C. A., 210 Fed. 129; *Re* Radley Steel Const. Co., 212 Fed. 462; *Re* Vallozza, 225 Fed. 334; Courtney v. Shea, C. C. A., 225 Fed. 358; *Re* Vocke, 242 Fed. 963; *Re* Gottlieb & Co., 245 Fed. 139. It has been held that the trustee cannot, in a summary proceeding, collect an unpaid stock subscription. *Re* Howe Mfg. Co., 193 Fed. 524.

24 *Re* Alexander, 193 Fed. 749; *Re* Banzai Mfg. Co., C. C. A., 183 Fed. 298, an assignee in insolvency; *supra*, § 609.

25 *Re* Teschmacher & Mrazay, 127 Fed. 728; *supra*, § 609. *Cf.* Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293. But see Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557.

26 *Re* Bertenshaw, C. C. A., 157 Fed. 363; Boyd v. Glucklich, C. C. A., 116 Fed. 131.

27 Am. Trust Co. v. Wallis, C. C. A., 126 Fed. 464; *Re* Smith Longbottom & Sons, 142 Fed. 291; *Re* Barton Bros., 149 Fed. 620; *Re* Weinreb, C. C. A., 146 Fed. 243. *Cf.* Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269. See *Re* Banzai Mfg. Co., C. C. A., 183 Fed. 298.

28 *Re* Knickerbocker, 121 Fed. 1004.

of the bankrupt, or in the possession of the Court of Bankruptcy, when that court, upon a summary application, may determine the validity of all claims against it.[29] There is no right to a trial by jury upon such an application.[30] The referee has jurisdiction to make such an order against the bankrupt or others in a proper case;[31] even, it seems, although the respondent is an officer of another court.[32] Where the property is in the custody of the receiver of a State court, the trustee should ordinarily apply to the State court before he petitions the Court of Bankruptcy.[33] When money or property is in the possession of the trustee, a claimant may make a summary application to have it paid or delivered to him.[34]

An application for an order for the payment of money or the delivery of property to the trustee should be instituted in the trustee's name[35] by a petition in writing,[36] which fairly ap-

[29] *Re* Rosenberg, 116 Fed. 402; Chauncey v. Dyke Bros., C. C. A., 119 Fed. 1; *Re* D. H. McBride & Co., 132 Fed. 285; *Re* Noel, 137 Fed. 694; *Re* McMahon, C. C. A., 147 Fed. 684; *Re* Eppstein, C. C. A., 17 L.R.A. (N.S.) 465, 155 Fed. 42. See *Re* Mertens, 131 Fed. 507.

[30] Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. B. R. 299; Remington on Bankruptcy, § 1834.

[31] Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405; *Re* Mayer, 98 Fed. 839, 3 Am. B. R. 533; *Re* Miller, 105 Fed. 57, 5 Am. B. R. 184; *Re* Kane, 131 Fed. 386, 12 Am. B. R. 444. See *Re* Corn, C. C. A., 179 Fed. 841.

[32] *Re* Geiser, 129 Fed. 237, 12 Am. B. R. 208; Remington on Bankruptcy, § 1836; *Re* Weedman Stave Co., 199 Fed. 948.

[33] Carling v. Seymour Lumber Co., C. C. A., 113 Fed. 483, 490.

[34] *Re* Dashiell, C. C. A., 246 Fed. 366; *Re* Goldberg & Sagman, 232 Fed. 194; International Agricultural Corp. v. Sparks, 250 Fed. 318. It has been held: that specific performance by the trustee of a contract made by the bankrupt cannot be thus enforced. Dreyer v. Perkins, C. C. A., 217 Fed. 889. That after confirmation of a sale although the deed has not been delivered the court cannot upon a summary application determine a controversy between the bidder and the claimant of an assignment or interest in his purchase. Henrie v. Henderson, C. C. A., 145 Fed. 316. That the claimant to a leasehold of the ownership of buildings upon the land cannot upon a summary petition restrain the trustee from selling the land and buildings when an adjudication of the title would require other parties to be brought before the court. *Re* Moose River Lumber Co., 251 Fed. 409.

[35] *Re* Rothschild, 5 Am. B. R. 587.

[36] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 7 Am. B. R. 421; Boyd v. Gluck-

prises the respondent of the nature of the claim,[37] although an accurate description of the property is not essential.[38] When the property is in the possession of a stranger to the proceeding, the petition should show that the latter's claim is merely colorable.[39] It has been said that a bill in equity cannot be sustained as a petition.[40] But it seems to be the opinion of the Supreme Court that a plenary suit may be brought in a case where a summary application might have been sustained;[41] and, in one case, a summary petition was sustained apparently because "it contained all the substantial allegations of a bill in equity."[42] The party against whom the order is sought must have reasonable notice of the proceedings.[43] The respondent is entitled to a hearing.[44] Depositions taken in the absence of the bankrupt and his counsel, without notice to him, cannot be offered in evidence,[45] unless they have made no objection to the trial of the issue upon affidavits. Testimony taken in other proceedings in the Bankruptcy Court is not admissible,[46] except as an admission by the respondent,[47] or to confront a witness with former

lich, C. C. A., 116 Fed. 131, 8 Am. B. R. 393; Remington on Bankruptcy, § 1837.

37 Remington on Bankruptcy, § 1837. A demurrer is waived by an answer to the whole petition. *Re* Koplin, 179 Fed. 1013. Where the allegations in the petition are not sufficiently precise, the proper remedy is a motion to make the same more definite and certain. *Re* Frank, C. C. A., 182 Fed. 794; *Re* Greer, 189 Fed. 511; *Re* Ruos, 164 Fed. 749. Such an objection is waived by answering and offering testimony without raising the same. *Re* Alexander, 193 Fed. 749.

38 Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. B. R. 299, 303.

39 *Re* Scherber, 131 Fed. 121.

40 Havens & Geddes Co. v. Pierek, C. C. A., 120 Fed. 244, 245. But see *supra*, § 259.

41 Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. 778.

42 *Re* Steuer, 104 Fed. 976. See *Re* Scherber, 131 Fed. 121.

43 *Re* Pearson, 95 Fed. 425, 2 Am. B. R. 819; *Re* Oliver, 96 Fed. 85, 2 Am. B. R. 783; *Re* Rosser, C. C. A., 101 Fed. 562, 4 Am. B. R. 153; *Re* Miller, 105 Fed. 57, 5 Am. B. R. 184; Boyd v. Glucklich, C. C. A., 116 Fed. 131, 8 Am. B. R. 393. *Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046.

44 Boyd v. Glucklich, C. C. A., 116 Fed. 131, 140, 8 Am. B. R. 393.

45 *Re* Frank, C. C. A., 182 Fed. 794; *Re* Friedman, C. C. A., 161 Fed. 260.

46 *Re* Alphin & Lake Cotton Co., 131 Fed. 824, 12 Am. B. R. 653, 655; aff'd 134 Fed. 477, 14 Am. B. R. 194; *Re* Kornit Mfg. Co., 192 Fed. 392.

47 *Re* Alphin & Lake Cotton Co., 131 Fed. 824, 12 Am. B. R. 653;

contradictory statements by him.[48] The respondent to the application may introduce evidence on his own behalf.[49] The order will not be granted unless facts sufficient to support it are proved by clear and convincing evidence;[50] and, according to a large number of cases, not unless they are proved beyond a reasonable doubt.[51] The sworn denial of the bankrupt or other respondent is not conclusive.[52] The order may be supported by circumstantial evidence.[53] When recent possession is proved, it is ordinarily presumed that the respondent still has the money or property, unless he affords reasonable proof of its disposition.[54] It has been said that proof of possession of the assets at

aff'd 134 Fed. 477, 14 Am. B. R. 194; *Re* Wiesen Bros., 135 Fed. 422, 14 Am. B. R. 347; *Re* Greer, 189 Fed. 511; Remington on Bankruptcy, § 1839.

48 Remington on Bankruptcy, § 1839.

49 *Re* Miller, 105 Fed. 57, 5 Am. B. R. 184; Boyd v. Glucklich, C. C. A., 116 Fed. 131, 140, 8 Am. B. R. 393, 397; *Re* Lasch, Referee (Pa.), 12 Am. B. R. 158; Remington on Bankruptcy, § 1839.

50 *Re* Gilroy & Bloomfield, 140 Fed. 733; *Re* Berman, 165 Fed. 383; *Re* Adler, 170 Fed. 634; *Re* Dickens, 175 Fed. 808; *Re* Jackier, 179 Fed. 720; *Re* Nisenson, 182 Fed. 912; *Re* Chamelin, 184 Fed. 553; *Re* Kreuger, 197 Fed. 124. See *Re* Jablin, 194 Fed. 228.

51 *Re* Sax, 141 Fed. 223; Samel v. Dodd, C. C. A., 142 Fed. 68, 16 Am. B. R. 167; *Re* D. Levy & Co., C. C. A., 142 Fed. 442, 15 Am. B. R. 169; Remington on Bankruptcy, § 1842; *Re* Nisenson, 182 Fed. 912; *Re* Kreuger, 197 Fed. 124. See *Re* Dickens, 175 Fed. 808.

52 *Re* Rosser, C. C. A., 101 Fed. 562; Ripon Knitting Works v. Schreiber, 101 Fed. 810; Boyd v. Glucklich, C. C. A., 116 Fed. 131; *Re* Feldser, 134 Fed. 307; *Re* Goldfarb Bros., 131 Fed. 643. *Contra*, *Re* Alphin & Lake Cotton Co., 134 Fed. 477, 14 Am. B. R. 194, 197; *Re* Cole, C. C. A., 144 Fed. 392, 16 Am. B. R. 302; *Re* Lasky, 163 Fed. 99; Seigel v. Cartel, C. C. A., 164 Fed. 691; *Re* Cramer, 175 Fed. 879; *Re* Holland, 176 Fed. 624; *Re* Robert Greenberg & Bro., 179 Fed. 413; *Re* Krall, 182 Fed. 191; *Re* Meier, C. C. A., 182 Fed. 799; *Re* Lippman, 184 Fed. 551; *Re* Cummings, 186 Fed. 1020; Stern v. U. S., C. C. A., 193 Fed. 888; *Re* Stokes, 185 Fed. 994.

53 *Re* Schacter, 119 Fed. 1010, 9 Am. B. R. 499; Schweer v. Brown, C. C. A., 130 Fed. 328; *Re* Goldfarb Bros., 131 Fed. 643, 12 Am. B. R. 386; *Re* Frankfort, 144 Fed. 721. See Henkin v. Fousek, C. C. A., 246 Fed. 285.

54 *Re* Felson, 124 Fed. 288, 10 Am. B. R. 716; *Re* D. Levy & Co., C. C. A., 142 Fed. 442; *Re* Cole, C. C. A., 144 Fed. 392, 16 Am. B. R. 302; Waters v. Davis, C. C. A., 145 Fed. 912; *Re* Edelman, 251 Fed. 429. The finding by a referee, that at the time of his bankruptcy the bankrupt had under his control money or property of his estate which he has never surrendered, will not, without further proof, sup-

the time of the filing of the petition for the summary order, together with proof of a subsequent disposition thereof, is not sufficient to support the order, when it appears that the respondent has no control over them or their proceeds.[55] Where third parties have interfered with property which was in the bankrupt's possession when the petition in bankruptcy was filed, the burden is upon them to show that they had a right to remove it.[56] Payment of interest will not be ordered unless it appears that interest has been received.[57] The order must definitely describe the property to be surrendered.[58] It has been held that an order directing the return of the "value" of the goods is

port an order, seven years later, requiring him to turn the same over to the trustee. *Re* Ruos, 164 Fed. 749.

[55] *Re* Cotton Co. (Alphin & Lake Cotton Co.), 134 Fed. 477, 14 Am. B. R. 194; *Re* McCormick, 97 Fed. 566, 3 Am. B. R. 340; *Re* D. Levy & Co., C. C. A., 142 Fed. 442, 15 Am. B. R. 166; *Re* Royce Dry Goods Co., 133 Fed. 100, 13 Am. B. R. 257; Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. B. R. 299; affirmed in 104 Fed. 1006; *Re* Gerstel, 123 Fed. 166, 10 Am. B. R. 411; *Re* Kane, 125 Fed. 984, 10 Am. B. R. 478. Compare *Re* Adler, 129 Fed. 502, 12 Am. B. R. 19; *Re* Shachter, 119 Fed. 1010, 9 Am. B. R. 499; *Re* Epstein, 15 Am. B. R. 711. Instance, *Re* Deuell, 100 Fed. 633, 4 Am. B. R. 60; *Re* Felson, 124 Fed. 288, 10 Am. B. R. 716; *Re* Schlesinger, 97 Fed. 930, 3 Am. B. R. 342; affirmed, C. C. A., 102 Fed. 117, 4 Am. B. R. 361; *Re* Finkelstein, 101 Fed. 418, 3 Am. B. R. 800; *Re* Greenberg, 106 Fed. 496, 5 Am. B. R. 840; Obiter, *Re* Mayer, 98 Fed. 839, 3 Am. B. R. 533; *Re* Anderson, 103 Fed. 854, 4 Am. B. R. 640; *Re* Goldfarb Bros., 131 Fed. 643, 12 Am. B. R. 386; Instance, *Re* Wilson, 116 Fed. 419, 8 Am. B. R. 612; *Re* Rosser, C. C. A., 101 Fed. 562, 4 Am. B. R. 153; *Re* De Gottardi, 114 Fed. 328, 7 Am. B. R. 723; Obiter, *Re* Laplume C. M. Milk Co., 145 Fed. 1013, 16 Am. B. R. 729; *Re* Hershkowitz, 136 Fed. 950, 14 Am. B. R. 86; *Re* Frankfort, 144 Fed. 721, 15 Am. B. R. 210; *Re* Levin, 113 Fed. 498, 6 Am. B. R. 743; *Re* Henderson, 130 Fed. 385, 12 Am. B. R. 351; *Re* Friedman, 2 Am. B. R. 301; *Re* Weinreb, C. C. A., 146 Fed. 243, 16 Am. B. R. 702; *Re* Feldser, 134 Fed. 307, 14 Am. B. R. 216; Remington on Bankruptcy, § 1850. See *Re* Jablin, 194 Fed. 228. But see *Re* Idzall, 96 Fed. 314, 2 Am. B. R. 741; *Re* Sax, 141 Fed. 223, 15 Am. B. R. 455; *Re* Switzer, 140 Fed. 976, 15 Am. B. R. 468.

[56] *Re* Iron Clad Mfg. Co., 193 Fed. 781.

[57] *Re* Rosser, C. C. A., 101 Fed. 562, 4 Am. B. R. 153. See also Remington on Bankruptcy, § 1848, and cases cited. *Contra*, *Re* Kurtz, 125 Fed. 992, 11 Am. B. R. 129.

[58] *Re* Davis, 119 Fed. 950, 9 Am. B. R. 670; Remington on Bankruptcy, § 1847; *Re* Rogowski, 166 Fed. 165. See *Re* Ironclad Mfg. Co., 193 Fed. 781.

erroneous.[59] The order may be enforced by imprisonment for contempt.[60]

The order directing the return of property or the payment of money is at least presumptive evidence that the bankrupt or other person against whom the same is directed is able to obey the same,[61] and according to some authorities it is conclusive of the facts at the time of its entry.[62] It has been held that the bankrupt may show inability to comply with the order, which accrued subsequently to its entry.[63] Subsequent proof of inability to comply with the order may justify a discharge from such imprisonment.[64]

An order in such a proceeding, of which the Court of Bankruptcy had jurisdiction, will in a subsequent proceeding in bankruptcy,[65] or a plenary suit,[66] be conclusive evidence of the respondent's liability. An order denying a summary application is not *res adjudicata* against a plenary suit.[67]

59 Samel v. Dodd, C. C. A., 142 Fed. 68, 16 Am. B. R. 163. Miller v. Carlton, C. C. A., 194 Fed. 1022.

60 Samel v. Dodd, C. C. A., 142 Fed. 68, 16 Am. B. R. 163; *Re* Petteiger, 181 Fed. 640; *Re* Iron Clad Mfg. Co., 193 Fed. 781. The referee has no power to make the commitment. *Re* Haring, 193 Fed. 168. See § 638, *infra*.

61 *Re* Stadrahn, C. C. A., Second Ct., 174 Fed. 330; *Re* Myerson, 253 Fed. 510. But see *Re* Elias, 240 Fed. 448.

62 *Re* Marks, (E. D. Pa.) 176 Fed. 1018; *Re* Richards, (W. D. Ark.) 183 Fed. 501; *Re* Frankel, (S. D. N. Y.) 184 Fed. 539. *Contra, Re* Reynolds, (M. D. Ala.) 190 Fed. 967; *Re* Haring, 193 Fed. 168. Upon such an application the court has power to find specifically that the bankrupts are then able to deliver the assets which they are ordered to turn over to the trustee. *Re* Jacobs, 235 Fed. 706. *Contra* Schmid v. Rosenthal, C. C. A., 230 Fed. 818; *contra Re* Ironclad Mfg. Co., C. C. A., 201 Fed. 66; Frederick v. Silverman, 250 Fed. 75. As to the approval by the referee of a compromise, see *Re* Goldman, 241 Fed. 385.

63 *Re* Mize, 173 Fed. 945; *Re* Marks, 176 Fed. 1018; *Re* Richards, 183 Fed. 501; *Re* Reynolds, 190 Fed. 967; *Re* Haring, 193 Fed. 168; *Re* Myerson, 253 Fed. 510.

64 Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. 15; affirming 130 Fed. 328; *Re* Schlesinger, C. C. A., 97 Fed. 930, 4 Am. B. R. 361; *Re* Rosser, C. C. A., 101 Fed. 562, 4 Am. B. R. 153, 157; Samel v. Dodd, C. C. A., 142 Fed. 68, 16 Am. B. R. 163; Moody v. Cole, 148 Fed. 295.

65 *Re* Taylor, 114 Fed. 607, 7 Am. B. R. 410. Criticized in Remington on Bankruptcy, § 1841.

66 *Re* Lemmon & Gale Co., C. C. A., 112 Fed. 296; Henderson v. Denious, C. C. A., 186 Fed. 100. See *Re* Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046.

67 Murray v. Joseph, 146 Fed. 260.

§ 636. Dismissal of petitions. The act of 1910, provides: "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."[1]

§ 636. [1]36 St. at L. 838, 841. *Re* J. W. Lavery & Son, 235 Fed. 910. It has been held that the statute does not apply to the dismissal of a voluntary petition on the court's own motion because of the failure of the bankrupt to furnish the requisite indemnity for the expense of publishing or mailing notices to creditors; *Re* Crisp, 239 Fed. 419; that where counsel for the petitioner appear before the court or the referee upon the trial, his failure to offer evidence does not constitute want of prosecution or consent to a dismissal, but if it seems that such conduct was pursuant to an agreement with the bankrupt the Court or referee should investigate the question before making its decision; *Re* Chalfen, 223 Fed. 379. An order, without notice to the creditors, directing that on payment into court of a sum to be used in payment of the claims which had been then proved together with the costs of the proceedings, should be dismissed; was reversed. Luxury Fruit Co. v. Harris, C. C. A., 217 Fed. 740. It was held: that the mere fact that a corporation adjudged a bankrupt might pay its creditors in full, was no ground for a dismissal of the proceedings, although a creditor had attempted to use the bankruptcy court in an improper way; *Re* Jamaica Slate Roofing & Supply Co., 197 Fed. 240. Upon such an application creditors may intervene to oppose the dismissal and continue the proceedings although they are barred by *laches* from beginning a new proceeding in bankruptcy. *Re* Bolognesi, 223 Fed. 771. But see *supra*, § 616. Such intervenors or those of the original petitioners who have not withdrawn may continue the proceedings although they are less than the number required for the filing of a petition. *Re* San Jose Baking Co., 323 Fed. 200; but see *Re* Sig. H. Rosenblatt & Co., C. C. A., 193 Fed. 638. Where all but one of the creditors, who exceeded twelve in number, consented to a dismissal, a motion by the bankrupt therefor was granted; *Re* Sig. H. Rosenblatt & Co., C. C. A., 193 Fed. 638.

Before this enactment, it had been held that a petition in involuntary bankruptcy might be dismissed for want of prosecution when called for trial; *Re* Levi & Klauber, C. C. A., 14 Fed. 962. Notice to the creditors who had not joined in the petition was not

This rule does not apply to a dismissal because the petition is insufficient,[2] or after a trial when the issues raised by the petition and answer have not been sustained by the petitioners.[3] A motion to dismiss is the proper remedy to test the sufficiency of the petition.[4] Upon such a motion the facts alleged in the petition will be presumed to be true.[5] Where a proceeding of voluntary bankruptcy was begun in order to obtain a discharge from a debt which could not be discharged by bankruptcy, it was held that the court might dismiss the proceeding instead of denying a discharge.[6] It has been held: that a proceeding for voluntary bankruptcy cannot after adjudication be dismissed at the bankrupt's motion on the consent of all the creditors,[7] that it is improper practice to include in the order of dismissal a reservation to other creditors of the right to intervene and have the matter reopened;[8] or to set aside an order of dismissal made pursuant to an agreement with the creditors for a settlement because the agreement was not made or performed by the bankrupt in good faith,[9] or after the dismissal to determine a controversy between a creditor and the alleged bankrupt.[10] A judgment of dismissal is an adjudication binding upon the petitioners or intervening creditors so far as concerns the

required; it was then further held that a petition of voluntary bankruptcy may then be withdrawn at any time before a creditor had proved a claim; *Re* Hebbart, 104 Fed. 322; Moulton v. Coburn, C. C. A., 131 Fed. 201; provided all costs and fees of officers were paid; *Re* Salaberry, 107 Fed. 95. That permission to withdraw was not void for failure to give notice to the other creditors; *Re* Jemison Mercantile Co., C. C. A., 112 Fed. 966, 968, 972; but that it was error to grant such an application when other creditors then appeared and opposed the same; *Re* Plymouth Cordage Co., C. C. A., 135 Fed. 1000, 1007.

2 *Re* Mason-Seaman Transp. Co., 235 Fed. 974.

3 Lackawanna Leather Co. v. La Porte Carriage Co., C. C. A., 211 Fed. 318.

4 *Re* Mason-Seaman Transp. Co., 235 Fed. 974.

5 Graham Mfg. Co. v. Davy-Pochahontas Coal Co., C. C. A., 238 Fed. 488.

6 *Re* Shepardson, 220 Fed. 186; *Re* Nash, 249 Fed. 375.

7 *Re* M'Kee, 214 Fed. 885.

8 Trammell v. Yarbrough, C. C. A., 254 Fed. 585; holding that such creditors must begin a new proceeding subject to the statutory limitation as to time.

9 *Re* Kaufman, 253 Fed. 301.

10 *Re* Sig. H. Rosenblatt & Co. C. C. A., 193 Fed. 638.

matters then decided,[11] but a voluntary dismissal has no binding effect in any other proceeding.[12]

§ 637. Trials, and adjudications of bankruptcy. "If the bankrupt, or any of his creditors, shall appear within the time limited and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition."[1] "If, on the last day

[11] *Re* Culgin-Pace Contracting Co., 224 Fed. 245.

[12] *Re* Bean, C. C. A., 30 Fed. 405.

§ 637. [1] 30 St. at L. 544, 551, § 18. The issues cannot, against objection, be referred for trial. *Re* King, C. C. A., 179 Fed. 694. When the facts are complicated, they may be referred to the referee to take testimony and report his opinion upon the same. They may be referred by consent, and in that case the court has no power to set aside the report except in case of misconduct by the referee. *Re* Senoia Dock Mills, 193 Fed. 711. General Order VII: "Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days, within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be cancelled or vacated." *Re* McCracken & McLeod, 129 Fed. 621. The adjudication should not be delayed in order to afford the creditors an opportunity for a reorganization. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 309. "VI. Petitions in Different Districts. In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that

within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition."[2] "If the judge is absent from the district or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee."[3] "Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition.[4] If the judge is absent from the district or the division of the district in which the petition is filed, at the time of the

first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court." It has been held that where subsequent to the filing of a petition for involuntary bankruptcy a petition for voluntary bankruptcy of the same person is filed in another district where he is domiciled, an adjudication in the latter proceeding is proper. *Re* R. H. Pennington & Co., 228 Fed. 388; *Re* Vanoscope Co., C. C. A., 233 Fed. 53. But that where in a similar case the voluntary proceeding was not instituted in the district of the domicile the voluntary adjudication should be disregarded and an adjudication of involuntary bankruptcy made in the court where the bankrupt was domiciled and where the proceedings were first instituted. Continental Coal Corp. v. Roszelle Bros., C. C. A., 242 Fed. 243.

[2] 30 St. at L. 544, 551, § 18.

[3] Ibid.

[4] Ibid. The adjudication of voluntary bankruptcy may be made immediately upon the filing of the petition. *Re* Southern Arizona Smelting Co., C. C. A., 231 Fed. 87. The solvency or insolvency of a corporation petitioner in voluntary bankruptcy has been said to be immaterial. *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155; reversed on another point by C. C. A., 244 Fed. 719; *Re* United Grocery Co., 239 Fed. 1016.

filing, the clerk shall forthwith refer the case to the referee."[5] "A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived. If a jury is not in attendance upon the court, one may be especially summoned for the trial, or the case may be postponed, or * * * it may be certified for trial to the Circuit Court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such Circuit Court has or is to have a jury first in attendance. The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force, or such as may be hereafter enacted in relation to trials by jury."[6] When there was not jurisdictional defect upon the face of the record, it was held that a creditor could not oppose a voluntary petition.[7] Intervening creditors who contest allegations in the petition are not entitled to a trial by jury.[8] A creditor by filing his claim in bankruptcy acqui-

[5] 30 St. at L. 544, 551, § 18.

[6] 30 St. at L. 544, 551, § 19. See Carpenter v. Cudd, C. C. A., 174 Fed. 603. Where no demand is made nor answer filed until after the return day of the subpœna the right is waived. Bray v. Cobb, 91 Fed. 102; *Re* Neasmith, C. C. A., 147 Fed. 160. A voluntary appearance and answer admitting bankruptcy, when made by the respondent, is a waiver of process and authorizes an immediate adjudication. *Re* Western Inv. Co., 170 Fed. 677.

[7] *Re* R. H. Pennington & Co., 228 Fed. 388; *Re* Herzikopf, C. C. A., 121 Fed. 544. Where the bankrupt admitted its inability to pay its debts and its willingness to be adjudged a bankrupt upon that ground, it was held that creditors could not object to the adjudication. *Re* Northampton Portland Cement Co., 179 Fed. 726.

[8] *Re* Herzikopf, C. C. A., 121 Fed. 544. Where the opposing creditor lived more than one hundred miles from the place of trial it was held to be improper to impose as a condition for permission to him to defend that he should there attend for examination without payment of his expenses. Abbott v. Wauchula Mfg. & Timber Co., 229 Fed. 677. See Steiner, Lobman & Frank v. T. S. Faulk & Co., C. C. A., 222 Fed. 61.

esces in the adjudication.[9] It has been held that claimants whose claims are not provable have no standing to contest the adjudication,[10] but the court will consider any objection to the jurisdiction which they may raise.[11] Receivers appointed by another court and in possession of property can contest the proceedings.[12] Stockholders cannot except under circumstances that would justify their intervention in a suit in equity.[13] The only issues on which a person against whom an involuntary petition in bankruptcy has been filed is entitled of right to a jury trial are with respect to his insolvency and the acts of bankruptcy with which he is charged,[14] including the questions, whether he has made an assignment for the benefit of his creditors,[15] and in the case of a corporation whether a receiver has been appointed because of its insolvency.[16] The question, who are the members of a copartnership is involved in that as to the firm's insolvency.[17] If the question, whether an alleged bankrupt is a member of a bankrupt firm, affects his solvency, this must, if such a trial is duly demanded, be submitted to a jury; otherwise not.[18] He is not entitled to a trial by jury upon the issue whether the petitioners are in fact creditors, so as to be

9 *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 284.

10 *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 284.

11 Ibid.

12 *Re* Hudson River El. Power Co., 173 Fed. 934.

13 *Re* Eureka Anthracite Coal Co., 197 Fed. 216. See §§ 238c, 630, 632. Where it was shown that the object of the proceedings was to avoid the effect of a judgment obtained by stockholders against the corporation and directors for the appointment of a receiver of the former's property and for an accounting by the latter; the stockholders were allowed to intervene and oppose the adjudication. Zeitinger v. Hargadine-McKittrick Dry Goods Co., C. C. A., 244 Fed. 719, reversing 239 Fed. 155. *Contra Re* United Grocery Co., 239 Fed. 1016.

14 Morss v. Franklin Coal Co., 125 Fed. 998. It is no defense that after the filing of the petition a suit had been brought by a creditor to foreclose a mortgage upon all the bankrupt's property, the value of which is less than the amount due the mortgagor. Vulcan Sheet Metal Co. v. North Platte Valley Irr. Co., C. C. A., 220 Fed. 106.

15 Day v. Beck & Gregg Hardware Co., C. C. A., 114 Fed. 834.

16 Blue Mountain Iron & Steel Co. v. Portner, C. C. A., 131 Fed. 57.

17 *Re* Neasmith, C. C. A., 147 Fed. 160; Buffalo Milling Co. v. Lewisburg Dairy Co., 159 Fed. 319.

18 *Re* Samuels & Lesser, 207 Fed. 195; *Re* Samuels, C. C. A., 215 Fed. 845.

entitled to maintain the proceedings,[19] nor whether they are estopped from prosecuting the proceedings;[20] nor whether the alleged bankrupt belongs to a class subject to the act.[21] The court has discretionary power to submit to a jury any other question in the case;[22] but the verdict thereupon is like that upon a feigned issue,[23] merely advisory.[24] Where the case is submitted upon the pleadings the allegations of the answer must be taken as true; and if a material allegation in the petition is denied, an adjudication of bankruptcy cannot be made in the absence of evidence in support of the petition.[25] If the bankrupt fails to appear upon the return day, an adjudication may be made in his absence.[26] "Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."[27] The burden of

19 Morss v. Franklin Coal Co., 125 Fed. 998. See *Re* San Miguel Gold Min. Co., 197 Fed. 126.

20 Simonson v. Sinsheimer, C. C. A., 100 Fed. 426.

21 Carpenter v. Cudd, C. C. A., 174 Fed. 603.

22 *Re* Rude, 101 Fed. 805; Oil Well Supply Co. v. Hall, C. C. A., 128 Fed. 875; *Re* Neasmith, C. C. A., 147 Fed. 160.

23 *Supra*, §§ 380-383.

24 Oil Well Supply Co. v. Hall, C. C. A., 128 Fed. 875; *Re* Neasmith, C. C. A., 147 Fed. 160. Where the bankrupt moved for leave to withdraw his demand for a jury and the withdrawal was denied; it was held that the verdict was merely advisory. Morrison v. Rieman, C. C. A., 249 Fed. 97.

25 *Re* Taylor, C. C. A., 102 Fed. 728; *Re* Cohn, 220 Fed. 956.

26 Young & Holland Co. v. Brande Bros., C. C. A., 162 Fed. 663.

27 30 St. at L. 544, 547, § 3. In determining presumptions and the burden of proof, the Federal courts are not bound by the State decisions. Young v. Lowry, C. C. A., 192 Fed. 825. The failure of the person charged with bankruptcy to appear for examination and produce his books creates a presumption of his insolvency when his creditor opposes the adjudication. *Re* Perlhefter, 177 Fed. 299. *Re* Electron Chemical Co., 208 Fed. 954. For a case where his failure to produce the papers relating to certain items on his schedules was held not to justify an instruction to disregard the value thereof when determining the issue of insolvency, see Cummins Grocer Co. v. Talley, C. C. A., 187 Fed. 507.

proof is otherwise upon the creditors to support the allegations of their petition.[28]

[28] *Re* Rome Planing Mill, 96 Fed. 812 (transfer with intent to prefer); *Re* Hudson River El. Power Co., 173 Fed. 934 (class subject to bankruptcy); Albers Commission Co. v. Richter, C. C. A., 251 Fed. 869 (admission in writing of inability to pay debts and of willingness to be adjudged a bankrupt). But where the bankrupt alleged that a note held by a petitioner was void because given in consideration of a gambling transaction, the respondent had the burden of proof to show that fact. Hill v. Levy, 98 Fed. 94. And where the act of bankruptcy charged was fraudulent concealment of property; it was held that the burden of proving solvency was upon the bankrupt. *Re* Burg, 245 Fed. 173. In determining the question of solvency the capital stock of a corporation is not to be treated as a debt. Tepel v. Coleman, 229 Fed. 201; nor is the liability as surety or indorser of the obligation of a solvent principal. *Re* Bowers, 215 Fed. 617. Property which the alleged bankrupt has concealed cannot be included in his assets when his solvency is determined. *Re* Burg, 245 Fed. 173. The accounts due the bankrupt cannot be considered as assets, unless they are such as would be available to meet his liabilities within a reasonable time. Ten months was held to be such a reasonable time. Louisiana Nat. Life Assur. Soc. v. Segen, 196 Fed. 903. Where, although the books showed an excess of assets over liabilities, the president and sole stockholder of the bankrupt testified to errors therein, which, if corrected, would make them show an excess of liabilities, the adjudication was affirmed. *Re* Iron Clad Mfg. Co., C. C. A., 197 Fed. 280. Upon writ of error in the same case, the Circuit Court of Appeals considered the schedules filed by the bankrupt after the adjudication. A letter by the respondent stating his inability to pay his debts and calling a meeting of his creditors for the purpose of compromising his indebtedness is *prima facie* evidence of his insolvency. *Re* Lange, 97 Fed. 197. Voluntary bankruptcy creates no presumption of previous insolvency. *Re* Chappell, 113 Fed. 545. It was held to be no evidence of insolvency that a corporation made an arrangement with the bank to overdraw its account. McDonald v. Clearwater Shortline Ry. Co., 164 Fed. 1007. A judgment against the bankrupt, entered more than four months before the commission of the act of bankruptcy, is admissible upon the proof of insolvency. *Re* McGowan, 134 Fed. 498, which considers other questions concerning the admissibility of evidence upon this issue. It has been said: that to justify an adjudication, that an alleged bankrupt is a member of a bankrupt firm, it is insufficient to prove that he has held himself out to various creditors as a partner. *Re* Kaplan, C. C. A., 234 Fed. 866. Where there was no evidence upon the question of solvency it was held that the referee was justified in finding that the alleged bankrupts were not insolvent and need not limit his report to the statement

The trial is conducted like any ordinary trial at common law.[29] The unsuccessful party is entitled to a bill of exceptions.[30] The review, except where the verdict is merely advisory, must be by writ of error and not by appeal.[31] Where there is a right to trial by jury, the verdict cannot be set aside in a case that would not justify a new trial at common law.[32] When both a voluntary and an involuntary petition affecting the same alleged bankrupt are filed the adjudication should ordinarily be made in the voluntary one with proper protection of the rights of those who have filed the other.[33] Where a petition for involuntary bankruptcy has been previously filed, notice should be given to the former petitioners before an adjudication upon the voluntary petition.[34] Notice to creditors of the filing of an involuntary petition is not required.[35] Laches may debar them from attacking the adjudication, at least upon grounds that are not jurisdictional.[36] An adjudication of bankruptcy does not dissolve a corporation or terminate its existence.[37]

§ 637a. Setting aside an adjudication in bankruptcy. Where the jurisdiction of the court appears upon the record the validity of the adjudication cannot be collaterally attacked by a bankrupt or by a creditor [1] or by a stranger to the proceeding.[2] The

that there was no evidence, that they were insolvent.

29 Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. 133; Duncan v. Landis, C. C. A., 106 Fed. 839; Bean-Chamberlain v. Standard Spoke & Nipple Co., 131 Fed. 215, 65 C. C. A. 201, 12 Am. B. R. ——, *supra*, § 473. Where, through oversight, the question of insolvency was not submitted to the jury before their verdict was rendered; it was held that the court had power, before they had been discharged, to require them to find a supplemental verdict on that issue. Bodders Clothing Co. v. Burnham Munger Coat D. G. Co., C. C. A., 228 Fed. 470.

30 Duncan v. Landis, C. C. A., 106 Fed. 839.

31 *Re* Neasmith, C. C. A., 147 Fed. 160.

32 Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200; *supra*, § 530.

33 *Re* New Chattanooga Hardware Co., 190 Fed. 241. See *Re* Lachenmaier, C. C. A., 203 Fed. 32.

34 *Re* Dwyer, 112 Fed. 777.

35 *Re* Billing, 145 Fed. 395.

36 *Re* Billing, 145 Fed. 395 (two years); *Re* First Nat. Bank of Belle Fourche, C. C. A., 152 Fed. 64; *Re* Marion Contract & Construction Co., 166 Fed. 618.

37 *Re* Russell Wheel & Foundry Co., 222 Fed. 569; Hunter Walton & Co. v. J. G. Sherry Co., C. C. A., 247 Fed. 458.

§ 637a. 1 *Re* Marion Contract & Construction Co., 166 Fed. 618; *Re*

bankrupt [3] or a receiver appointed by another court who is in possession of the bankrupt's property [4] or a creditor whose claim is provable [5] or a purchaser whose title is affected by the bankruptcy proceedings [6] may move to set aside the adjudication; but a creditor whose claim has been filed or proved cannot.[7] A creditor whose claim is not provable has no legal standing to move to vacate the adjudication,[8] but he may appear in the court of original jurisdiction [9] or, if his application is there denied, by petition for revision in the court of review as a *amicus curiæ*

Dempster, C. C. A., 172 Fed. 353; Finn v. Carolina Portland Cement Co., C. C. A., 232 Fed. 815; Sabin v. Larkin-Green Logging Co., 218 Fed. 984; *Re* Gibney Tire & Rubber Co., 241 Fed. 879; *Re* Greer, 248 Fed. 131. The following are such jurisdictional defects: Where the petition is filed by only two creditors, the law requiring three, *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 285; or fails to state that one of the specified acts of bankruptcy was committed, *Re* D. F. Herlehy Co., 247 Fed. 369; or shows that the alleged bankrupt was a railroad company or other corporation clearly exempted by the statute from bankruptcy proceedings, Re N. Y. Tunnel Co., C. C. A., 166 Fed. 285; but not a corporation whose liability to bankruptcy is doubtful. Ibid. An inadequate averment in the petition as to the act of bankruptcy charged. Larkin-Green Logging Co. v. Sabin, 222 Fed. 814; International Silver Co. v. New York Jewelry Co., C. C. A., 233 Fed. 945; or as to the principal business in which the corporation is engaged, *Re* Marion Contract and Construction Co., 166 Fed. 618; and may be cured by amendment. Where the bankrupt fails to appear upon the return day the creditors or receivers previously appointed by a State court may move to vacate the adjudication if made without notice to them and they have a defense thereto. *Re* Hudson River Electric Co., 167 Fed. 986; *Re* New England Breeders' Club, C. C. A., 169 Fed. 586. It has been held that where the adjudication is made before the time for the creditors to answer has expired; this is an irregularity which does not make the adjudication subject to collateral attack; *Re* Sage, 224 Fed. 525.

2 Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 427.

3 *Re* Columbia Real Estate Co., 101 Fed. 965; Finn v. Carolina Portland Cement Co., 232 Fed. 815.

4 *Re* Hudson River El. Power Co., 173 Fed. 934; *Re* San Antonio Land & Irrigation Co., 228 Fed. 984.

5 Altonwood Park Co. v. Gwynne, C. C. A., 160 Fed. 448; *Re* Antonio Land & Irrigation Co., 228 Fed. 984.

6 Abbott v. Wauchula Mfg. & Timber Co., C. C. A., 240 Fed. 938.

7 *Re* Mason, 99 Fed. 256; *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 284; *Re* Worsham, C. C. A., 142 Fed. 121.

8 *Re* Columbia Real Estate Co., 101 Fed. 965; *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 284.

9 See *Re* Columbia Real Estate Co., 101 Fed. 965.

and point out a defect in the jurisdiction appearing on the face of the record which will then be considered.[10] Stockholders cannot move to set aside an adjudication in bankruptcy of their corporation unless they show such a case as would authorize them to intervene and set up a defense in a suit against it.[11] A motion to set aside the adjudication may be denied for laches.[12] It has been said, that a creditor cannot complain of an adjudication of voluntary bankruptcy of a corporation upon the ground that the petition was filed without authority;[13] but stockholders were allowed to intervene and set aside the adjudication because the object of the proceedings was to avoid the effect of a judgment obtained by them against the corporation and directors for the appointment of a receiver of the former's property and for an accounting by the latter.[14] A creditor cannot attack a voluntary adjudication because of the solvency of the bankrupt,[15] nor an involuntary adjudication, made upon the ground that the bankrupt has admitted in writing inability to pay debts and willingness to be adjudged a bankrupt, because the written admission was not made at the time the petition was filed when it was contained in an answer by the bankrupt.[16] A creditor may set aside the adjudication when it was made before his time to answer had expired,[17] but a purchaser of the bankrupt's

10 *Re* N. Y. Tunnel Co., C. C. A., 166 Fed. 284.

11 *Re* Eureka Anthracite Coal Co., 197 Fed. 216. An application by stockholders to set aside an adjudication of voluntary bankruptcy upon the ground that the proceedings were fraudulently instituted by the directors to avoid liability in a stockholders' suit was denied. *Re* United Grocery Co., 239 Fed. 1016.

12 *Re* Marion Contract & Construction Co., 166 Fed. 618 (3 months); *Re* Mitchell & Co., 211 Fed. 778; *Re* Greer, 248 Fed. 131. A delay of six weeks after notice of an adjudication made more than four months before the application was held not to be laches. Altonwood Park Co. v. Gwynne, C. C. A., 160 Fed. 448. See Finn v. Carolina Portland Cement Co., C. C. A., 232 Fed. 815 (a delay of twenty-nine days when no subsequent proceedings had been taken). *Supra*, § 630.

13 *Re* Gammaccvi Tunnel Co., C. C. A., 201 Fed. 316.

14 Zeitinger v. Hargadine-M'Kittrick Dry Goods Co., C. C. A., 244 Fed. 719, reversing 239 Fed. 155. *Contra*, *Re* United Grocery Co., 239 Fed. 1016. See *Re* S. & S. Mfg. & Sales Co., 246 Fed. 1005.

15 *Re* Southern Arizona Smelting Co., C. C. A., 231 Fed. 87.

16 *Re* Veler, C. C. A., 249 Fed. 633.

17 *Re* Gibney Tire & Rubber Co., 241 Fed. 879.

property at a sale under execution cannot where the bankrupt has consented to the involuntary adjudication and there are no other equities.[18]

A motion upon notice for the vacation of the adjudication upon a voluntary or involuntary petition is the proper procedure to raise the propriety of the adjudication.[19] Where the allegations in the petition are disputed, the issue cannot be considered upon a motion to open the adjudication, but leave must be obtained to permit that defense to be made.[20] Where the trustee and the bankrupt had answered a petition to set aside an adjudication, the court struck out objections by a creditor thereto.[21] The motion papers should show that the moving party, if not the bankrupt or a creditor,[22] is aggrieved by the adjudication.[23] At the hearing upon a petition by the purchaser, the records in the bankruptcy proceeding which show a confession by the bankrupt of insolvency and of the act of bankruptcy are admissible.[24] In a proper case, the court when denying a motion to set aside the order of adjudication may amend this so as to preserve the rights of the objectors.[25] An order, that if the bankrupt shall within five days appear and plead to the petition, the order of adjudication shall be set aside, otherwise that his motion will be denied and the other stand as entered, is not final nor appealable.[26] No subsequent order is required to give effect to the adjudication in case of failure by him to appear.[27]

18 Abbott v. Wauchula Mfg. & Timber Co., C. C. A., 240 Fed. 938.

19 *Re* Nash, 249 Fed. 375; *Re* San Antonio Land & Irrigation Co. Ltd., 228 Fed. 984.

20 *Re* Order of Sparta, 238 Fed. 437.

21 Abbott v. Manchester Mfg. & Timber Co., C. C. A., 240 Fed. 938.

22 Where the adjudication was prematurely entered, the creditor need not upon his application show facts which constitute a sufficient answer to the petition of involuntary bankruptcy. *Re* Gibney Tire & Rubber Co., 241 Fed. 879.

23 Abbott v. Manchester Mfg. & Timber Co., C. C. A., 240 Fed. 938. As to the effect of a previous decision that the petitioner should not be compelled to submit to an examination, see ibid.

24 Ibid.

25 International Silver Co. v. N. Y. Jewelry Co., C. C. A., 233 Fed. 945.

26 *Re* Sutter Hotel Co., C. C. A., 241 Fed. 367.

27 Ibid.

§ 638. References. Referees are appointed by the Courts of Bankruptcy within the territorial limits of their jurisdiction, each for a term of two years, subject to removal because their services are not needed, or for other cause.[1] "Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy."[2] "Referees shall take the same oath of office as that prescribed for Judges of the United States Courts."[3] "Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties."[4]

§ 638. [1] 30 St. at L. 544, 555, § 34.

[2] Ibid., § 43. See Bray v. Cobb, 91 Fed. 102. The limits of the districts of the referees are designated by the courts that appoint them, which have power to change the same from time to time, so that each county, where the services of a referee are needed, may constitute at least one district. 30 St. at L. 544, 555, § 34. Each court of bankruptcy has discretion as to the number of referees which it shall appoint. 30 St. at L. 544, 555, § 37. When there are two District Judges in the same district, it seems that either, when holding a Court of Bankruptcy, may appoint as many referees as he deems proper. Birch v. Steele, C. C. A., 165 Fed. 577; affirming *Ex parte* Steele, 156 Fed. 854; s. c., 161 Fed. 886; overruling *Ex parte* Steele, 162 Fed. 694. "Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the Courts of Bankruptcy or Circuit Courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed." 30 St. at L. 544, 555, § 35.

[3] *Ibid*, § 36.

[4] *Ibid*, § 50. An order allowing fees and compensation to a referee cannot be collaterally attacked in an action by the United States

"*a*. After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues;[5] or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district. *b*. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another."[6] It has been said, that the referee "is, in fact, the judge of the Bankrupt Court."[7] Their jurisdiction is as follows: "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petition;[8] (2) exercise the powers vested

upon his bond for the benefit of the persons interested in the estate. U. S. v. Brainerd, C. C. A., 250 Fed. 1011. It has been said that the bond gives no right of action to the United States but is merely collateral security for performance by the referee of the duties imposed by the bankruptcy law which if so can only be enforced by an order in a bankruptcy proceeding. Ibid.

5 The powers of a special referee previously appointed are superseded by an adjudication and an order of general reference. *Re* Ruos, 164 Fed. 749. But see U. S. v. Liberman, 176 Fed. 161, *infra*, § 639.

6 30 St. at L. 544, § 22. It has been held that this authorizes the judge to refer the proceedings to any referee within the territorial jurisdiction. *Re* Western Inv. Co., 170 Fed. 677. Where members of a bankrupt firm resided in different counties it was held that the proceeding might be referred to a referee in either county. *Re* Watkinson, C. C. A., 205 Fed. 145.

7 Jackson J., *Re* Tebo, 101 Fed. 419, 427.

8 The clerk cannot refer a petition in involuntary bankruptcy to a referee for adjudication where an issue is made upon the allegations in the petition by the bankrupt or any other creditor. *Re* L. Humbert Co., 100 Fed. 349. Where, after the reference of a petition by part of a firm, the other partners appeared and contested the adjudication, it was held that the referee must certify the issue to the judge. *Re* Murray, 96 Fed. 600. A deputy clerk has no power to refer a petition in bankruptcy. Bray v. Cobb, 91 Fed. 102. But an order of reference made by the judge, and attested by the deputy, is valid. Bray v. Cobb, 91 Fed. 102. The clerk cannot refer a petition, whether voluntary or involuntary, unless the

in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them,[9] except the power of commitment;[10] (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act;[11] (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings."[12]

The duties of referees are thus prescribed: "a. Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended; (3) furnish such information con-

judge is absent from the division of the district where the proceeding is pending at the time when the reference may be made. *Re* L. Humbert Co., 100 Fed. 439. Where an answer to an involuntary petition in bankruptcy is filed, the judge may refer the proceeding to a special commissioner to take the testimony upon the issues and to report the same with opinion, where no jury trial has been demanded; although the judge has determined the issues, upon a former petition by other creditors, in favor of the alleged bankrupt. *Re* Lacov, C. C. A., 134 Fed. 237.

9 The order for the production of books of account need not specify their importance. *Re* Soloway & Katz, 195 Fed. 103.

10 *Re* Magen, 179 Fed. 572; *Re* Epstein, 219 Fed. 635.

11 In case of the disability or absence of the judge, upon the certificate of the clerk to that effect a referee may, before adjudication, appoint a receiver. *Re* Kelly Dry Goods Co., 102 Fed. 747; *supra*, § 634; and order a receiver to sell assets, *Re* Kelly Dry Goods Co., 102 Fed. 747.

12 30 St. at L. 544, 555 § 10.

cerning the estates in process of administration before them as may be requested by the parties in interest;[13] (4) give notices to creditors as herein provided;"[14] but it has been held that the bankrupt cannot complain of an omission to serve a few creditors with notice of the first meeting;[15] "(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;[16] (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken, or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities as towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practise as attorneys and counselors at law in any bankruptcy proceedings;[17] or (3) purchase, directly or indirectly, any property of an es-

13 A creditor of a bankrupt is a "party in interest" although he has not formally proved his claim. *Re* Samuelson, 174 Fed. 911.

14 30 St. at L. 544, 556, § 39. The referee was allowed his fees for sending out notices of a final meeting of creditors after a composition had been accepted by them and affirmed by the court. *Re* McNeil Corp., 249 Fed. 765.

15 *Re* Schiller, 96 Fed. 400.

16 The referee has no power to correct or amend the record of a State court. *Re* Dubosky, 232 Fed. 380.

17 Whether it is proper for their partners to do so has not been decided. It was raised by the author in *re* Albey Press, *supra;* but the attorney withdrew from the case.

tate in bankruptcy."[18] It has been held that a referee who is a debtor to the bankrupt is not disqualified: but that the court upon being apprised of that fact may revoke the order of reference and send the case to another referee.[19] Each referee must account to the judge under oath with vouchers on the first Tuesday of each month.[20] "a. The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in Circuit Courts of the United States. b. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case. c. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court."[21] The General Orders provide as follows: "1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."[22] After the general order of reference the referee may grant injunctions and restraining orders;[23] but he is with-

18 30 St. L. 544, 556, § 39.

19 Bray v. Cobb, 91 Fed. 102.

20 General Order XXVI.

21 30 St. at L. 544, 556, 557, § 42. The record should be so kept that a full and fair review of the proceedings can be had. *Re* Romine, 138 Fed. 837.

22 General Order XII.

23 *Re* Steuer, 104 Fed. 976, 980; *Re* Martin, 105 Fed. 753; *Re* Adams, 134 Fed. 142; *supra*, § 633. But not to restrain the trustee from taking proceedings for the bankrupt's commitment. *Re* Epstein, 219 Fed. 635. It has been held that under the equity rules no such power can be conferred upon a special master. *Re* Gordon, 250 Fed. 798.

out power to enjoin the proceedings of a court or officer;[24] he may marshal liens upon property in the custody of the court and determine their validity and priority;[25] he may order the sale of assets,[26] free of liens,[27] and appoint appraisers,[28] but not before the adjudication in bankruptcy.[29] He may determine the priority of claims and direct the payment of such as have a preference.[30] He may limit the time within which petitions for reclamations can be presented.[31] He may make summary orders for the surrender of money or property held by the bankrupt,[32] or by the bankrupt's agent, or other persons not claiming adverse interests therein.[33] And may approve a compromise between the trustee and the bankrupt whereby the trustee accepts a lesser amount than that which the bankrupt has been ordered to pay.[34] He may disapprove of a trustee elected by the creditors.[35] He has no jurisdiction of a plenary suit to avoid a transfer in fraud of creditors;[36] nor of a suit to enforce specific performance of a contract between the bankrupt and a stranger to the proceedings.[37] He may call meetings of creditors to consider matters in which the estate is interested, amongst others whether the trustee should be authorized to file objections to the bankrupt's discharge.[38] He may conduct the examination

24 General Order XII. *Re* Siebert, 133 Fed. 781; *supra*, § 633.

25 *Re* Kellogg, C. C. A., 121 Fed. 333; *Re* Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. B. R. 608.

26 *Re* Sanborn, 96 Fed. 551; *Re* Styer, 98 Fed. 290; *Re* Matthews, 109 Fed. 603.

27 *Re* Pittelkow, 93 Fed. 901; *Re* Sanborn, 96 Fed. 551; *Re* Styer, 98 Fed. 220; *Re* Matthews, 109 Fed. 603; *Re* Kellogg, 113 Fed. 120, 122; *Re* Waterloo Organ Co., 118 Fed. 904; *Re* Granite City Bank, C. C. A., 137 Fed. 818; *infra*, § 641a.

28 *Re* Styer, 98 Fed. 290; *Re* Fisher & Co., 135 Fed. 223.

29 *Re* Styer, 98 Fed. 290.

30 *Re* Tilden, 91 Fed. 500.

31 *Re* Gay & Strugis, 224 Fed. 177.

32 *Re* Oliver, 96 Fed. 85; *Re* Rosser, C. C. A., 101 Fed. 562; *Re* Miller, 105 Fed. 57; *supra*, § 635.

After the general order of reference it is the proper practice to present to the referee and not to the court, a petition for such summary order. *Re* Nankin, C. C. A., 246 Fed. 811.

33 Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269; *supra*, § 635.

34 *Re* Goldman, 241 Fed. 385.

35 General Order XIII. *Re* McGill, C. C. A., 106 Fed. 57; *infra*, § 640.

36 Weidhorn v. Levy, 253 U. S. 268.

37 *Re* Ballou, 215 Fed. 810.

38 *Re* Whitney, 250 Fed. 1005.

of the bankrupt,[39] and that of any other person, concerning the acts, conduct, or property of the bankrupt, when ordered by the court.[40]

"2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform. 3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."[41] "All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court."[42] Special questions arising in bankruptcy proceedings are often referred to the official referees or others for reports as special masters.[43] It is the practice in

[39] 30 St. at L. 544, 559, 560, § 55b.

[40] 30 St. at L. 544, 552, § 21.

The referee may be directed to report: Should there be a call upon the shareholders of unpaid stock, and, if so, to what amount? *Re* Munger Vehicle Tire Co., 168 Fed. 910.

To authorize an assessment upon stockholders of a bankrupt corporation, the referee amongst other things must find that the assets of the company are insufficient to pay its debts; that the stock, or some of it, was not paid for in full, and that the holders thereof had, or are chargeable with, knowledge of that fact in the acquirement of the stock; and the pro rate upon their shares that the holders of such stock must pay up to the par value thereof, in order to liquidate the indebtedness of the company and pay the expenses of the proceeding. When such findings have been made, the referee may order an assessment upon the holders of such unpaid stock for any amount of the unpaid portion found to be necessary, and for such amount only. *Re* Canister Co., 248 Fed. 587, aff'd, C. C. A., 252 Fed. 70.

[41] General Order XII.

[42] General Order XVII. General Order XII. It seems that the referee cannot surcharge the account on another ground as to which there was no exception or hearing. *Re* Schoenfeld, C. C. A., 183 Fed. 219, a receiver's accounts. But it has been said that it is his duty to examine the accounts although no exceptions are filed. *Re* Fullick, 201 Fed. 463.

[43] *Re* Herskovitz, 152 Fed. 316. Chapman v. Hunt, 248 Fed. 160 (a proceeding to set aside an alleged preference); *Re* C. W. Bartleson Co., 243 Fed. 1001 (the issues

the Second Circuit to refer petitions for the reclamation of property,[44] as well as other matters,[45] to a special master, who is often also a referee in bankruptcy, with authority to hear and determine the questions thereupon arising. Although there is considerable doubt about the validity of such references, the Circuit Court of Appeals has refused to interfere with the same.[46]

It has been held that the official referee is not disqualified by interest from being appointed special master to take and report testimony with findings of fact and law and his conclusions upon the issues raised upon a petition for involuntary bankruptcy and upon petitions for intervention;[47] nor from presiding at the examination of a person charged with indebtedness to the bankrupt although the discovery of such indebtedness will increase his fees.[48]

"Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk."[49] The practice before referees in bankruptcy and special masters appointed in bankruptcy proceedings, where the bankruptcy statute and rules are silent, conforms in general to the practice before masters in suits in equity.[50] "In all orders made by the referee, it shall

upon a petition for involuntary bankruptcy and petitions of intervention, with instructions to take the testimony and report findings of fact and law). The practice is criticized by Referee Remington in his Bankruptcy, § 517, note 29. It has been held that there can be no reference to a special commissioner to perform the statutory duties of a referee and that if such a reference is made the compensation is limited to that prescribed for official referees by the statute. *Re* Nankin, C. C. A., 246 Fed. 811. An order of reference may be conditioned upon a stipulation by the applicant that the costs and expenses if he fail will be borne by him. *Re* T. A. McIntyre & Co., 221 Fed. 232.

44 *Re* Tracy, C. C. A., 179 Fed. 366.

45 Ibid.

46 Ibid.

47 *Re* C. W. Bartleson Co., 243 Fed. 1001.

48 *Re* Abbey Press, C. C. A., 134 Fed. 51, in which the writer was counsel. In Matter of Higley v. Novark, 145 App. Div. (N. Y.) 7, it was held that an attorney-at-law holding an unsatisfied judgment against a debtor should not be appointed referee to take evidence in supplementary proceedings against the latter by another creditor.

49 General Order, XX.

50 *Re* C. W. Bartleson Co., 243 Fed. 1001; *Re* Association Dairy Co., 251 Fed. 729; *supra*, §§ 384-395. Before the proceedings are

be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.'' [51]

begun a master's notice showing the relief sought must be served upon all the parties interested; *Re* Martin, C. C. A., 210 Fed. 620. *Re* Ballou, 215 Fed. 810; *Re* Atwater, 227 Fed. 511; but subsequent intervenors are not entitled to notice of the hearing, *Re* Smith, 232 Fed. 284. Lienors who are not parties to the proceeding are not bound by any decision therein made. *Re* Collins, 235 Fed. 937. The referee may take the testimony upon several claims in one proceeding provided that his report or certificate separates and distinguishes them from each other. *Re* Aronson, 245 Fed. 207. He is bound by the rules of evidence which prevail at the common law, *Re* Rubin & Lipman, 215 Fed. 699. He cannot without the consent of the parties report upon evidence taken before another master or referee who has died, *Re* Rubin & Lipman, 215 Fed. 669; although when the latter before his death has entered an order but not completed his findings his successor may be ordered by the court to certify the entire proceeding with the testimony taken and exhibits introduced, *Re* Wray, C. C. A., 233 Fed. 418. The referee may refuse to permit the discontinuance by the petitioner of a petition that has been filed with him, *Re* Brown, 228 Fed. 533. Upon a reference to find the facts it is not improper for him to include in the report his conclusions on the facts found, *Re* Baker, 212 Fed. 765. General exceptions to the report of a master in bankruptcy will not be considered. The exceptions must specify the matter to which objection is made and the ground of the objection, *Re* Association Dairy Co. 251 Fed. 749. The referee's office expenses may be charged pro rata against the various estates referred to him, *Re* McNeil Corp., 249 Fed. 765. Where the referee sits as special master his compensation is not regulated by the bankruptcy law but is fixed in accordance with the general rules in equity, *Re* Growe Const. Co., 253 Fed. 981. It is the safer practice to specify the fees in a written stipulation approved by the court before any testimony is taken. But see *supra* §§ 395, 418b. It has been held that after the report is made the court cannot by an order entered *nunc pro tunc* or otherwise increase the compensation beyond that allowed by the rule. Ibid.

[51] General Order XXIII.

The order of the referee where there is a disputed question of fact should be supported by a finding of the ultimate facts; *Re* Canister Co., 248 Fed. 587. It may be sustained although there is no specific finding. Houghton Wool Co. v. Morris, C. C. A., 249 Fed. 434. A description of a finding as a conclusion of law will not affect its binding nature if it is in truth a finding of fact. *Re* Pierce, Butler & Pierce, C. C. A., 246 Fed. 814.

It has been held: that a petition requesting a referee to review an order previously made by him after hearing is in the nature of a review in equity and is governed by the same rules of procedure;[52] that it can only be filed by his permission;[53] and for error in law apparent upon the face of the order, or because of the discovery of new evidence since the hearing;[54] and, in the latter case, that the new evidence must be relevant, material, and such as would have produced a different result, and must have been unknown to the petitioner at the time of the previous hearing, and such as he could not have known by the exercise of reasonable diligence.[55] "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."[56] The referee's certificate should

[52] *Re* McIntire, 142 Fed. 593. See *supra*, §§ 393, 447-450. It has been held that it may be filed within the time limited for the review of his decision. *Re* Brenner, (M. D. Pa., Sept. 13, 1911), 190 Fed. 209. *Contra*, *Re* Greek Mfg. Co., (E. D. Pa.), 164 Fed. 211, holding that the referee has no power to review his own orders on exception to the same.

[53] *Re* McIntire, 142 Fed. 593.

[54] *Re* McIntire, 142 Fed. 593.

[55] *Re* McIntire, 142 Fed. 593.

[56] General Order XXVII. Irwin V. Maple, C. C. A., 252 Fed. 10. Findings of fact made by the referee upon conflicting evidence will ordinarily be affirmed in the District Court; *Re* San Miguel Gold Min. Co., 197 Fed. 126; *Re* Charles Town Light & Power Co., 199 Fed. 846; *Re* Cox, 199 Fed. 952; *Re* Cozatsky, 216 Fed. 920; *Re* Hawks, 204 Fed. 309; *Re* Crocker et ux, 217 Fed. 167; *Re* Hindin, 219 Fed. 605; *Re* Utica Pipe Foundry Co., 221 Fed. 787; Finlayson v. Barrows, C. C. A., 221 Fed. 837; *Re* New York & Philadelphia Package Co., 225 Fed. 219; *Re* Ylia, 233 Fed. 476; *Re* Faekler, 246 Fed. 864; *Re* Amster, 249 Fed. 256; *Re* Nejour, 251 Fed. 677; or the Circuit Court of Appeals; Deupree v. Watson, C. C. A., 216 Fed. 483; Salsburg v. Blackford, 204 Fed. 439; *Re* Pierce, Butler & Pierce Mfg. Co., C. C. A., 246 Fed. 814; *Re* Nankin, C. C. A., 246 Fed. 811. See § 393, *supra*. But the court is not bound by his findings on a question of fact based upon inferences drawn from uncontradicted evidence. Baumhauer v. Austin, C. C. A., 186 Fed. 260. *Re* Elmore Cotton Mills, 217 Fed. 809; *Re* S. & S. Mfg. & Sales Co., 246 Fed. 1005; *Re* Blanchard, 253 Fed. 758.

A finding that there was "a good delivery" under a contract of sale

present specific questions upon which the opinion of the judge is desired.[57] It has been said that a general review of the proceedings before the referee is not permitted.[58] The order, if within the jurisdiction of the referee, can only be reviewed in the manner above specified.[59] But, it has been held that, when

was held to be sufficient upon the issue that the seller had waived its right to return unmerchantable goods. *Re* Nathan, C. C. A., 200 Fed. 379. The court refused to consider the question whether there was sufficient evidence to satisfy the referee that an order should be made directing the production by the bankrupt of missing books of account. *Re* Soloway & Katz, 195 Fed. 103. The certificate should contain a detailed summary of the evidence, not a mere statement of conclusions. *Re* Petersen, 252 Fed. 846. In the absence of a request there can be no objection because the testimony was not re-returned verbatim. Lackawanna Leather Co. v. La Porte Carriage Co., C. C. A., 211 Fed. 318. Where the record showed no request that the master state, in his report, the character of the evidence upon which certain findings were based, or whether his findings were based on evidence received under objection, it was held that his omission of such was no error. *Re* Graves, 182 Fed. 443. Counsel cannot by consent agree upon the effect of the testimony when it is not summarized by the referee. *Re* Petersen, 252 Fed. 846. But see *Re* Williams, 252 Fed. 924. Where there is no summary or report of the evidence, the referee's findings of fact will not be reviewed, unless on the face of his certificate they appear to be erroneous. *Re* Miller, 225 Fed. 331; *Re* Murphy, 225 Fed. 392; *Re* Schultz & Guthrie, 235 Fed. 907. Where a letter which seemed inconsistent with a finding might for anything appearing to contrary have been overcome by other remedies; *Re* Avoca Silk Co., 241 Fed. 607; *Re* J. W. Lavery & Son, 244 Fed. 959; *Re* Golub, 245 Fed. 512.

Where the issues were referred to a special master by consent, it was held that the court had no discretionary power to set aside his report; *Re* Senoia Duck Mills, 193 Fed. 711; and that the findings of fact could not be reviewed. Grant v. Nat. Bank of Aurburn, 232 Fed. 201. See *supra*, § 475.

[57] *Re* T. L. Kelly Dry Goods Co., 102 Fed. 747; *Re* Kurtz, 125 Fed. 992.

[58] Ibid. Rulings upon ordinary matters of practice will not be reviewed. *Re* Graboyes, 228 Fed. 574. Where no party asked that an order be certified to the court for review, it was not reviewed on a report by the referee of his entire proceedings, including such order. *Re* Kimmel, 183 Fed. 665. *Re* Stokes, 185 Fed. 994. *Contra*, *Re* Monongahela Distillery Co., 186 Fed. 220. On a petition to review an order of a referee, the court will not review the order of reference. *Re* Graff, 255 Fed. 239.

[59] *Re* Home Discount Co., 147 Fed. 538. An exception, *Re* Bartman, 242 Fed. 595, or an appeal, *Re* Octave Mining Co., 212 Fed. 457, unaccompanied by a petition

the court reviews an order or report of a referee, it may properly consider any point presented by the record before it, although the same was not discussed by or before the referee.[60] A petition to review an order of the referee may be denied for laches.[61] A motion to set aside an order by a referee for lack of jurisdic-

is insufficient. In the absence of a rule of court upon the subject, no formal exceptions are required. *Re* People's Department Store Co., 159 Fed. 286.

A person who had filed no petition to review was not allowed to intervene under a petition filed by another when his own time to file had expired and the original petitioner wished to dismiss his application, *Re* L. & R. Wister & Co., 237 Fed. 793.

60 *Re* Samuel Wilde's Sons, C. C. A., 144 Fed. 972. *Contra*, *Re* Stucky Trucking & Rigging Co., 240 Fed. 427. A question not involved in the issues made before the referee will rarely, if ever, be considered. *Re* Sam Z. Lorch & Co., 199 Fed. 944. *Contra*, *Re* Kellar, C. C. A., 192 Fed. 830. The court may remand the case to the referee for further hearing upon the facts; Moore v. Crandall, C. C. A., 205 Fed. 689; *Re* J. C. Wilson & Co., 252 Fed. 631; or for additional finding, *Re* Hawley Down Draft Furnace Co., 214 Fed. 500.

61 *Re* Scherr, 138 Fed. 695; Cary v. International Agr. Corp., 234 Fed. 475 (two years). Grant, 143 Fed. 661, a delay of three months. *Re* Verdon Cigar Co., 193 Fed. 813, more than four months, pending an appeal by another party from an order disallowing part of another claim. But the delay of thirty days is not unreasonable in the absence of any rule of court, when no prejudice has resulted from the same. *Re* Foss, 147 Fed. 790. Where, subsequent to the confirmation of an order disallowing claims, the Circuit Court of Appeals in another case so construed the statute as to permit such claims to be proved, the case was sent back to the referee more than five months after such confirmation. *Re* Keyes, 160 Fed. 763. The matter is often regulated by a rule of court. In S. D. N. Y., ten days, unless the time is extended by the referee or the court. S. D. N. Y. B'k'cy. Rule 15. See *Re* Nichols, 166 Fed. 603. In E. D. Pa., ten days. *Re* T. M. Lesher & Son, 176 Fed. 650. *Re* Wister, 232 Fed. 899. In N. D. Ia., 10 days. *Re* Kruse, 234 Fed. 470.

In the Western District of Washington, ten days. *Re* Nippon Trading Co., 182 Fed. 959, where the petition by inadvertence was filed with the clerk, instead of with the referee, and the mistake was corrected after the expiration of the time allowed by the rule for filing the same. In the District of Maryland, 30 days. *Re* Wink, 206 Fed. 348, the time begins to run from the entry of the referee's order if one is made not from the announcement of his decision. *Re* Place, 224 Fed. 778. It has been held that the time can be extended before or after the expiration of the alloted period. *Re* Grant, C. C. A., 238 Fed. 132. See *Re* Libby 253 Fed. 278.

tion may be made at any time.[62] Where the referee tried together three separate claims of which two were disallowed and the third in part allowed, the acceptance of all that was allowed did not deprive the claimant of the right to review the rest of the decision.[63] It has been held that the petitioner has the right to dismiss his petition for review and that when the time fixed by the rule has then expired no person similarly interested has the right to intervene and bring the matter for review before the court.[64] The proceedings for review suspend the operation of the order of the referee.[65]

"a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, that no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the Court of Bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court." [66]

62 *Re* Willis W. Russell Card Co., 174 Fed. 202. *Re* Ballou, 215 Fed. 250.

63 Peck v. Richter, C. C. A., 217 Fed. 880.

64 *Re* Wister, 232 Fed. 899.

65 Brown v. Detroit Tr. Co., C. C. A., 193 Fed. 622.

66 30 St. at L. 544, 556, § 41. *Re* Epstein, 219 Fed. 635. When the contempt consists in disobedience to the order of the referee, it seems that the certificate should contain a summary of the evidence and the finding and order of the referee upon the same. General Or-

§ 638a. Examination of bankrupt. "Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."[1] Creditors must have at least ten days' notice by mail

der XXVII; Craddock-Terry Co. v. Kaufman, 175 Fed. 303; McNeil v. McCormack, C. C. A., 182 Fed. 808. The bankrupts are entitled to notice of the proceeding before the court. *Re* Magen, 179 Fed. 572. *Cf. supra,* § 429; but not of the application to the referee for the certificate, *Re* Magen, 179 Fed. 572. Where the certificate made no specific finding of contemptuous acts, the application was denied. *Re* Iron Clad Mfg. Co., 193 Fed. 781. There will be no punishment if the order of the referee was beyond his jurisdiction. *Re* Soloway & Katz, 195 Fed. 100. An order of commitment for contempt is not void so that it can be questioned collaterally because it was not preceded by a certificate of the referee. U. S. v. Henkel, 185 Fed. 553. There may be a question as to whether there will be a commitment, before the final report of the referee, when no party to the proceeding has requested the referee to make such a certificate. See *Re* Kimmel, 183 Fed. 665. The court cannot authorize the referee to carry an order or judgment into effect by the commitment of a person for contempt. Smith v. Bedford, C. C. A., 106 Fed. 658. It has been held that a rule requiring the bankrupt to show cause why he should not be punished for contempt for refusing to answer "sundry questions" put to him, during his examination before the referee, is sufficient, although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, in which they fully appear. U. S. v. Goldstein, 132 Fed. 789. The propriety of the order by the referee, which has been disobeyed, cannot then be considered, provided that it was within his jurisdiction. *Re* Home Discount Co., 147 Fed. 538.

§ 638a. [1] 30 St. at L. 544, 547, § 3. At the first meeting of the creditors, any one whose name appears in the schedule of creditors. *Re* Jehu, 94 Fed. 638, and it seems that, at any time, any person who gives to the referee *prima facie* evidence of his claim, may obtain an examination of the bankrupt, even if the debt has not been regularly proved. *Re* Price, 91 Fed. 635; *Re* Schenkein, 113 Fed. 421; *Re* Kuffler, 153 Fed. 667; *Re* Samuelsohn, 174 Fed. 911. But it seems that a preferred creditor cannot conduct an examination un-

of all examinations of the bankrupt unless they waive this in writing.[2] Under ordinary circumstances such an examination should be held once for all the creditors.[3] His further examina-

less he relinquishes his preference, *Re* Schenkein, 113 Fed. 421. See *Re* Price, 95 Fed. 655. Such an examination may be had at the request of the bankrupt's receiver. *Re* Fleischer, 151 Fed. 81, 18 Am. B. R. 197. See *supra*, § 634. No formal order is required for the examination of the bankrupt at the first meeting of his creditors, *Re* Price, 91 Fed. 635; nor perhaps at the time and place to which the same is adjourned, Ibid; but, if his examination is desired at another creditors' meeting, an order must be obtained and ten days' notice given to all the creditors, *Re* Peters, 1 Am. B. R. 248; *Re* Westfall Bros., 8 Am. B. R. 431; Remington on Bankruptcy, § 1542. Upon an examination of a bankrupt at a creditors' meeting fixed by statute, a *subpœna duces tecum* is not required to justify an order directing him to produce books of account, *Re* Soloway & Katz, 195 Fed. 103. Such an order may be supported by testimony presented at the creditors' meeting, Ibid; but an application for such an order, when not made at the meeting, must be made upon notice to the bankrupt, *Re* Soloway & Katz, 195 Fed. 100; although the petition need not be verified therefor, Ibid.

A general order requiring alleged bankrupts, who were mercantile partners and resided at a distance from the referee, to appear for examination prior to the adjudication, and to produce all their books of account and other writings, and memoranda "from which might be ascertained any of the matters and things to be covered in said examination," was held to be too broad and erroneous, Rawlins v. Hall-Epps Clothing Co., C. C. A., 217 Fed. 884. It was held, in the Fifth Circuit, that the certificate of a referee that the alleged involuntary bankrupt refused to submit to an examination before adjudication upon an application for a receiver, was not sustained as an application of the creditors for an order to examine the bankrupt. Craddock-Terry Co. v. Kaufman, 175 Fed. 303.

[2] 30 St. at L. 544, 561, § 58a, as amended 36 St. at L. 838. *Re* Franklin Syndicate, 101 Fed. 402. It was held that a person adjudged a bankrupt upon an involuntary petition may be ordered to attend before the referee for examination, before the first meeting of his creditors and the appointment of a trustee; and, if the examination is limited to obtaining information on which to prepare the schedules, that it is not essential to the validity of the proceedings that ten days' notice thereof by mail should have been given to creditors. *Re* Walker, 96 Fed. 550.

[3] *Re* Price, 91 Fed. 635. If no examination has previously been had, the notice to creditors to attend in opposition to the discharge should embrace also a notice of the examination of the bankrupt; and the testimony thereupon should be taken at the expense of the creditors, Ibid; *Re* Schenkein, 113 Fed. 421; *Re* Kuffler, 153 Fed. 667.

tion may be directed at any time before the final disposition of the case, although his previous examination has been adjourned without a day.[4] The examination may be had at any time, even before adjudication,[5] or after his removal from the district[6] or his discharge.[7] A special master[8] or commissioner[9] may be appointed to conduct the examination.

The bankrupt "shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence."[10] He is not entitled to any witness fees.[11] Great latitude is allowed in the

4 *Re* Bryant, 188 Fed. 530. His second examination can only be obtained for cause shown by an order, the application for which should be upon notice to him; *Re* Fleischer, 151 Fed. 81; *Re* Herskovitz, 152 Fed. 316. *Contra, Re* Crenshaw, 155 Fed. 271; Remington on Bankruptcy, § 1543. Upon such an application, the trustee need not set forth the nature and character of the testimony sought. *Re* Bryant, 188 Fed. 530.

5 Cameron v. U. S., 231 U. S. 710, affirming 192 Fed. 548; U. S. v. Liberman, 176 Fed. 161. U. S. v. Coyle, 299 Fed. 256. It has been held that where there has been no adjudication nor receivership the bankrupt should have notice of an application for his examination, Rawlins v. Hall-Epps Clothing Co., C. C. A., 217 Fed. 884; that in such a case the application may be denied for laches, *Re* Wilkes-Barre Light Co., C. C. A., 208 Fed. 539; and that it should not then be permitted solely in order to aid the petitioning creditors in establishing their case for adjudication, Rawlins v. Hall-Epps Clothing Co., C. C. A., 217 Fed. 884. See *infra* § 638b.

6 *Re* Havens, C. C. A., 255 Fed. 478.

7 *Re* Fleischer, 151 Fed. 81; *supra*, § 629.

8 U. S. v. Coyle, 229 Fed. 256.

9 *Re* Fleischer, 151 Fed. 81.

10 30 St. at L. 544, § 7. Where the bankrupt obtained an order of protection, forbidding his arrest on civil process while in attendance for examination in a State where he did not reside, it was held that when he was there arrested on a claim not dischargeable in bankruptcy, he should be discharged by the court of bankruptcy upon the writ of *habeas corpus*. U. S. ex rel. Mansfield v. Flynn, 179 Fed. 316. It has been held that the writ of *habeas corpus ad testificandum* should not issue to bring before the court, for examination, the bankrupt, who is in another State in the custody of the authorities there, after his commitment as a lunatic. *Re* Thaw, C. C. A., 166 Fed. 71.

11 *Re* Shanker, 138 Fed. 802.

examination; but the rules which prevail in the Federal courts concerning the direct and cross-examination of witnesses are usually followed.[12] "No testimony given by the bankrupt shall be used against him in any criminal proceeding."[13] A refusal

[12] *Re* Kinnane Co., 217 Fed. 488.

[13] 30 St. at L. 544, 548, § 7. This does not exempt him from an indictment for perjury then committed, Glickstein v. U. S., 222 U. S. 139; Edelstein v. U. S., C. C. A., 149 Fed. 636; Cameron v. U. S., 231 U. S. 710. But see U. S. v. Rhodes, 212 Fed. 518, holding that false testimony by the bankrupt upon his examination before the referee for purposes of discovery when no issue has been joined does not constitute perjury. *Cf.* State v. Strait (Minn.), 102 N. W. 913. Upon the trial of an indictment for concealing assets, his schedules may be put in evidence. Johnson v. U. S., 228 U. S. 457. *Cf.* Ensign v. Pennsylvania, 227 U. S. 592; Edelstein v. U. S., C. C. A., 149 Fed. 636; U. S. v. Brod, 176 Fed. 165.

As to what testimony is sufficiently material to be the subject of an indictment for perjury see Ulmer v. U. S. 219 Fed. 641; U. S. v. Coyle, 229 Fed. 256. He may be punished for contempt for such perjury and for evasive answers, *Re* Fellerman, 149 Fed. 244, 17 Am. B. R. 785; *supra*, § 428b. When the answer is claimed to be evasive or insufficient, the bankrupt should be so admonished and given an opportunity to purge himself before he is committed, *Re* Blitz, 232 Fed. 276; and for a refusal to produce his books, *Re* Magen, 179 Fed. 572; *Re* Alper, 162 Fed. 207; *Re* Sorkin, 166 Fed. 831.

Since the statute does not relieve him from an indictment for a crime thus disclosed, Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122; *Re* Walsh, 104 Fed. 518; he can plead his privilege against an incriminating question; *Re* Scott, 95 Fed. 815; *Re* Rosser, 96 Fed. 308; *Re* Feldstein, 103 Fed. 269; *Re* Walsh, 104 Fed. 518; *Re* Smith, 112 Fed. 509; *Re* Shera, 114 Fed. 207; U. S. v. Goldstein, 132 Fed. 789 (voluntary bankruptcy). See *supra*, §§ 339, 343. In such a case, he will not be excused from answer unless it appears from the character of the information sought or the questions propounded or the facts produced by him that his claim has justification, Podolin v. Lesher Warner Dry Goods Co., C. C. A., 210 Fed. 97; nor when he has previously volunteered partial testimony upon the subject. *Re* Bendheim, 180 Fed. 918. For a case where the refusal to answer certain cross-interrogatories upon the ground that they might incriminate the bankrupt was held to be no ground for the suppression of the whole deposition. Carey v. Donohue, C. C. A., 209 Fed. 328. The objection cannot be taken before he is sworn, *Re* Scott, 95 Fed. 815. He cannot object to surrendering books of account of a receiver or trustee because they may tend to incriminate him, Matter of Harris, 221 U. S. 274, 55 L. ed. 732. (Where the order directed that the receiver should not permit the books to be used in preparation for any criminal proceeding and that the bankrupt should have notice from him of any subpœna for their production.) *Re* Sapiro, 92 Fed. 340. *Cf.*

to answer a question approved by the court and referee may be a ground for denying a discharge in bankruptcy.[14]

§ 638b. Examination of strangers to bankruptcy proceedings. "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her, or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."[1]

Re Nachman, 114 Fed. 995. See, also, *Re* Edward Hess & Co., 136 Fed. 988. *Contra, Re* Kanter & Cohen, 121 Fed. 984, 58 C. C. A., 260 (where the bankrupts were relieved from filing schedules as well as from producing books). See U. S. v. Rhodes, 212 Fed. 518. It has been held not to be improper for the trustee to permit the use of such books by a State prosecutor in criminal proceedings against the bankrupt. *Re* Tracy & Co., 177 Fed. 532. *Contra*, Blum v. State, 94 Md. 375, 56 L.R.A. 322; People v. Swarts, (Cook County Crim. Ct., Ill.) 8 Am. B. R. 487. It was said, however, that to show the books to trade rivals of the bankrupt would be a wanton and illegal use of the powers of the trustee, *Re* Tracy & Co., 177 Fed. 532. *Cf.* State v. Strait, 94 Minn. 384. The Court of Bankruptcy refused to order the State District Attorney to deliver to the receiver books about to be used in the trial of the bankrupt upon an indictment in the State Court. *Re* Mandel, 224 Fed. 642.

[14] *Re* Dresser, C. C. A., 146 Fed. 383, *Infra* § 656. The statute affords no protection to any witness except the bankrupt. Knoell v. U. S., C. C. A., 239 Fed. 16.

§ 638b. [1] 30 St. at L. 544, § 21a, as amended 32 St. at L. 797. An extraordinary ruling in Pennsylvania is to the effect that, notwithstanding the express authority for the examination of the bankrupt's wife, she cannot be examined in a case as to matters about which the laws of the State make her incompetent to testify. *Re* Kessler, 225 Fed. 394. It was held that an examination may be had of books of a corporation managed by two bankrupts, in which their wives own substantially all the stock, and it is claimed that the corporate property constitutes assets of the bankrupts. *Re* Horgan, C. C. A., 98 Fed. 414; s. c., 97 Fed. 319. *Cf. Re* Cohn, 98 Fed. 75. The statute does not authorize such an examination concerning dealings with a trustee in bankruptcy. *Re* Madero Bros., 256 Fed. 859. It is no objection to the examination that a suit is pending between the trustee and the witness. *Re* Cliffe, 97 Fed. 540, 542. The pendency of a suit by or against the bankrupt or his

Such an examination may be ordered at any time, even before

representative is not a prerequisite. *Re* Fixen & Co., 96 Fed. 748. The examination may be made concerning facts which could not be the subject of a suit in a court of the United States; *Re* Cliffe, 97 Fed. 540. The examination is not limited to transactions occurring within the four months preceding the bankruptcy. *Re* Brunlage, 100 Fed. 613; *Re* Pursell, 114 Fed. 371. An order for the examination of a stranger to the proceeding concerning the acts, conduct or property of the bankrupt is not a matter of right, but rests in the discretion of the court or referee. *Re* Andrews, 130 Fed. 383. It has been held that the examination of a third person at the request of a receiver or trustee in bankruptcy may be granted without any showing of the questions to be asked or the facts into which inquiry is to be made; *Re* Howard, 95 Fed. 415; *Re* Fixen & Co., 96 Fed. 748. That a witness cannot refuse to attend or be examined by a receiver in bankruptcy on the ground that the order appointing a receiver was erroneously or improvidently made. *Re* Fixen & Co., 96 Fed. 748. That he cannot refuse to produce books because he contends that they contain nothing relating to the bankrupt's property; and must leave the determination of that question to the court. *Re* Fixen & Co., 96 Fed. 748. But see *Re* Carley, 106 Fed. 862. The witness should not be compelled to answer matters not relevant to the acts, conduct or property of the bankrupt; and when he has denied that the transaction inquired into has any relation to the same, it seems that the examiner must show some connection therewith, or that the question will be disallowed. *Re* Carley, 106 Fed. 862, 866. A witness is not justified in refusing to answer a material question because he owes to his customers the duty not to disclose their private affairs, *Re* Lathrop, Haskins & Co., 184 Fed. 534; *Cf.* § 343, *supra;* nor is an attorney to refuse to identify documents which he has witnessed for his client or to testify with reference to facts concerning which he obtained knowledge from others. *Re* Ruos, 159 Fed. 252. No notice of the application is required, *Re* Howard, 95 Fed. 415. It has been said: that the request for the same may be oral, *Re* Howard, 95 Fed. 415; See *Re* Abbey Press, C. C. A., 134 Fed. 51, in which the author was counsel, and that the order may be made by the referee. Ibid. After such an examination of a third person has been terminated, a further examination may be ordered by the referee for special cause shown; but it has been said to be within the discretion of the referee to decide in each particular case what cause is sufficient and upon what he will make the order. Ibid. "No person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him," 30 St. at L. 544, § 41. Where the examination is held in another district, the proper course is to make an ancil-

adjudication.[2] The order may be made by the referee.[3] The examination usually takes place before the referee; but a special master[4] or commissioner[5] may be appointed for such purpose and the referee may be appointed such special master.[6] It seems that the officer before whom the testimony is taken may rule upon the admission and exclusion of evidence.[7] The testimony

lary application to a judge of that district for the examination of the witness there, *Re* Robinson, 179 Fed. 724. See *Re* Williams, 123 Fed. 321. It has been held that such an examination may be had. The examination may be had by order of the court, in which proceedings in bankruptcy were pending, in another district by a commission under the Revised Statutes, *Re* Carley, 106 Fed. 862; U. S. R. S., §§ 868, 869. See *Re* Robinson, 179 Fed. 724, or before a referee in bankruptcy in another district. *Re* Sturgeon, C. C. A., 139 Fed. 608 (where the order was made by the referee in the district where the proceedings were pending). But see *Re* Williams, 123 Fed. 321, and that in such a case, it is the duty of the referee to take all the evidence and note objections to the same. *Re* Sturgeon, C. C. A., 139 Fed. 608. The order may be obtained by the trustee, *Re* Fleischer, 151 Fed. 81, or a receiver, Cameron v. U. S., 231 U. S. 710, of the bankrupt, or by a creditor, *Re* Henderson, 266 Fed. 254. When the time for proof of debts has not expired it seems that the applicant's oath that he is such a creditor is sufficient to support the order. Ibid. A witness other than the bankrupt is not entitled to have counsel present at such an examination. *Re* Abbey Press, C. C. A., 134 Fed. 51, in which the author was counsel. Every creditor has the right to participate by counsel in the examination. *Re* Prussian, 255 Fed. 857, Remington on Bankruptcy § 1574, citing *contra*, *Re* Cobb, 7 Am. B. R. 104. The bankrupt has the right to be represented by counsel at all the hearings. *Re* Hark, 136 Fed. 986.

2 Cameron v. U. S., 231 U. S. 710, affirming 192 Fed. 548. It has been held in such a case the examination should not be extended solely for the purpose of obtaining evidence for use upon the trial of the issue as to the solvency of the alleged bankrupt. Abbott v. Wauchula Mfg. & Timber Co. (C. C. A.), 229 Fed. 677.

3 *Re* Abbey Press, C. C. A., 134 Fed. 51, in which the author was counsel.

4 U. S. v. Coyle, 229 Fed. 256.

5 *Re* Fleischer, 151 Fed. 81.

6 *Re* Fleischer, 151 Fed. 81.

7 *Re* De Gottardi, 114 Fed. 328; *Re* Wilde's Sons, 131 Fed. 142. *Re* Ruos, 159 Fed. 252; *Re* Harrison Bros., 197 Fed. 320, 321. But see *Re* Lipset, 119 Fed. 379; Dressel v. North State Lumber Co., 119 Fed. 531; *Re* Sturgeon, C. C. A., 139 Fed. 608; Bank of Ravenswood v. Johnson, C. C. A., 143 Fed. 463; reversing *Re* Romine, 138 Fed. 837; *Re* Isaacson, 175 Fed. 292. He has power to exclude evidence plainly privileged and which affirmatively appears to be so incompetent, irrelevant and immaterial, that it

so taken is a part of the record, to which creditors are entitled to access so long as it remains in the custody of the referee, although it might in a suit for a preference, injuriously affect the party taking it.[8]

§ 639. Evidence in bankruptcy. "(*b*) The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.[1] (*c*) Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim, notice shall also be served upon the claimant, and when in opposition to a discharge, notice shall also be served upon the bankrupt. (*d*) Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of District Courts of the United States are now or may hereafter be admitted as evidence. (*e*) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. (*f*) A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[2] (*g*) A certi-

would be an abuse of process to compel its production or permit its introduction. Missouri-Am. El. Co. v. Hamilton-Brown Shoe Co., C. C. A., 165 Fed. 283. See §§ 343, 353, *supra*. *Contra*. He may exclude repetitions of the same question. *Re* Romine, 138 Fed. 837; reversed upon another point, Bank of Ravenswood v. Johnson, C. C. A., 143 Fed. 463. Approved in Remington on Bankruptcy § 552. See General Order XXII. *Supra* §§ 352, 355, 391, 638.

[8] *Re* Samuelsohn, 174 Fed. 911.

§ 639. [1] This authorizes the taking of a deposition of a witness who lives more than a hundred miles from the place of trial whether within or without the State, *Re* Washington Steel & Bolt Co., 210 Fed. 984. See *Supra* §§ 354-359.

[2] The bankrupt has the burden of proving his solvency unless he appears with his books, papers and accounts, submits to an examination and fully testifies, as to all matters tending to establish solv-

fied copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bank-

ency or insolvency. 30 St. at L. 544, 547, § 3. *Supra* § 638a. *Re* Perlhefter, 177 Fed. 299. See Cummins Grocer Co. v. Talley, C. C. A., 187 Fed. 507. In the absence of countervailing evidence it is presumed that a bankrupt was insolvent at the close of the day preceding that on which an involuntary petition was filed against it, followed by an adjudication, *Re* Star Spring Bed Co., C. C. A., 265 Fed. 133. The burden of proof is otherwise usually upon the creditor to support the allegations of their petitions. *Re* Rome Planing Mill, 96 Fed. 812. But where the bankrupt alleged that a note held by a petitioner was void because given in consideration of a gambling transaction, it was held that the respondent had the burden of proof to show that fact. Hill v. Levy, 98 Fed. 94. A letter by the respondent stating his inability to pay his debts and calling a meeting of his creditors for the purpose of compromising his indebtedness is *prima facie* evidence of his insolvency. *Re* Lange, 97 Fed. 197. Voluntary bankruptcy creates no presumption of previous insolvency. *Re* Chappell, 113 Fed. 545. It was held to be no evidence of insolvency that a corporation made an arrangement with the bank to overdraw its account. McDonald v. Clearwater Shortline Ry. Co., 164 Fed. 1007. A judgment against the bankrupt, entered more than four months before the commission of the act of bankruptcy, is admissible upon the proof of insolvency. *Re* McGowan, 134 Fed. 498, which considers other questions concerning the admissibility of evidence upon this issue. In determining presumptions and the burden of proof, the Federal courts are not bound by the State decisions. Young v. Lowry, C. C. A., 192 Fed. 825. It was held that a judge who made an order appointing a receiver was a competent witness to testify that the appointment was not made because of insolvency. Schumert & Warfield v. Security Brewing Co., 199 Fed. 358. Upon an issue as to the insanity of an alleged bankrupt, it was said that the evidence of his acts, speech and demeanor, the change of his habits, and the testimony of physicians who treated him, was of greater weight than the hypothetical testimony of alienists. *Re* Ward, C. C. A., 194 Fed. 89. Upon the trial of an issue as to the value of land, it was held that the master properly excluded cross-examination of the trustee concerning efforts made by him to secure purchasers at a given price and his knowledge or understanding of what the property could have been bought for, *Re* Graves, 182 Fed. 443; and that evidence of the amounts received on sale of similar land in the neighborhood was inadmissible in the absence of proof that it was substantially of the same value as the land in controversy and covered with similar timber, Ibid. A party who called a witness was not allowed to impeach his credibility. *Re* San Miguel Gold Min. Co., 197 Fed. 126. A verified proof or petition for the allowance of a claim is *prima facie* evidence

rupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart."[3]

of its validity, Whitney v. Dresser, 200 U. S. 532, 50 L. ed. 584, *infra*, § 645; but not, it has been held, of any facts therein alleged to establish its priority, *Re* Jones, 151 Fed. 108. Where the claimant did not rest on his proof of claim, but offered evidence which was insufficient to establish its allegations, it was held that he could not, upon appeal, use the allegations, in the proof to supply the deficiencies in his testimony, *Re* T. A. McIntyre & Co., C. C. A., 174 Fed. 627. Upon an issue as to the validity of a claim, a claim against another debtor for the same debt, which was previously allowed, is inadmissible in support of objections. *Re* James Dunlap Carpet Co., 171 Fed. 532. An adjudication in bankruptcy is in that proceeding conclusive of all the jurisdictional facts, and cannot be collaterally attacked. *Re* Hecox, C. C. A., 164 Fed. 823; *Re* V. & M. Cumber Co., 182 Fed. 231; Cook v. Robinson, C. C. A., 194 Fed. 785; Lazarus v. Eagen, 206 Fed. 518; (all cases of insolvency). Where the petition charged different acts of bankruptcy and the adjudication did not show upon which it was based, it was not treated as *res adjudicata* of either, *Re* Julius Bros., C. C. A., 217 Fed. 3. See In re McCrum, C. C. A., 214 Fed. 207. Where a material issue was the indebtedness of the bankrupt to a petitioner, an adjudication of bankruptcy which found that issue in favor of the latter was conclusive evidence of the validity of his claim, which could not thereafter be disputed by either the bankrupt or another creditor, *Re* Henry Ulfelder Clothing Co., 98 Fed. 409. An order or judgment sustaining objections to a claim upon the ground that the claimant had received a preference binds him in a subsequent action by the trustee to recover such preference. *Re* Davidson, 211 Fed. 687. See *supra* § 186j. The adjudication is not conclusive evidence of the bankrupt's insolvency against a creditor who is defendant to a suit to recover a preference when the latter did not appear in the bankruptcy proceedings. Gratiot County State Bank v. Johnson, 249 U. S. 246. Findings in a proceeding before the same referee that has been finally dismissed for want of jurisdiction cannot be the basis of findings in a subsequent proceeding before him. *Re* Rosenberg, 116 Fed. 402.

[3] 30 St. at L. 544, 552, § 21; as amended by 32 St. at L. 797. The testimony of a bankrupt upon his examination at a creditors' meeting, or otherwise, may be offered in evidence against him as an admission upon his application for his discharge, *Re* Leslie, 119 Fed. 406; Shaffer v. Koblegard Co., 183 Fed. 71; or upon any other application in the proceeding, *Re* Wilcox, C. C. A., 109 Fed. 628; *Re* Alphin & Lake Cotton Co., 131 Fed. 824; *Re* Wiesen Bros., 135 Fed. 442; *Re* Greer, 189 Fed. 511. Even, it has been said, although it was not signed nor taken down in writing, if it is proved by the testimony of those who heard the same, *Re* Bard,

Other witnesses must, however, be paid or tendered their legal fees in advance.[4] It has been held: that a witness cannot be compelled to appear at a place outside the State where he resides, although within one hundred miles from his residence;[5] and that he cannot be compelled to attend within the State at a place more than one hundred miles from his residence. "No person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fees for one day's attendance shall be first paid or tendered to him."[6] Except, perhaps, upon examinations for the purpose of discovery[7] it seems that the referee may rule upon the admission and exclusion of evidence.[8] He may exclude repetitions of the same questions.[9]

108 Fed. 208; *Re* Knasak, 151 Fed. 503. It has been held: that such statements, made by the bankrupt are admissible against the trustee in litigation with a stranger to the proceeding, *Re* Thompson, 197 Fed. 681; that in a plenary action by a trustee in another court in the same district, it cannot take judicial notice of matters of record in the bankruptcy proceedings, McDonald v. Clearwater Shortline Ry. Co., 164 Fed. 1007; See *supra* § 329; and that insolvency may then be proved by the uncorroborated testimony of the bankrupt, Collett v. Bronx Nat. Bank, 200 Fed. 111; which seems to hold that the testimony of the bankrupt upon his examination in bankruptcy is then admissible. *Contra* Taylor v. Nicholas, 134 App. Div. (N. Y.) 787. It has been held that, in an action by a trustee against a stranger to the proceeding, the books of the bankrupt are competent evidence of his insolvency, Ernst v. Mechanics' & Metals Nat. Bank of N. Y., 200 Fed. 295. *Contra* Taylor v. Nicholas, 134 App. Div. (N. Y.) 787. A single case seems to hold that the uncorroborated testimony of the bankrupt upon his examination in the bankruptcy proceedings is competent for the same purpose, Collett v. Bronx Nat. Bank, 200 Fed. 111. *Contra Re* Hersey, 171 Fed. 1004. The testimony of other persons in other applications in the proceeding in bankruptcy cannot be offered in evidence against the bankrupt, except as a means of contradicting a witness then examined, after his attention has been called to the same, *Re* Alphin & Lake Cotton Co., 131 Fed. 824; *Re* Weisen Bros., 135 Fed. 442.

[4] *Re* Kerber, 125 Fed. 653. See *supra*, § 343. The husband of a bankrupt is entitled to witness fees. *Re* Marcus, 160 Fed. 229.

[5] *Re* Cole, 133 Fed. 414. But see *Re* Hemstreet, 117 Fed. 568.

[6] 30 St. at L. 544, § 41.

[7] *Supra*, § 638b.

[8] *Re* De Gottardi, 114 Fed. 328; *Re* Wilde's Sons, 131 Fed. 142. *Re* Ruos, 159 Fed. 252.

[9] *Re* Romine, 138 Fed. 837; re-

§ 640. Meetings of creditors and appointments of trustees. "(*a*) The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. (*b*) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. (*c*) The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.[1] (*d*) A meeting of the creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. (*e*) The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of filing the request.

versed upon another point, Bank of Ravenswood v. Johnson, C. C. A., 143 Fed. 463. Approved in Remington on Bankruptcy, § 552.

§ 640. [1] The referee may call a meeting to allow the creditors to decide whether litigation should be instituted which, if unsuccessful, would subject the estate to expense and possible cost, *Re* Cutler & John, 228 Fed. 771. It has been held improper to allow a creditors' meeting to select the attorney for the trustee, *Re* Columbia Iron Works, 142 Fed. 234; or to elect appraisers, Ibid.; or to determine the manner in which the property shall be sold, *Re* Arnett, 112 Fed. 770.

(*f*) Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered."[2]

"If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called."[3] "Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called."[4] "(*a*) Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.[5] (*b*) Creditors holding claims which are secured[6] or

2 30 St. at L. 544, 559, 560, § 55.

3 General Order XV.

4 General Order XXV.

5 The word "creditor," in the act, includes "any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy," 30 St. at L. 544, § 1. It has been held that a stockholder or director, *Re* Syracuse Paper & Pulp Co., 164 Fed. 275; *Re* L. W. Day & Co., C. C. A., 178 Fed. 545; *Re* Stradley & Co., 187 Fed. 285; or attorney, *Re* L. W. Day & Co., C. C. A., 178 Fed. 545; or employee, *Re* Syracuse Paper & Pulp Co., 164 Fed. 275; *Re* Floyd, 183 Fed. 791; of the bankrupt, if he is a creditor, may vote; but none of them can vote until his claim has been proved and allowed, *Re* Walker, 96 Fed. 550; *Re* Eagles, 99 Fed. 695; *Re* Henschel, C. C. A., 113 Fed. 443, 7 Am. B. R. 662. Shareholders of a building and loan association, *Re* Continental Building & Loan Ass'n, 232 Fed. 413; reversing Merchants' Nat. Bank v. Continental Build. & L. Ass'n, 829; C. C. A., 232 Fed. 828, and depositors in a bank, United States District Court. Southern District of New York. May, 1915. *Re* Oliner Brothers; U. S. D. C., S. D. N. Y., May, 1915, were allowed to vote as creditors. When a claim is disputed, the referee may disfranchise the holder upon the filing of the objection, or he may, in a summary proceeding decide whether the latter should be allowed to vote, *Re* Rosenfeld-Goldman Co., 228 Fed. 921; or he may postpone the meeting until the objection can be heard and decided, *Re* McGill, C. C. A., 106 Fed. 57, 65; *Re* Knox, C. C. A., 221 Fed. 36. When he adjourned the meeting for such a purpose, the election held before the adjournment was

have priority shall not, in respect to such claims be entitled

treated as tentative, *Re* Wenatchee-Stratford Orchard Co., 205 Fed. 964; *Re* Knox, C. C. A., 221 Fed. 36. It has been held that, where a creditor of a bankrupt is a debtor to the estate for an amount equal to his claim, he cannot vote until he has made his indebtedness good, *Re* Duryea Power Co., 159 Fed. 783. No one can cast a vote of a creditor without a written proxy, *Re* Blankfein, 97 Fed. 191; *Re* Eagles, 99 Fed. 695; *Re* Richards, 103 Fed. 849; even if he be an attorney at law who has appeared generally for him in the proceedings, *Re* Blankfein, 97 Fed. 191; *Re* Scully, 108 Fed. 372; *Re* Capitol Trading Co., 229 Fed. 806. It has been held that a proxy may be acknowledged before a justice of the peace, *Re* Roy, 185 Fed. 551; or a foreign consul; but not before the person who receives it, although he is a public officer otherwise qualified, *Re* Grossman, 225 Fed. 1020. An internal revenue stamp under the act of Oct. 22, 1914, (ch. 331, § 5, 38 St. at L. 753), to be affixed thereto, *Re* Capitol Trading Co., 229 Fed. 806, 807; that it may contain a power of substitution; and that when given to three or to anyone or more of them, its acknowledgment before one of the three does not invalidate its appointment of the other two. *Re* Sugenheimer, 91 Fed. 744. An attorney who had previously been guilty of improper conduct in connection with the proceedings and represented conflicting interests was not allowed to act as a proxy and the votes which he cast were not received, *Re* Forestier, 222 Fed. 537. The holders of proxies who were not allowed to vote should not be counted as present at the election, *Re* Kaufman, 179 Fed. 552. Votes cast for a candidate that is disqualified are not to be disregarded so as to give the election to one who has less than a majority of the votes, *Re* Machin, 128 Fed. 315, but the holders of proxies, which have not been duly executed, are not to be counted, *Re* Henschel, C. C. A., 113 Fed. 443, 7 Am. B. R. 662. When objections to a proxy are not verified, they may be disregarded, *Re* Syracuse Paper & Pulp Co., 164 Fed. 275. It has been held that where the holders of proxies were not allowed to vote and the votes cast and counted are less than a majority, the referee should give those whose votes were excluded an opportunity to appoint a new proxy and should adjourn the election for that purpose, *Re* Kaufman, 179 Fed. 552. But see *Re* Goldstein, 199 Fed. 665; *Re* E. A. Walker & Co., 204 Fed. 132.

6 The words "secured creditor" include "a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt, has such security upon the bankrupt's assets," 30 St. at L. 544, 545, § 1. The holder of a mechanic's lien is thus secured, *Re* Ferrand, 263 Fed. 908. It has been held that the holder of a note made by the bankrupt is not secured within the meaning of the Act, when he holds collateral given

to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.'' [7] ''The creditors of a bankrupt estate shall, at their first meeting [8] after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.'' [9]

by an endorser, *Re* Pan-American Match Co., 242 Fed. 995. The disqualification applies to all creditors, meetings including those held after a trustee has been elected. Merchants' National Bank of San Francisco v. Continental Building & Loan Ass'n, C. C. A., 232 Fed. 829. Upon the election of a trustee, a secured creditor may surrender his security and vote as if his claim was unsecured; but otherwise his vote is only good for the amount of the excess of his claim over the value of his security as found by the court, or perhaps as found by the referee, *Re* Eagles, 99 Fed. 695. The claimant and the objecting creditors are entitled to a hearing and to offer testimony on the question, *Re* Columbia Iron Works, 142 Fed. 234. If objections are made to a claim on the ground that it is preferred, the claimant cannot be allowed to vote until that question is decided, *Re* Malino, 118 Fed. 368; *Re* Columbia Iron Works, 142 Fed. 234.

7 30 St. at L. 544, 560, § 56. A relative of the bankrupt, when a creditor, may vote, *Re* Rothleder, 232 Fed. 398; but the vote of the bankrupt's wife was rejected when it would have decided the election, *Re* Ballantine, 232 Fed. 271. Votes have been rejected because their holders were parties to an improper combination to control the election, *Re* Forestier, 222 Fed. 537; *Re* Stowe, 235 Fed. 463. But the safer practice is to receive votes challenged for such a reason, and to reconsider the question upon a subsequent application to set aside the election. Falter v. Reinhard, 104 Fed. 292; *Re* Parsons Mfg. Co., 247 Fed. 126. See *Re* Rothleder, 232 Fed. 398. The referee need not decide the validity of the claim when his decision would not affect the result. *Re* Rosenfeld-Goldman Co., 228 Fed. 921. Where claims have been assigned, the assignee is counted as a single creditor, *Re* Messengill, 113 Fed. 366.

8 An adjourned meeting of the creditors is considered as a continuance of the original meeting and not a separate one, *Re* Eagles, 99 Fed. 695.

9 30 St. at L. 544, 557, § 44. The referee may make such an appointment, *Re* Knox, C. C. A., 221 Fed. 36. Upon the bankruptcy of a partnership separate trustees may be appointed for the partnership

"If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called."[10] "It shall be the

estate and for the estates of the different partners although this is usually not advisable, *Re* Wood, C. C. A., 246 Fed. 246. *Re* Currie, 197 Fed. 1012. *Contra Re* Coe, 154 Fed. 152. The appointment may be made when the failure to elect is because of delay in the determination of objections to a majority of the claims, *Re* Knox, C. C. A., 221 Fed. 36. It has been held: that a temporary trustee may be appointed pending the decision of a dispute as to the validity of certain votes, *Re* Rochester Sanitarium & Baths Co., C. C. A., 222 Fed. 22. When there is no election or the choice of the creditors is disapproved, and it appears that the majority are not likely to agree upon another candidate the referee appoints the trustee. Appointments have been sustained when there was immediate need of action by a trustee, and after two sessions of a creditors' meeting, upon successive days, there was a failure to obtain a majority for any one; *Re* Kuffler, 97 Fed. 187. Where, at a meeting of creditors called for the election of a trustee a majority in number were represented by the attorney of record for the bankrupt and by a student in his office; *Re* Morris, 154 Fed. 211, and where, at the first creditors' meeting, there was no request that an election be had nor a nomination of any candidate. *Re* Brooke, 100 Fed. 432. That it is not improper for the referee to appoint one of those for whom votes were cast at the election, *Re* F. & D. Co., C. C. A., 242 Fed. 69, reversing 237 Fed. 895. That no trustee should be appointed until after an adjudication of bankruptcy, Vulcan Sheet Metal Co. v. North Platte Val. Irr. Co., 220 Fed. 106; *Re* Forestier, 222 Fed. 537; *Re* Parsons Mfg. Co., 247 Fed. 126; *Re* Snow, 248 Fed. 295; *Re* Eisenberg, 251 Fed. 427. Where a trustee elected by the creditors is disapproved by the court, or declines to act, or fails to qualify, a vacancy arises which must be filled by a new election if practicable, *Re* Lewensohn, 98 Fed. 576; *Re* Margolies, 191 Fed. 369; *Re* Van de Mark, 175 Fed. 287. When, at a meeting of creditors, objections are made to the person elected as trustee and the referee takes them under advisement, the meeting should be adjourned for a new election in case the objections are sustained and the appointment disapproved, *Re* Lewensohn, 98 Fed. 576. Since the referee has no power to remove a trustee, his order appointing a new incumbent to the office and directing the one originally appointed to turn over the assets to the latter is ineffectual. *Re* Berree & Wolf, 185 Fed. 224.

[10] General Order XV; *Re* Smith, 93 Fed. 791. "No official trustee

duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond." [11]

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only." [12]

shall be appointed by the court, nor any general trustee to act in classes of cases." General Order XIV.

[11] General Order XVI.

[12] General Order XIII. See *Re* Sitting, 182 Fed. 917; *Re* L. W. Day & Co., C. C. A., 178 Fed. 545; *Re* Van de Mark, 175 Fed. 287. The proper practice is for the party aggrieved to file a petition of review, *Re* Arti-Stain Co., 216 Fed. 942. This may be filed by a creditor, *Re* Parsons Mfg. Co., 247 Fed. 126; but not by a defeated candidate who is not a creditor. *Re* Grossman, 225 Fed. 1020. The District Court will ordinarily not set aside the decision of the referee upon such a question, *Re* Rosenfeld-Goldman Co., 228 Fed. 921. The Circuit Court of Appeals will rarely set aside an order of the District Court approving the decision of the referee in this respect, M. C. Kiser Co. v. Georgia Cotton Oil Co., C. C. A., 208 Fed. 548. The referee cannot exercise his discretion arbitrarily, *Re* Merritt Const. Co., C. C. A., 219 Fed. 555; Wilson v. Continental Building & Loan Ass'n, C. C. A., 232 Fed. 824. If the election of the trustee was procured by the influence of the bankrupt, it will be set aside, *Re* Kaufman, 179 Fed. 552; *Re* Floyd, 183 Fed. 791; *Re* Sitting, 182 Fed. 917; in all of which proxies were cast by attorneys for the bankrupt; *Re* Van de Mark, 175 Fed. 287; Falter v. Reinhard, 104 Fed. 292; s. c., as *Re* McGill, C. C. A., 106 Fed. 57. Ordinarily an election will be set aside when the result was obtained through the active efforts of the bankrupt. *Re* Rothleder, 232 Fed. 398. It was held that a referee properly refused to approve the election of the assignee in insolvency of the bankrupt and of such assignee's attorney. *Re* Keller, C. C. A., 192 Fed. 830. At a creditors' meeting an attorney, who formerly represented the bankrupt, may be asked by any creditor whether any claims which he wishes to vote upon have been assigned in the interest of the bankrupt. If he refuses to answer, the referee may compel an answer, or else the election may be set aside. *Re* Dayville Woolen Co., 114 Fed. 674. It has been held, however, that the attorney for the bankrupt may be allowed to vote upon a proxy that comes to him unsolicited. Where a debtor stated, at a meeting of his creditors: that he intended to file a petition in bankruptcy; that if a person, whom he nominated, could be elected trustee, he believed that his debts would be

§ 641. Qualifications of trustees. "Trustees may be (1) individuals, who are respectively competent to perform the duties of that office,[1] and reside or have an office in the judicial district

paid in full and a surplus for himself; and he then asked his creditors to vote for such person, to which they agreed; and pending the election a letter was prepared by the bankrupt's attorney, signed and sent out by a large creditor advocating the election of the bankrupt's candidate, who was elected by a large majority in number and in amount of claims; it was held that the election would not be set aside. *Re* Eastlack, 145 Fed. 68. See *Re* Ketterer Mfg. Co., 155 Fed. 987. An election will not be set aside because persons, not the bankrupt, canvassed creditors to secure the election of a particular person as trustee. *Re* Fisher, 193 Fed. 104, where the trustee occupied the same suite of offices as the bankrupt's attorney; *Re* Margolies, 191 Fed. 369. See *Re* Kreuger, 196 Fed. 705. But where the canvasser was an endorser upon the bankrupt's notes, which, after payment, he transferred to a stranger without any consideration, the votes thereupon were excluded. *Re* L. W. Day & Co., C. C. A., 178 Fed. 545. It was similarly held where the canvasser was a large creditor of the trustee, who was charged with having obtained a preference. *Re* Anson Mercantile Co., 185 Fed. 993. Where the unpreferred creditors had been paid in full, an election of a trustee was not set aside because the bankrupt solicited votes for him. *Re* Morton, 118 Fed. 908. The fact that the trustee has solicited votes is not a disqualification if this was not done in the interest, or at the request, of the bankrupt. *Re* Lloyd, 148 Fed. 92, 17 Am. B. R. 96. It seems that suspicion by the referee that the appointment was procured by improper considerations, is insufficient to justify him in setting aside an election, although it is based upon the frequency with which the candidate has been selected as trustee in bankruptcy matters under the influence of the same attorneys. *Re* Kreuger, 196 Fed. 705. See *Re* Margolies, 191 Fed. 369. Where claims offered for proof and allowance at a meeting of creditors were disallowed and the claimants excluded from voting, the court has power, after they have been allowed upon appeal, to set aside the election provided that their votes, if cast, would have changed the result. *Re* Eagles, 99 Fed. 695.

§ 641. [1]A person is ineligible who is otherwise interested so that he might be compelled to assume inconsistent positions, Wilson v. Continental Building & Loan Ass'n, C. C. A., 232 Fed. 824. (A trustee of mortgages belonging to the bankrupt, who had been intimately associated with the latter's business.) But see *Re* Archbold & Hamilton, 237 Fed. 408. A trustee may be a creditor of the bankrupt's estate. *Re* Lazoris, 120 Fed. 716. Hostility to the bankrupt is not an objection to the approval of the election if it has not been accompanied by misconduct; *Re* Lewensohn, 98 Fed. 576; *Re* Mangan, 133 Fed. 1000. It has been held that the legal adviser of

within which they are appointed,[2] or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."[3] An alien, who has an office in the district, is competent to act as trustee.[4]

§ 641a. Bankruptcy sales. "Real and personal property shall, when practicable, be sold, subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised

a bankrupt, *Re* Gordon Supply & Mfg. Co., 129 Fed. 622; and his assignee in insolvency; *Re* Kellar, C. C. A., 192 Fed. 830, where the assignee had an unsettled account and a claim for his services; and the counsel of the latter, Ibid; *Re* Forestier, 222 Fed. 537; are disqualified from being appointed or elected trustee. It has been said that his former attorney is ordinarily disqualified; *Re* Gordon Supply & Mfg. Co., 129 Fed. 622; *Contra, Re* Machin, 128 Fed. 315; *Re* Cooper, 135 Fed. 196; *Re* Wink, 206 Fed. 348. A person is not disqualified because he is a creditor of the bankrupt's estate; *Re* Lazoris, 120 Fed. 716; even, it was held, in a decision of doubtful authority where he had bought his claim after the bankruptcy; *Re* Sweetser, 240 Fed. 167; nor because he is attorney for the petitioner; W. A. Liller Bldg. Co. v. Reynolds, C. C. A., 247 Fed. 90; or other creditors; *Re* Margolies, 191 Fed. 369; *Re* Archbold & Hamilton, 237 Fed. 408; although, it has been held, when using a proxy, he voted for himself, Ibid; nor because he is a stockholder, *Re* Merritt, Const. Col., 219 Fed. 555, or officer, Ibid; or director; *Re* Syracuse Paper & Pulp Co., 164 Fed. 275, where two other trustees were appointed, of the bankrupt corporation. A contract is invalid which stipulates that the attorney for one party shall be trustee and the counsel for the other, attorney for the creditors, that the latter party shall be paid by the former the full amount of his claim against the bankrupt provided that the former could buy the assets for less than a specified amount; Holsberry v. Clark, C. C. A., 242 Fed. 831.

[2] Non-residence in the county where the assets are situated is no disqualification; *Re* Jacobs & Roth, 154 Fed. 988.

[3] 30 St. at L. 556, 547, § 45. See *Re* Lewensohn, 98 Fed. 576. It has been held: that the remoteness of his residence from the place where the trust property is to be administered, is no ground for disapproval where he resides or has an office within the district, *Re* Kruger, 196 Fed. 705; and that he should not be removed because he changes his legal residence to another district, if he retains his office in that where he was appointed, and the change does not interfere with the administration of the estate and the service of notices upon him; *Re* Seider, 163 Fed. 138.

[4] *Re* Coe, 154 Fed. 162.

value.[1] (c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee."[2] "1. All sales shall be by public auction

§ 641a [1] The court may refuse its approval or may set aside a sale because of gross inadequacy, *Re* Am. Beaver Co., 242 Fed. 599; Jacobsohn v. Larkey, C. C. A., 245 Fed. 538; but this will rarely be done unless the price seems to be unconscionable; *Re* Shapiro, 154 Fed. 673; *Re* Kronrot, 183 Fed. 653; *Re* Burr Mfg. & Supply Co., 217 Fed. 16, *supra*, § 394d. When the price is less than seventy-five percentum of the appraised value the court may refuse to confirm the sale; *Re* Beaver Co., 242 Fed. 540. As a condition of such disapproval, security may be required of the objectors to insure a higher bid on the second sale, even when the first sale was for less than seventy-five percentum of the appraised value; Jacobsohn v. Larkey, C. C. A., 245 Fed. 538. For a refusal to confirm a sale when more than three-fourths of the appraised value was bid. See Untereiner v. Camors, C. C. A., 228 Fed. 890. A sale will rarely be disapproved, when a large majority of the creditors wish its confirmation; *Re* Haywood Wagon Co., C. C. A., 219 Fed. 655. Objections to the sale may be made by other bidders who are not creditors; Jacobsohn v. Larkey, C. C. A., 245 Fed. 538. If the accepted bid equals the appraised value, the sale will ordinarily be confirmed and not set aside for inadequacy of price; Schuler v. Hansinger, C. C. A., 177 Fed. 119. *Cf.* *Re* Zehner, 193 Fed. 787. The purchaser at a judicial sale may be required to accept a title good by adverse possession, although not supported by the records; Marsh v. Kenyon, 37 App. D. C. 574. The purchaser was not allowed a credit upon his bid for the amount he had paid in endeavoring to obtain possession of property from a person who gave notice at the sale that he would not surrender the same. *Re* Criblier, 184 Fed. 338. Where after the sale and before its confirmation the property was seriously damaged by a flood, the buyer was not obliged to complete his purchase. In *Re* Finks, C. C. A., 224 Fed. 92. For a refusal to confirm because of an appreciation in value, see *Re* Ohio Copper Mining Co., 237 Fed. 490. The purchaser will be relieved because of a material mistake caused by an innocent misrepresentation by the trustee. *Re* Caponigri, C. C. A., 210 Fed. 897. But see *Re* Frasin, C. C. A., 201 Fed. 343; Taylor v. Kimmerle, C. C. A., 232 Fed. 134. For a denial of an application to be relieved from a purchase because the only other bidder was "a 'puffer'" employed to run up the bid, see Williams v. Hogue, C. C. A., 219 Fed. 182. A bid may be withdrawn at any time before it is accepted, *Re* Glas-Shipt Dairy Co., C. C. A., 239 Fed. 122. But see *Re* Lane Lumber Co., C. C. A., 207 Fed. 762.

[2] 30 St. at L. 544, § 70 Subd C. The Act of March 3, 1893 regulating sales of land by courts of the United States does not apply to proceedings in bankruptcy. Robertson v. Howard, 229 U. S. 254,

unless otherwise ordered by the court.[3] 2. Upon application to

see *supra*, § 394. The trademarks cannot be sold separately from the other assets. *Re* Jaysee Corset Co., 201 Fed. 779 (Court, S. D. New York, November 9, 1911.) When the bankrupt's merchandise was sold without the trademark and good will the trustee was restrained from a subsequent sale of the two latter. Ibid. It has been held that the good will cannot be sold without the bankrupt's consent, unless it has been bought by him from another. *Re* Myers, C. C. A., 208 Fed. 407.

[3] General Order XVIII. No order of the court is required to authorize such sale. *Re* La France Copper Co., 205 Fed. 207. It is not a sufficient compliance with this order to advertise for bids to be submitted at a creditors' meeting. A special order for this is necessary, *Re* Nevada-Utah Mines & Smelters Corp., C. C. A., 202 Fed. 126, but see s. c., below. The court may authorize the sale of land or other property of the bankrupt situated in another district. Robertson v. Howard, 229 U. S. 254. A sale by the trustee should ordinarily not be made without notice to the creditors. *Re* James Carothers & Co., 193 Fed. 687. But such notice is not required in the sale of securities of fluctuating value which have been pledged by the bankrupt. Ibid. When a trustee sends to a newspaper a legal notice for publication the publisher is not in the absence of any special direction entitled to infer that the notice should be published as a display advertisement and charge for such advertising. *Re* Pierce, Butler & Pierce Mfg. Co., 231 Fed. 312. It has been held that the court may select an auctioneer, whom all trustees must employ, *Re* Benjamin, C. C. A., 136 Fed. 175, 14 Am. B. R. 481, affirming 13 Am. B. R. 18, but this ruling has been criticised by a high authority, Referee Remington in his treatise on Bankruptcy, § 2037. When the property consists of several parcels, it is the usual practice first to offer them separately for sale and afterwards in mass and to accept the highest bid. *Re* Haywood Wagon Co., 219 Fed. 655. But this is not indispensable. Jacobsohn v. Larkey, C. C. A., 245 Fed. 538, *supra*, § 394. An order for a sale subject to the confirmation of the court is not invalid because it does not fix an upset price for the property. Schuler v. Hastings, C. C. A., 177 Fed. 119. An appraiser has no right to buy property of the bankrupt. *Re* Frazin & Oppenheim, C. C. A., 181 Fed. 307. A sale to a corporation, in which the appraiser and the bankrupt's family have the controlling interest, was set aside. Ibid. In the absence of a charge of collusion by the trustee, it was held: that, after the confirmation, a creditor could not, upon a petition, obtain a summary order setting aside the same for a conspiracy between the purchaser and former employees of the bankrupt, which enabled the purchaser to buy the property for an inadequate consideration; and that the remedy was a plenary suit by the trustee for an accounting. *Re* Charles Knosher & Co., C. C. A., 197 Fed. 136. A sale was con-

the court, and for good cause shown, the trustee may be authorized to sell any specific portion of the bankrupt's estate at private sale;[4] in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee. 3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."[5] A Court of Bankruptcy has power, in its discretion, to order a sale of the bankrupt's property free from liens thereon, which may be transferred to the proceeds.[6]

firmed although the property was bought by a reorganization committee, whose purchase was favored by the trustee. Schuler v. Rassinger, C. C. A., 177 Fed. 119. See *Re* Ohio Copper Mining Co., 237 Fed. 490. For authorities upon Judicial Sales, see §§ 394-394b, *supra*.

[4] *Re* Nevada-Utah Mines & Smelters Corporation, C. C. A., 202 Fed. 126; *Re* Knox Automobile Co., 210 Fed. 569; *Re* Eden Musee American Co., 230 Fed. 926. The sale of all the bankrupt's property may thus be be authorized; *Re* Knox Automobile Co., 210 Fed. 569.

[5] General Order XVIII. The term, "perishable" is not limited to liability to physical deterioration, but included liability to deteriorate in price and market value. *Re* Pedlow, C. C. A., 209 Fed. 820.

[6] *Re* Keet, 128 Fed. 651. See also Factors' & Tr. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582; *Re* Worland, 92 Fed. 893; *Re* Sanborn, 96 Fed. 551; *Re* Styer, 98 Fed. 290; *Re* Pittelkow, 92 Fed. 901; *Re* Mead, 58 Fed. 312; So. L. & Tr. Co. v. Benbow, 96 Fed. 514; *Re* Whiteside, 230 Fed. 937. It has been held that such a sale in Pennsylvania does not divest the property of the inchoate right of dower held by the bankrupt's wife; *Re* Chotiner, 216 Fed. 916; *Contra Re* Codori, 207 Fed. 784; Kelly v. Minor (two cases), C. C. A., in re 252 Fed. 115. Held otherwise in North Carolina, *Re* Munford, 225 Fed. 108. As an incident to this power the court has the power to determine the amount of the lien claimed and to direct payment thereof out of the funds arising from the same. *Re* Torchia, 185 Fed. 576; *Re* Roger Brown & Co., C. C. A., 196 Fed. 758; *Re* Progressive Wall Paper Corp., 222 Fed. 87; *Re* Reading Hat Mfg. Co., 224 Fed. 786; Dunlap v. Baker, C. C. A., 239 Fed. 193; *Re* North Star Ice & Coal Co., 252 Fed. 301. But see *Re* Henderson, 206 Fed. 137. For cases as to the determination of

§ 642. Duties of trustees. "(*a*) Trustees shall respectively (1) account for and pay over to the estates under their control all in-

the share of a lienor upon part of property sold for a lump sum, see, Vollmer v. McFadgen, C. C. A., 161 Fed. 914; *Re* B. A. Lockwood Grain Co., 225 Fed. 873. Where such a lienor was allowed no priority, *Re* Keyser v. Wessel, C. C. A., 128 Fed. 281, 62 C. C. A., 650, 12 Am. Br. 126; and *Re* F. & B. Co., C. C. A., 256 Fed. 73; and in case the lienor is a purchaser, to permit the amount of the lien to be credited upon his bid, *Re* Roger Brown & Co., C. C. A., 196 Fed. 758; Clark Hardware Co. v. Sauve, 220 Fed. 102; *Re* States Printing Co., C. C. A., 241 Fed. 245; *Re* Franklin Brewing Co., C. C. A., 249 Fed. 333. Where it is contended that the amount secured by the lien is in part a voidable preference, the trustee may deduct that amount from the payment and withhold the same until the controversy has been adjudicated.. *Re* V. & M. Lumber Co., 182 Fed. 231. It has been said that a sale free of liens should be directed whenever there is reasonable ground to believe that more may be realized than the amount of the encumbrance, although there is doubt upon the point. *Re* Zehner, 193 Fed. 787; *Re* Progressive Wall Paper Corp., 222 Fed. 87. In such a case, the creditor will usually be enjoined from foreclosing in the State court. Ibid. Where it is reasonably certain that the property is encumbered to its full value, the court will not direct such a sale, nor enjoin foreclosure proceedings in the State court. Ibid; *Re* Foster, 181 Fed. 703; *Re* Rose, 193 Fed. 815; *Re* Fayetteville Wagon Wood & Lumber Co., 197 Fed. 180, where there was a dispute as to the validity of the lien. But see, *Re* Franklin Brewing Co., C. C. A., 249 Fed. 333. Upon an application for such a sale, the court is not bound by the opinions of witnesses as to the value of the property even when they are uncontradicted, when they are at variance in the appraisers' estimate. Clark Hardware Co. v. Sauve, 220 Fed. 102. Where a trustee had taken possession of property in another State where a lienor lived, it was held that he might be authorized to make such a sale. *Re* Wilka, 131 Fed. 1004 *Re* States Printing Co., C. C. A., 241 Fed. 245; Kelly v. Minor, C. C. A., 252 Fed. 115. When a trustee finds that the bankrupt owns property subject to liens, he should petition the court for instructions, *Re* Cutler & John, 228 Fed. 771. An order directing a sale of a bankrupt's property on which valid liens exist should be granted only on notice to lien creditors, and the record should affirmatively disclose that every creditor whose lien will be discharged by the sale has received such notice. *Re* Platteville Foundry & Machine Co., 147 Fed. 828; *Re* Stewart, 193 Fed. 791; *Re* Torchia, 185 Fed. 576; *Re* National Boat & Engine Co., 216 Fed. 208; *Re* Reading, 224 Fed. 786; *Re* North Star Ice & Coal Co., 252 Fed. 301. In one case a lienor not a creditor was not permitted to object, *Re* Pittsburg-Big Muddy Coal Co., C. C. A., 215 Fed. 703; see *Re* States Printing Co., C. C. A., 241 Fed.

terest received by them upon property of such estates;[1] (2)

245. Slight circumstances may constitute an estoppel against an objection by a lienor to such an order, even though the order was irregularly made. *Re* N. Y. & Phila. Package Co., 225 Fed. 219; Crampton v. Massie, C. C. A., 236 Fed. 901; Gugel v. New Orleans Nat. Bank, C. C. A., 239 Fed. 676; *Re* States Printing Co., 241 Fed. 245. But see North Star Ice & Coal Co., 252 Fed. 201; *Re* McAusland, 235 Fed. 173. An action of trover is an affirmance of the sale. *Re* Platteville Foundry & Machine Co., 147 Fed. 828. An order by the bankruptcy court directing a sale of the bankrupt's property without mentioning liens is construed as only authorizing a sale subject to existing liens. *Re* Platteville Foundry & Machine Co., 147 Fed. 828; *Re* Reading Hat Mfg. Co., 224 Fed. 786. In such a case any lienor may bid at the sale. *Re* Old Oregon Mfg. Co., 236 Fed. 804. The details as to the sale of encumbered property may be left to the discretion of the creditors, subject to the approval of the court, after the lienor has been afforded a hearing. *Re* Zehner, 193 Fed. 787. Ordinarily, no more should be expended for advertising than would be required in case of a sale under the State laws. Ibid. Where it is doubtful whether the property will sell for more than the amount of the lien, the trustee may be directed to sell the property himself without the aid of an auctioneer. Ibid. Where the trustee sells mortgaged property free from a mortgage, which the court holds to be valid, the mortgagee is entitled to the payment of interest, as well as principal, out of the proceeds, if the mortgage entitles him to interest. Coder v. Arts, C. C. A., 15 L.R.A. (N.S.) 372, 152 Fed. 943, aff'd 213 U. S. 233, 53 L. ed. 772; *Re* Allert, 173 Fed. 691. The amendment of 1910 gives the trustees commissions "on all moneys disbursed or turned over to any person, including lienholders, by them." 36 St. at L. 838, amending 30 St. at L. 544, § 48; *Re* Holmes Lumber Co., 189 Fed. 179. See § 663, *infra*. For the previous decisions see the fifth edition of this book § 642, note 11. The court of bankruptcy cannot order mortgaged premises sold clear of the mortgage lien and deduct from the mortgagee's share of the proceeds any of the general expenses of the administration of the estate beyond the expense of the sale of the proceedings to ascertain the amount due the lienor and the trustee's commissions. *Re* Howard, 207 Fed. 402.

§ 642. 1He is liable for all profits, beyond the statutory compensation, made by him in connection with his trust, including those resulting from the purchase at a discount alone or in connection with others, of claims against the bankrupt. In the latter case, such profits made by his partners must also be returned to the estate. U. S. Fidelity & Guaranty Co. v. Eichel, 220 Fed. 803; *Re* Webster Loose Leaf Filing Co., 252 Fed. 959. It has been held that a trustee is not bound to account for profits made by a corporation, of which he was a stockholder, upon goods sold by the corporation to himself and other

collect and reduce to money the property of the estates for which they are trustees, under the direction of the court,[2] and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;'' [3] '' (3) deposit all money re-

receivers of the bankrupt's estate. *Re* Frazin & Oppenheim, C. C. A., 181 Fed. 307. It is hoped that this decision, which opens the door for fraud, will not be followed. Union Electric Co. v. Hubbard, C. C. A., 242 Fed. 248. A trustee in bankruptcy is bound to use due diligence to collect the assets of the estate, and he may be charged in his account with the value of assets which never came into his possession, if he failed to exercise reasonable diligence in collecting them.

[2] *Re* Reinboth, C. C. A., 16 L.R.A. (N.S.) 341, 157 Fed. 672. *Re* Kane, 161 Fed. 633. See *Re* Di Cola, 217 Fed. 743. He is *prima facie* liable for his failure to collect assets stated in the schedules. *Re* Kuhn Bros., C. C. A., 234 Fed. 277. He may be personally responsible for transferring property in such a way as to defeat a lien thereon, of which notice has been given him. *Re* Cadenas & Coe, 178 Fed. 58. The fact a trustee failed to object to the discharge of a bond for the value of property given by a third party in possession thereof is evidence of the negligence in this respect. Ibid. A trustee is under no obligation to buy property at a foreclosure sale in order to prevent its being acquired by the mortgagor for less than the amount of the mortgage. *Re* Graves, 182 Fed. 443. Where a trust company was appointed receiver and trustee, it was held that it was its duty to act as custodian of the property and that it could not charge for the services of a watchman, although that was required as a condition to the issue of a fire insurance policy. *Re* Pickhardt, 198 Fed. 879.

[3] It has been said that the trustee is to some extent a stakeholder and occupies a fiduciary relation toward the bankrupt as well as the creditors. *Re* Lenters, 225 Fed. 878, 883. *Contra Re* Kreuger, 196 Fed. 705, 708. He and the estate, irrespective of negligence, are liable for the loss of property in his possession belonging to another which he has refused to surrender to the rightful owner. *Re* Reeves, 227 Fed. 711, or for his other conversion of such property. McAuley v. Jackson, 165 App. Div. (N. Y.) 846; Bramble v. Brett, C. C. A., 236 Fed. 385. He may be liable for the penalties imposed by a State statute for the non-payment of taxes. Stanard v. Dayton, 220 Fed. 441. The court may instruct the trustee what counsel to employ, *Re* Arnett, 112 Fed. 770; and give orders concerning litigation by him; *Re* Bailey, 151 Fed. 953. He should not engage in expensive litigation concerning doubtful claims without the authority of a large majority of the creditors, unless creditors who wish the litigation instituted assume responsibility for the expense. *Re* Harper, 175 Fed. 412; *Re* Kearney, 184 Fed. 190. But he may be required to do so upon the petition of a creditor, *Re* Bailey, 151 Fed. 953, or stockholder, *Re* John H.

ceived by them in one of the designated depositories;[4] (4) disburse money only by check or draft on the depositories in which it has been deposited;[5] (5) furnish such information concerning

Woodbury Dermatological Institute, C. C. A., 191 Fed. 819, of the bankrupt who files a bond to protect the estate from liability for costs and expenses; and, in such a case, the court may direct that the creditors who paid the expense of the litigation should have a prior lien for the same and for the amount of their claims out of any amount that may be recovered, Cornell v. Nichols & L. Mach. Co., C. C. A., 201 Fed. 320, affirmed, 189 Fed. 556; *Cf. Re* Buchanan, 219 Fed. 492; see §§ 311, 322, 421, *supra*. A trustee may be sued in a State court in trover, without leave of the Court of Bankruptcy, for an act done in the performance of his official functions, *Re* Smith, 121 Fed. 1014; *Re* Hunter, 151 Fed. 904. But it has been held that rent cannot be collected from him, except by a proceeding in the Court of Bankruptcy; *Re* Bishop, 153 Fed. 304. See §§ 643, 647, *infra*. The trustee is liable for reimbursement from the estate for rent, which he is obliged to pay for the reasonable use of property for the purposes of his trust, *Re* Hunter, 151 Fed. 904. When because of his payment of attorney's fees the assets were insufficient to pay claims entitled to a priority he was directed to make up such deficiency. *Re* Mitchell, C. C. A., March 10, 1914.

[4] "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories." 30 St. at L. 544, 562, § 61. See *Re* Barnett, 214 Fed. 263. It has been held that the District Court should not direct a trustee to withdraw the proceeds of a sale from the designated depository and deposit them in a national bank in the district, in return for a time certificate of deposit bearing the highest current rate of interest. Huttig Mfg. Co. v. Edwards, C. C. A., 160 Fed. 619. And even that without the approval of the creditor he cannot make deposits in the savings departments of such depositaries where it bears interest, but is not subject to being withdrawn by checks. *Re* Dayton Coal & Iron Co., 239 Fed. 737. The estate to which the deposit belongs should be stated at the time thereof. *Re* Cobb, 112 Fed. 655, 657; *Re* Carr, 117 Fed. 572. But see State Bank v. Dodge, 124 U. S. 333, 31 L. ed. 458. The deposit should be made in the name of the court or judge, *Re* Cobb, 112 Fed. 655, 657, or in that of the trustee in his official capacity, Carr, 117 Fed. 572.

[5] "No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the

the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts;[6] and (11) set apart the bankrupt's ex-

clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.'' General Order XXIX. Payments made by the trustee without any authority from the Court of Bankruptcy may be disallowed, and he and his bondsmen may be obliged to return to the estate the amount thereof, although the court might have authorized them had the trustee applied for authority before they were made. *Re* Hoyt & Mitchell, 127 Fed. 968. *Cf. Re* Rude, 101 Fed. 805. But see *Re* Cobb, 112 Fed. 655.

[6] A trustee in bankruptcy is considered to be an officer of the court and subject to its direction by an order in summary proceedings, as to all matters affecting money or property, which came into his possession by virtue of his office. *Re* Howard, 130 Fed. 1004; *Re* Cadenas & Coe, 178 Fed. 158. It has been held that an order in such a proceeding cannot be set aside by the court that made it, after the expiration of a year. *Re* Hoyt & Mitchell, 127 Fed. 968. But see § 614, *supra*. When a trustee in bankruptcy, in a suit in another district, had been required to make restitution of money paid to his attorney under a previous decree, which was reversed; it was held that that decree might be enforced by a summary application in the

emptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."[7] "Proofs of debt received by any trustee shall be delivered to the referee, to whom the cause is referred."[8] "(*b*) Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. (*c*) The creditors of a bankrupt estate, at their first meeting, after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustees, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. (*d*) The court shall require evidence as to the actual value of the property of sureties. (*e*) There shall be at least two sureties upon each bond.[9] (*f*) The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. (*g*) Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties

district where he was appointed; that it was no defense that his attorney refused to surrender a part of the fund because of an alleged lien for counsel fees and disbursements; but that, where there were no funds of the estate in his hands, he could not be required to pay the costs awarded against him in the other district. *Re* Howard, 130 Fed. 1004.

[7] 30 St. at L. 544, 550, § 47, *Cf.* Merchants' Bank v. Slagle, 106 U. S. 558, 27 L. ed. 204. "The trustee shall, within 30 days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which together with a filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings." Ibid. § 47c.

[8] General Order XXI.

[9] Ibid.

upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. (*h*) Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.[10] (*i*) Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees. (*j*) Joint trustees may give joint or several bonds. (*k*) If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office."[11] "Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed."[12] "The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be

10 Alexander v. Union Surety & Guaranty Co., 89 App. D. (N. Y.) 3. It has been held that an order directing a trustee to account is a necessary prerequisite to an action on his bond; U. S. v. Sondheim, 188 Fed. 378; unless he has absconded, then it is not, Scofield v. U. S., C. C. A., 174 Fed. 1. That the account may be settled and allowed by the referee upon the confirmation of a composition; and that when this is done without any objection or appeal by the bankrupt, the latter cannot thereafter dispute such allowance in a suit upon such bond. U. S. v. Sondheim, 188 Fed. 378.

11 St. at L. 544, 558, § 50.

12 Ibid.

due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court."[13] "(*b*) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court."[14] "The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest."[15]

§ 643. Title and powers of trustees. "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt,[1] as of the

[13] General Order XVII.

[14] 30 St. at L. 544, 565, amended Feb. 5, 1903, ch. 487, § 16, 32 Stat. L. 800. A person is not disqualified for appointment as an appraiser of a bankrupt's property merely because some of the officers and directors of a corporation creditor are also officers and directors of another corporation of which such appraiser is president. *Re* Columbia Iron Works, 142 Fed. 234. See Clark Hardware Co. et al. v. Sauve, C. C. A., 220 Fed. 102. The lack of an appraisal of real estate is an irregularity which is cured by the order of confirmation. Robertson v. Howard, 229 U. S. 254, 264, *supra*, § 394c.

[15] 30 St. at L. 544, 558, § 49. A creditor may inspect them, although he claims adversely to the trustee. *Re* Saur, 122 Fed. 101. It seems that his motive is immaterial. *Re* Sully, C. C. A., 152 Fed. 619, reversing 142 Fed. 895. A mere debtor of the estate cannot. *Re* Sully, C. C. A., 152 Fed. 619.

§ 643. [1] The trustee acquires no greater rights than the bankrupt or his creditors. *Re* N. Y. Economical Printing Co., C. C. A., 110 Fed. 514; *Re* Kellogg, C. C. A., 118 Fed. 1017. It has been said that he represents the creditors only and not the bankrupt. *Re* Kreuger, 196 Fed. 705. Where the trustee sells the interest of the bankrupt in land, the purchaser acquires only the latter's interest on the day of the adjudication; and no interest therein, subsequently acquired by him, passes by the deed. Cramer v. Wilson, 195 U. S. 408, 49 L. ed. 256. A trustee in bankruptcy takes the property subject to all the equities imposed upon it in the hands of the bankrupt which are not invalid as to creditors or avoided by the Bankruptcy Act. *Re* Chantler Cloak &

date he was adjudged a bankrupt,[2] except in so far as it is to

Suit Co., 151 Fed. 952; *Re* V. & M. Lumber Co., 182 Fed. 231; Aldine Tr. Co. v. Smith, C. C. A., 182 Fed. 449; *Re* Wade, 185 Fed. 664; Henry v. Harris, 191 Fed. 865; *Re* Stewart, 193 Fed. 791; *Re* McConnell, 197 Fed. 438; *Re* Hoffman, 199 Fed. 448; *Re* Davison, 179 Fed. 750. *Re* Wright-Dana Hardware Co., C. C. A., 211 Fed. 908; *Re* Sweeney, C. C. A., 212 Fed. 1; Consolidated Arizona Smelting Co. v. Hinchman, C. C. A., 212 Fed. 813; *Re* Deutsche Bros., 220 Fed. 532; Galbraith v. First Nat. Bank of Alexandria, Minn., 221 Fed. 386; *Re* International Mineral Co., 222 Fed. 415; Shaffer v. Federal Cement Co., 225 Fed. 893; *Re* East Stroudsburg Supply & Construction Co., 248 Fed. 356; *Re* Moose River Lumber Co., 251 Fed. 409; *Re* Roseboom, 253 Fed. 136; Keefe v. Worcester Trust Co., C. C. A., 253 Fed. 536.

2 By the amendment of June 25, 1910, "such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. Everett v. Judson, 228 U. S. 474, 479. See Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 649. *Re* Williamsburg Knitting Mill, 190 Fed. 871, 877. Before this amendment it was said that "the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction." Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405; citing Bank v. Sherman, 101 U. S. 403, 405, 25 L. ed. 866, under the former law. This dictum was criticised in *Re* Williamsburg Knitting Mill, 190 Fed. 871, 877; Remington on Bankruptcy, § 1212. See, also, York Mfg. Co. v. Cassell, 201 U. S. 344, 353, 50 L. ed. 782; Davis v. Crompton, C. C. A., 158 Fed. 735, 742. The effect of the amendment seems to be to establish this doctrine. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307; *Re* Williamsburg Knitting mill, 190 Fed. 871, 877; Remington v. Bankruptcy, III, 331. See Toof v. City Nat. Bank of Paducah, Ky., C. C. A., 206 Fed. 250; *Re* Federal Contracting Co., C. C. A., 212 Fed. 688; Tripplehorn v. Cambron, 250 Fed. 605. The trustee was allowed to recover the amount of a check given by the bankrupt before the petition and collected by the defendant after the adjudication. Edison Electric Illuminating Co. v. Tibbetts, C. C. A., 241 Fed. 468, 469, affirming Morton, J., who said: "It may be that, as between the trustee and the bank, the latter would be protected by reason of the agreement under which deposits are customarily accepted. See *In re*

property which is exempt,[3] to all (1) documents relating to his

Zotti, 186 Fed. 84, 108 C. C. A. 196, Ann. Cas. 1914A, 240; Reed v. Mattapan Del. & Tr. Co., 198 Mass. 306, 84 N. E. 469." Before the amendment, it was held, that a sale of perishable goods by a State court was valid although ordered after the filing of the petition in bankruptcy and made after the adjudication without notice of the bankruptcy proceedings, Jones v. Springer, 226 U. S. 148, 57 L. ed. —. But see Harv. Law Rev. XXV. 80, 469. The trustee has no greater rights than an execution creditor at the date of the filing of the petition. *Re* Terrell, C. C. A., 246 Fed. 743. Since the amendment it has been said that an assignee in insolvency is bound to take notice of the filing of the petition and that a subsequent sale by him is "null and void;" although subsequently approved by the State court. This dictum, however, was not essential to the decision. *Re* Louis Neuburger, 233 Fed. 701. It has been said that the trustee may enforce an estoppel for the benefit of a part of the creditors. *Re* Desnoyers Shoe Co., 210 Fed. 533. He has the rights of a judgment and execution creditor although no creditor has entered judgment. Baldwin v. Kingston, 247 Fed. 162. Under Va. Code of 1904, § 2877, he may seize goods held by the bankrupt on consignment for sale. Virginia Book Co. v. Sites, C. C. A., 254 Fed. 46. He was allowed land which the bankrupt intended to mortgage but failed sufficiently to describe. *Re* Scruggs Bros., 252 Fed. 322. That he cannot assert the rights of stockholders of a bankrupt corporation, *Re* V. & M. Lumber Co., 182 Fed. 231; nor of creditors who have released their rights under a prior composition which they have not sought to avoid. Batchelder & Lincoln Co. v. Whitmore, C. C. A., 122 Fed. 355. As to wages previously earned, see *Re* Beck, 238 Fed. 653. This includes the reward for information concerning smugglers, allowed by the Secretary of the Treasury, after the filing of the petition for services previously given. *Re* Ghazal, C. C. A., 174 Fed. 809. An award subsequent to the bankruptcy of an increase of wages for services previously performed can be enforced for the benefit of the bankrupt's trustee. *Re* Evans, 253 Fed. 276. He acquires the rights to commissions, subsequently paid upon the renewals of insurance policies negotiated by a bankrupt agent; although, by the terms of the latter's contract with the insurance company, they may be forfeited if he fails to comply with its conditions or quits the company's employment. *Re* Wright, C. C. A., 18 L.R.A. (N.S.) 193, 157 Fed. 544; *Re* Wright, 177 Fed. 578. Wages earned subsequent to the adjudication are the property of the bankrupt and not assets to be administered by his trustee. *Re* Karns, 148 Fed. 143; Progressive Building & Loan Co. v. Hall, C. C. A., 220 Fed. 45. It has been held that the trustee cannot obtain an injunction against their collection by a creditor who has an assignment made prior to the petition. *Re* Karns, 148 Fed. 143; but that the debtor may do so. *Re* Newberry, 183 Fed. 338.

property; (2) interest in patents, patent-rights, copyrights, and trade-marks;[4] (3) powers he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors;[5] (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:[6] Provided, that when any bankrupt shall have any insur-

See § 650, *infra*. See *Re* Gillespie, 209 Fed. 1003. The trustee acquires no right to the cause of action upon a contract for personal services to be rendered in the future, *Re* D. H. McBride & Co., 132 Fed. 285.

3 *Infra* § 650.

4 It has been held that the trustee takes no interest in applications for patents, which have not been granted. *Re* McDonnell, 101 Fed. 239; *Re* Dann, 129 Fed. 495. *Contra, Re* Cantelo Mfg. Co., 185 Fed. 276. *Re* Myers-Wolf Mfg. Co., C. C. A., 205 Fed. 289. Where a bankrupt corporation had agreed to publish an author's works, the copyright for which was taken in the corporate name, under a contract providing that, upon its failure to carry out its provisions, the copyright should revert to the author; it was held that the trustee in bankruptcy of the company acquired no title thereto. *Re* D. H. McBride & Co., 132 Fed. 285. But see *Re* Howley-Dresser Co., 132 Fed. 1002.

5 See § 644, *infra*. For desultory remarks as to the definition of property, see Fisher v. Cushman, C. C. A., 51 L.R.A. 292, 103 Fed. 860, 864. Board of Trade of City of Chicago v. Weston, C. C. A., 243 Fed. 332.

6 The trustee has the right to the crop growing on the bankrupt's land in Tennessee although the State statute does not authorize such a sale until a month subsequent to the adjudication, *Re* T. C. Burnett & Co., 201 Fed. 162, but not, it has been held, to a crop growing upon a homestead entered upon public lands of the United States. *Re* Miller, 221 Fed. 690. The trustee takes the title of the bankrupt to a vested remainder, although subject to be defeated by a subsequent event. Davis v. Gates, 235 Fed. 192; *Re* Dorgan's Estate, 237 Fed. 507; also, it has been held, to a contingent remainder. Clowe v. Seavey, 208 N. Y. 496; but see Van Heusen v. Van Heusen Charles Co., 74 Misc. (N. Y.) 292; to a legacy bequeathed to the bankrupt by a testator who died a few hours before the petition upon the same day, *Re* M'Kenna, 137 Fed. 611, to the rents of the land of an intestate conveyed by the heirs to the bankrupt when no proceedings have been taken to sell this in order to pay the former's debts, *Re* Tietje, 253 Fed. 283, but not to a fund bequeathed in trust to pay the income to the bankrupt during his life with a remainder to others, the remainder being subject to the condition that the principal be paid the bankrupt whenever he became able to pay his just debts

ance policy which has a cash-surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash-surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets;[7] and (6) rights of action

and liabilities from other sources, although such principal had been paid the bankrupt after his discharge, the State law recognizing the validity of such a trust. Hull v. Farmers' Loan & Trust Co., 245 U. S. 312. Nor to land in Michigan held by the bankrupt and his wife as tenants by the entirety. *Re* Berry, 247 Fed. 700. A trustee was allowed to recover property bought by the bankrupt's wife out of her savings from money given her by her husband for household expenses. Milkman v. Arthe, 221 Fed. 134. It was held that arrears of alimony due a woman prior to the filing of the petition in bankruptcy against her did not pass to her trustee. Bolton v. Bolton, N. J. S. Ct., March, 1914, 89 Atl. 1014.

The right to a liquor license or the proceeds thereof passes to a trustee in bankruptcy in Massachusetts, *Re* Brodbine, 93 Fed. 643; Fisher v. Cushman, C. C. A., 51 L.R.A. 292, 103 Fed. 860. But see *Re* Beahn, 212 Fed. 763; *Re* Tracy v. Ginzberg, 205 U. S. 170; *Re* McArdle, 126 Fed. 442. Minnesota, *Re* May, 5 Am. B. P. 1, by Merriman, Referee, Pennsylvania, *Re* Becker, 98 Fed. 407; *Re* Benz, C. C. A., 218 Fed. 50, including the right of renewal. *Re* John F. Doyle & Son, C. C. A., 209 Fed. 1, reversing 205 Fed. 543. *Contra Re* Olewine, 125 Fed. 840. *Re* Mitchell, 250 Fed. 1003, and in Virginia, *Re* Flaherty, 104 Fed. 962; as to South Dakota, see Strub v. Gamble, C. C. A., 221 Fed. 253. But as to Georgia, *Re* Keller, 16 Am. B. R. 727, by Referee Isaac. So does the right to a market stall, *Re* Emrich, 101 Fed. 231; and a membership in a stock exchange, Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318 (the Philadelphia Stock Exchange); *Re* Gaylord, 111 Fed. 717 (the St. Louis Stock Exchange); *Re* Hurlbutt, Hatch & Co., C. C. A., 135 Fed. 504 (the N. Y. Stock Exchange); O'Dell v. Boyden, C. C. A., 150 Fed. 731 (the N. Y. Stock Exchange); Solinsky v. N. Y. Stock Exchange, 260 Fed. 266, or chamber of commerce, *Re* Neimann, 124 Fed. 738 (the Milwaukee Chamber of Commerce); when the same is transferable, although the other members have a right to decide the eligibility of the purchaser. The bankrupt may be compelled to execute the necessary application for such transfer. Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318; *Re* Gaylord, 111 Fed. 717; *Re* Hurlbutt, Hatch & Co., C. C. A., 135 Fed. 504; O'Dell v. Boyden, C. C. A., 150 Fed. 731.

[7] Policies of life insurance, which

arising upon contracts or from the unlawful taking or deten-

are exempted by the State law, do not pass to the trustee, Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, *infra*, § 650. Nor do policies payable absolutely to another without any power in the bankrupt to change the beneficiary. *Re* Simmons & Griffin, C. C. A., 235 Fed. 521; *Re* Fetterman, 243 Fed. 975; *Re* Jamison Bros. & Co., 222 Fed. 92; *Re* Flanigan, 228 Fed. 339; *Re* Arkin, C. C. A., 231 Fed. 947; *Re* Majors, 241 Fed. 538; *Re* Gannon, 241 Fed. 733; Harriman Nat. Bank v. Huiett, 244 Fed. 216, nor policies assigned before the bankruptcy to another when the assignment was valid as between the parties but invalid as against the company. *Re* Baird, 245 Fed. 504. The trustee takes life insurance policies, not exempt, which are payable to the bankrupt or his estate. Cohn v. Malone, 248 Fed. 450; *Re* Levy, 227 Fed. 1011, conditionally or contingently, as in the case of tontine, *Re* Boardman, 103 Fed. 783; Clark v. Equitable Life Assur. Soc., 143 Fed. 175; or semi-tontine, *Re* Slingluff, 106 Fed. 154; *Re* Welling, C. C. A., 113 Fed. 189; or endowment, *Re* Diack, 100 Fed. 770; Clark v. Equitable Life Assur. Soc., 143 Fed. 175; *Re* Herr, 182 Fed. 716; Equitable Life Assur. Soc. of U. S. v. Miller, C. C. A., 185 Fed. 98; *Re* Loveland, 192 Fed. 1005; *Re* Churchill, 198 Fed. 711; policies, and annuity bonds, Smith v. Mutual Life Ins. Co., 158 Fed. 365; Mutual Life Ins. Co. of N. Y. v. Smith, C. C. A., 33 L.R.A. (N.S.) 439, 184 Fed. 1. But, although the bankrupt may be required to execute the necessary assignments or other papers to enable the trustee to realize upon such balance, *Re* Coleman, C. C. A., 136 Fed. 818; a third person, who has a partial or contingent interest therein, cannot be compelled to accept a paid up policy, nor to apply for the surrender value in cash, nor to suffer the policy to lapse, nor to take any other proceedings in relation to the same, *Re* Diack, 100 Fed. 770. Where the bankrupt is the beneficiary in a policy on the life of another, his interest therein passes to his trustee, if the same by the State law is assignable, *Re* Blalock, 118 Fed. 679; *Re* Judson, 188 Fed. 702. Where the insured has reserved the right to change the beneficiary at will, the policy passes to his trustee in bankruptcy, Cohen v. Samuels, 245 U. S. 50; Cohn v. Malone, 248 U. S. 450; *Re* Orear, C. C. A., 30 L.R.A. (N.S.) 990, 178 Fed. 632; *Re* Dolan, 182 Fed. 949; *Re* Herr, 182 Fed. 716; *Re* Hogan, 186 Fed. 537; Foxhever v. Order of the Red Cross, 2 Ohio C. C. (N.S.) 394; *Re* Jamison Bros. & Co., No. 4060, 222 Fed. 92; In *Re* Shoemaker, 225 Fed. 329; In *Re* Bonvillains, 232 Fed. 370; In *Re* Farrand et al., 235 Fed. 809; Malone v. Cohn, C. C. A., 236 Fed. 882; In *Re* Jones, 249 Fed. 487. But see Frederick v. Metropolitan Life Ins. Co., C. C. A., 239 Fed. 125. *Contra*, *Re* Cohen, 230 Fed. 733, under Georgia statutes; Frederick v. Metropolitan Life Ins. Co., 235 Fed. 639, under Pa. statute; *Re* Fetterman, 243 Fed. 975, under Ohio statute, the policy has no actual value at the date of the adjudication, it will not pass to the

trustee, Burlingham v. Crouse, 228 U. S. 459; *Re* Churchill, 209 Fed. 766; Gould v. N. Y. Life Ins. Co., 132 Fed. 927; *Re* Rosenberg-Oldstein Co. et al., 236 Fed. 812; *Re* Williams, 250 Fed. 288; *Re* Gannon, C. C. A., 247 Fed. 932. But see Le More v. United States, C. C. A., 253 Fed. 887, although the bankrupt dies before the estate is closed. Ibid., 228 U. S. 459, if it has no cash surrender value, yet has an actual value, it has been held that it will pass to the trustee, Gould v. New York Life Ins. Co., 132 Fed. 927 (where a few months later, without any further payment, the policy would have a paid-up value, which could be used as collateral to a loan), Richter v. Rockhold, C. C. A., 253 Fed. 941; *Re* Samuels, C. C. A., 254 Fed. 775, although, in such a case, it seems that the bankrupt cannot redeem the same policy. Ibid. Gould v. New York Life Ins. Co., 132 Fed. 927. It has been held that, where the policy has by its terms no surrender value, but it is the practice of the company to allow its surrender for cash after a certain period, the bankrupt may exercise the right secured by the statute, Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, affirming *Re* Mertens, C. C. A., 142 Fed. 445, which reversed 131 Fed. 972; *Re* Draper, 211 Fed. 230; *Re* Simmons et al. 253 Fed. 466. The trustee was not allowed to recover from the holder of a preference insurance collected by the latter upon property received under a preference which was set aside. Lewis v. Julius, 212 Fed. 225. The trustee was allowed to collect upon a policy of insurance against loss from injury to his employees the amount of a judgment recovered after the assets were sold, and paid by the vendee of the purchaser which had assumed the latter's obligation, under a promise to hold the trustee harmless from any such liability when the sale was subject to the condition that the court might order a resale in case any part of the purchase money was not paid. Georgia Casualty Co. v. Bowron, C. C. A., 223 Fed. 89. See *Re* Judson, C. C. A., 192 Fed. 834; s. c., 188 Fed. 702. Where the bankrupt died before the cash surrender value had been ascertained, it was held that his legal representative succeeded to the right of redemption and did not forfeit his right by a failure for more than thirty days to pay the money necessary to redeem the same, Van Kirk v. Vermont Slate Co., 140 Fed. 38. It is said to be the duty of the trustee not to wait for the maturity of the policy, but to collect the surrender value, *Re* Baird, 245 Fed. 504, or to sell his interest in the same at once for what it will bring, *Re* Diack, 100 Fed. 770; but, it has been held that he may pay premiums out of the bankrupt's assets to keep the life insurance policies alive. Gould v. New York Life Ins. Co., 132 Fed. 927. *Contra*, *Re* Josephson, 121 Fed. 142, affirmed in Meyers v. Josephson, C. C. A., 124 Fed. 734. Where the bankrupt dies after the filing of the petition and before the adjudication the trustee is entitled to no more than the cash surrender value as of the date of the filing of the petition. Everett v. Judson, 228 U. S. 474; Andrews v. Partridge, 228 U. S. 479, affirming Partridge v. Andrews, C. C. A., 41 L.R.A. (N.S.) 123, 191 Fed. 325.

tion of, or injury to, his property."[8] The clause of the Bank-

The trustee is entitled to the proceeds of an accident policy, *Re* Natschke, 193 Fed. 284, but not, it has been held, an industrial insurance policy which gave the insurer the right to pay its amount to any relative or person appearing to the insurer to be equitably entitled thereto from having incurred an expense on behalf of the insured. *Re* Gannon, C. C. A., 247 Fed. 932. Creditors whose claims upon their own application had been withdrawn and expunged from the list of claims upon the record and excluded from participation in the distribution of the bankrupt's estate were allowed subsequently to collect from the latter's executrix the balance due under the policies after the surrender value had been paid to the trustee. Andrews v. John Nix & Co., 246 U. S. 273. Where, by the terms of a fire insurance policy, it was avoided upon a change in the title, interest, or possession of the premises, whether due to legal process or otherwise, and the insurance company had consented to a recognition of the title of a receiver in bankruptcy to the same, which was noted on the policy, but no such note was made after the trustee's election, since he considered that the general creditors had no substantial interest therein; it was held that the policy was void as to such trustee. *Re* M. I. Hibbler Mach. Supply Co., 192 Fed. 741.

[8] 30 St. at L. 544, § 70. A trustee acquires the right to an action for damage caused by fraudulent representations. *Re* Harper, 175 Fed. 412; *Re* Gay, 182 Fed. 260; for damages under the Anti-Monopoly Law, Loeb v. Eastman Kodak Co., C. C. A., 183 Fed. 704. Bonvillain v. American Sugar Refining Co. et al., 250 Fed. 641, to recover usurious interest paid to a national bank. Reed v. German American Nat. Bank, 155 Fed. 233. To recover damages for the wrongful appointment of a receiver. *Re* Veler, C. C. A., 249 Fed. 633; but not to a cause of action for a tort which caused damages not injurious to the bankrupt's property and which by the State law would not be assignable; such as one for malicious prosecution. *Re* Haensell, 91 Fed. 355; or conspiracy to drive the plaintiff out of business, Cleland v. Anderson (Neb. Sup. Ct.), 11 Am. B. R. 605. The trustee of a bankrupt corporation may compel stockholders to pay the balance of their subscriptions. He may collect these by a suit in equity, irrespective of the citizenship of the parties. *Re* Crystal Spring Bottling Co., 96 Fed. 945; Babbitt v. Read, 173 Fed. 712; but not in a summary proceeding where no assessment has been made. *Re* Howe, 193 Fed. 524, (Ky. statute). It has been held that such an assessment is a necessary precedent to such a suit. Bergdoll v. Harrigan, C. C. A., 263 Fed. 279. See Rosoff v. Gilbert Transp. Co., 204 Fed. 349. Courts of bankruptcy have granted petitions by trustees to levy assessments upon stockholders under the Connecticut statute, *Re* Monarch Corporation, 177 Fed. 464; and the New Jersey statute, *Re* Remington Automobile & Motor Co., C. C. A., 153 Fed. 345; *Re* Newfoundland

ruptcy Act which provides for avoiding levies, judgments, at-

Syndicate, 196 Fed. 443; including foreign stockholders, *Re* Monarch Corporation, 196 Fed. 252; Enright v. Heckscher, C. C. A., 240 Fed. 863, but not under the New York statute, *Re* Jassoy Co., C. C. A., 178 Fed. 515. See Sternbergh v. Duryea Power Co., C. C. A., 161 Fed. 540. An order directing an assessment on stockholders is conclusive as to the necessity thereof but in an action against the stockholder is not binding as an adjudication that he has not paid for his stock when he was not a party to the application. Enright v. Heckscher, C. C. A., 240 Fed. 863; Bergdoll v. Harrigan, C. C. A., 263 Fed. 279; *supra*, §186w. It has been held that a trustee in bankruptcy cannot maintain a claim, under the New York Stock Corporation Law, against stockholders for the balance of the par value of stock issued as full paid for property purchased at an undervaluation. *Re* Jassoy Co., C. C. A., 178 Fed. 515. (Under N. Y. statute). See Breck v. Brewster, 153 App. Div. N. Y. 800; Courtney v. Georger, 221 Fed. 502, (under Minn. statute). See Clark v. Johnson, C. C. A., 245 Fed. 442, (under Ark. statute). *Contra*, Kiskadden v. Steinle, C. C. A., 203 Fed. 375, (under Ohio statute); Babbitt v. Read, C. C. A., 263 Fed. 42, (under Mo. statute). To enforce the statutory liability of directors to creditors for contracting debts in excess of the lawful amount. *Re* Crystal Spring Bottling Co., 96 Fed. 945 (under Vt. statute), or for paying dividends when the corporation was insolvent, Ibid.; Seegmiller v. Day, C. C. A., 249 Fed. 177 (under Illinois statute); *Contra*, E. L. Moore & Co. v. Murchison, C. C. A., 226 Fed. 679 (under South Carolina statute); Ratcliff v. Clendenin, C. C. A., 232 Fed. 61 (under Kansas statute); Cottrell v. Albany Card & Paper Mfg. Co., 142 App. Div. (N. Y.) 148; but that he may sue them to recover corporate funds which they have lost or misappropriated, *Re* Swofford Bros. Dry Goods Co., 180 Fed. 549; Bynum v. Scott, 217 Fed. 122; Billings v. Charles Millar & Son Co., 227 Fed. 185. But see Lummis v. Crosby, 176 App. Div. N. Y. 315; Babbitt v. Read, C. C. A., 2 Ct., 236 Fed. 42; Sanford v. First Nat. Bank of Marysville, Kan., C. C. A., 238 Fed. 298. A trustee may sue to set aside a fraudulent transfer of the assets of a corporation in which the bankrupt is a stockholder, Greenhall v. Carnegie Tr. Co., 180 Fed. 812; and in such a case, where the result might resuscitate debts of the bankrupt, from which he could not be discharged in the proceeding, the latter was, against his consent, joined as a party defendant, Ibid. For the extent of the liability of a creditors' committee to the trustee, see *Re* Thomas, 199 Fed. 214. He may sue to cancel bonds and a mortgage the execution of which by the bankrupt was obtained through fraud. First Nat. Bank of Memphis, Tenn., v. Towner, 239 Fed. 433. As to the right of the trustee to compel the payment of dividends by a corporation in which the bankrupt is a stockholder see *Re* Brantman, C. C A., 244 Fed. 101.

tachments, or other liens, obtained through legal proceedings against a person who is insolvent, provides: that the court may "on due notice, order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate; and thereupon the same may pass to it and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."[9] "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."[10]

[9] 30 St. at L. 544, § 67*f*; Rock Island Plow Co. v. Reardon, 222 U. S. 354, 56 L. ed. 231, affirming C. C. A., 168 Fed. 654. Fallows v. Continental & Commercial Tr. & Sav. Bank, 235 U. S. 300; *Re* Fitzhugh Hall Amusement Co., 169 Fed. 171 (all cases of liens of executions); Rock Island Plow Co. v. Reardon, 222 U. S. 354, 56 L. ed. 231, lien of execution against property returned to vendor; Fallows v. Continental & Commercial Tr. & Sav. Bank, 235 U. S. 300, lien of execution against chattel mortgage; *Re* Malone's Estate, 228 Fed. 566 (lien of an attachment which took precedence of a declaration of homestead). See Mutual Life Ins. Co. of N. Y. v. Cockrell, N. Y. Sup. Ct., Sp. Tm., Bischoff J., N. Y. L. J. Dec. 22, 1911. The remedy is not confined to cases where, if the lien were allowed, the title to the property affected would pass to the bankrupt. The Court of Bankruptcy has power to allow the trustee to enforce, for the benefit of all the creditors, an attachment obtained by one of them within the four months' period, so as to cut off an unrecorded prior deed, which was invalid as against attaching creditors, but was otherwise valid as against the trustee. First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, affirming C. C. A., 133 Fed. 717. In such a case, the attorneys for the attaching creditors may be allowed, out of the bankrupt's estate, reasonable compensation for their services in procuring the attachment. Receivers of Va. Iron, Coal & Coke Co. v. Staake, C. C. A., 133 Fed. 717. Such a lien is not preserved unless the Court of Bankruptcy enters some order upon the subject. Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577; *Re* Baird, 126 Fed. 845. The trustee is entitled to a reasonable time within which to apply for the order. Watschke v. Thompson, 85 Minn. 105, 7 Am. B. R. 504. The right is not lost by the action of the trustee in first basing his right to relief upon the ground that the person who took the property subject to the lien had acquired an unlawful preference. Rock Island Plow Co. v. Reardon, 222 U. S. 354, 364, 56 L. ed. 231.

[10] 30 St. at L. 544, 564, § 67b. The word "prevented" means pre-

"Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee." [11]

"Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate." [12] "Whenever a composition shall be set aside, or discharge revoked, the trustee shall upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge." [13] It has been held that a trustee cannot move to reopen a bankruptcy proceed-

vented by bankruptcy proceedings. *Re* Schweitzer, 217 Fed. 495. The lien of an execution issued by a judgment creditor who has lost his preference by the bankruptcy proceedings may be thus enforced by the trustee for the benefit of all the creditors, Ibid.

[11] General Order XXVIII. *Re* East Stroudsburg Supply & Construction Co., 248 Fed. 356. He may with the approval of the court complete a contract of conditional sale. *Re* Wegman Piano Co., 221 Fed. 128, and waive the failure by the vendor to comply with the provisions of the State statute upon the subject. Breakstone v. Buffalo Foundry & Machine Co., 167 App. Div. 62. The trustee has the right to assume the executory contracts of the bankrupt, *Re* Berry, 247 Fed. 700. It seems that he cannot renounce them, nor return to an adverse claimant property in his possession without leave of the court. *Re* Caldwell Machinery Co., 215 Fed. 428.

[12] 30 St. at L. 544, § 47b.

[13] 30 St. at L. 544, § 70*d*; §§ 653, 658, *infra*.

ing after it has been closed.[14] "The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor."[15] "(*a*) The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. (*b*) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator. (*c*) The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury."[16] "The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate."[17] "The court

[14] *Re* Paine, 127 Fed. 246. See *infra*, § 654.

[15] 30 St. at L. 546, 557, § 46.

[16] 30 St. at L. 544, 553, § 26.

It has been held: that the court may set aside the award of the arbitrators for any reason that would justify a new trial of an action at common law; *Re* McLam, 97 Fed. 922, and may set the same aside when the third arbitrator was selected by the contending parties instead of by the two arbitrators respectively selected by them. Ibid.

[17] 30 St. at L. 44, 555, § 27*a*; *Re* Jackson Stores, 192 Fed. 705; *Re* John H. Woodbury Dermatological Institute, C. C. A., 191 Fed. 819, where the compromise was rejected upon the protestant's indemnifying the estate against any loss that might thereby be sustained. The bankrupt has no right to interfere with such a compromise. *Re* Kranich, 174 Fed. 908. A majority of the creditors have no power to compel the compromise of a pending suit. *Re* Meadows, Williams & Co., 181 Fed. 911. It has been held that a trustee in bankruptcy will not be authorized to compromise and settle a suit brought by the bankrupt in a State court without the consent of the bankrupt's attorney therein who has a lien on any judgment recovered for his services; and that he cannot set aside the abandonment or settlement of the contest of a will made by the bankrupt while insolvent. Edington v. Masson, C. C. A., 177 Fed. 209. *Re* Adamo, 151 Fed. 716. For a refusal of leave to compromise a claim by the receiver of a bankrupt to property described in the schedules, see *Re* Stier March Contracting Co., 245 Fed. 223.

may order the trustee to enter his appearance and defend any pending suit against the bankrupt."[18] "A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him."[19] "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."[20] When an asset, such as a patent[21] or patent license[22] or the membership in an exchange[23] or real estate association,[24] or a leasehold,[25] is subject to burdens the trustee is not bound to

18 30 St. at L. 544, 547, § 11*b*.

19 Ibid. § 11*c*. This does not authorize his substitution in a suit such as an action for malicious prosecution, the proceeds of which form no part of the assets. *Re* Haensell, 91 Fed. 355. The court whose approval is required is that which appointed the trustee. The Alert, 199 Fed. 542. The trustee is bound in collateral proceedings by a judgment against him in a suit in which he was substituted for the bankrupt. *Re* Van Alstyne, 100 Fed. 929. He may be estopped by his failure to intervene in a pending suit. Frazier v. So. L. & Tr. Co., C. C. A., 99 Fed. 707. Ordinarily, when there are sufficient assets to pay the costs and damages, no bond for costs nor injunction bond will be required of a trustee in bankruptcy suing in a Federal court in the district where he was appointed, even where the State law requires a bond in such a case. *Re* Barrett, 132 Fed. 362. A trustee is usually bound by a stipulation made by a receiver of the bankrupt before his appointment. *Re* E. M. Newton & Co., C. C. A., 153 Fed. 841.

20 30 St. at L. 545, 549, § 11*d*. See Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, Jenkins v. International Bank, 106 U. S. 571, 27 L. ed. 304. See § 654, *infra*. This section applies only to suits arising out of disputes in respect of property and of rights of property of the bankrupt to which adverse claims existed while in the hands of the bankrupt and before the institution of the proceedings in bankruptcy. Dushane v. Beall, 161 U. S. 513; Hammond v. Whittredge, 204 U. S. 538; Yazoo & Miss. R. R. Co. v. Brewer, 231 U. S. 245.

21 Sessions v. Romadka, 145 U. S. 29, 36 L. ed. 609.

22 *Re* Wisconsin Engine Co., 234 Fed. 281.

23 Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915; Jaretzki v. Lee, City Court of City of New York, McAvoy, J., N. Y. L. J., Jan'y. 6, 1912. But see Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791.

24 *Re* Berry, 247 Fed. 700.

25 *Re* Chambers, Calder & Co., 98 Fed. 865. The obligations which the trustee assumes by occupying, after the adjudication, premises leased to the bankrupt has not yet been authoritatively determined. Referee Remington is of the opinion

accept it if it would be unprofitable; but it has been held that this doctrine does not apply to a judgment.[26]

§ 644. Right of trustee to set aside preferences, liens and conveyances. By § 67 of the Bankruptcy Law. "c. A lien created by or obtained in or pursuant to any suit or proceeding

that the trustee in such a case is only liable for the value of the use of the premises while he occupies them, subject to his right to occupy, free of charge, for an unexpired portion of a term, for which a landlord holds a provable claim and that he does not thereby accept the lease. He cites Bray v. Cobb, 100 Fed. 270, 3 Am. B. R. 788; reversed on another point, Cobb v. Overman, C. C. A., 109 Fed. 65, 54 L.R.A. 369, 6 Am. B. R. 324, and *Re* Jefferson, 93 Fed. 948, 2 Am. B. R. 206. See *supra*, § 313. But see Commonwealth v. Franklin Ins. Co., 115 Mass. 278; People v. National Trust Co., 82 N. Y. 283; People v. Universal Life Ins. Co., 30 Hun (37 N. Y. S. C. R.) 142; Wells v. Higgins, 132 N. Y. 459. In such a case it was held that the trustee might remain in possession of the premises a reasonable time in order to ascertain whether it was expedient to assume the lease; that one month was not unreasonable; and that in such a case, where that time was required for the proper packing and safe removal of the bankrupt's property thereupon, the lease was not assumed and the estate was liable only for a reasonable sum for the use and occupation of the premises. *Re* Chambers, Calder & Co., 98 Fed. 865. *Cf.* Re Grimes, 96 Fed. 529; Bray v. Cobb, 100 Fed. 270; *Re* Secor, 18 Fed. 319; *Re* Rubel, 166 Fed. 131. It has been held that a delay of five days in the payment of the first month's rent by the trustee, does not authorize a forfeiture of the lease. *Re* Gutman, 197 Fed. 472. For a case where it was held that a lease was terminated before the bankruptcy, see *Re* Van Da Grift Motor Car Co., 192 Fed. 1015. For a subsequent termination, see *Re* Desmond & Co., 198 Fed. 581. It has been said that it is the duty of a trustee who claims a leasehold, either to sell it at an upset price for the balance of the rent for the term, which he should pay to the lessor, or to condition the sale upon a bond of indemnity; and that if he cannot obtain a bid subject to these conditions, he should surrender the lease. *Re* Gutman, 197 Fed. 472. A leasehold owned by the bankrupt passes to the trustee. Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950; Crowe v. Baumann, 190 Fed. 399. The trustee receives it by operation of law; and neither the bankruptcy, nor the sale by the trustee of the bankrupt's interest, is a ground for re-entering under a covenant in the lease providing for its termination upon its assignment by the lessee, or a sale of its interest under execution or other legal process when there is no right to a re-entry in case of a transfer by operation of law. Gazlay v. Williams, 210 U. S. 42, 52 L. ed. 950. See *infra*, §§ 647, 649.

[26] Dolan v. Koupal, N. Y. Sup. Ct., Sp. Tm., per Bijur, J., N.Y.L.J. March 27, 1916.

at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent[1] and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy,[2] or (3) that such

§ 644. [1] A bankrupt was insolvent at the time of the transfer if the property that he then owned, at a fair valuation, was insufficient to pay the debts that he then owed. Paper v. Stern, C. C. A., 198 Fed. 642; Stephens v. Union Sav. Bank & Trust Co., C. C. A., 250 Fed. 192, held solvent; Moran v. Morgan, C. C. A., 252 Fed. 719, held insolvent. See § 622, *supra*.

When he is then engaged in business, his property must be valued as that of a going concern and not as what it was worth as dead property after bankruptcy had intervened and the business was closed. *Re* Klein, C. C. A., 197 Fed. 241. In determining the solvency of a bankrupt, when a conveyance by him is attacked as made with intent to defraud his creditors, the value of the property conveyed is not to be computed; but if the same conveyances are attacked as preferences not fraudulent, the value of such property is to be considered in determining the question of solvency when the same was made. Acme Food Co. v. Meier, C. C. A., 153 Fed. 74.

[2] Dreyer v. Kicklighter, 228 Fed. 744; Brent v. Simpson, C. C. A., 238 Fed. 285. It has been held that a mortgage within the four months' period, although given to secure prior indebtedness, is still good if the mortgagee did not have reasonable cause to believe that it was intended to create a preference.—Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, affirming C. C. A., 152 Fed. 943; McNair v. McIntyre, C. C. A., 113 Fed. 113; *Re* Sam Q. Lorch & Co., 199 Fed. 944. *Contra, Re* W. W. Mills Co., 162 Fed. 42. The fact that the grantee or payee had no personal knowledge of the actual insolvency is no defense to an action to recover the preference. Plummer v. Myers, 137 Fed. 660. Knowledge of an attorney who acted in the preferential transaction is imputable to his client, Farmers' State Bank v. Freeman, C. C. A., 249 Fed. 579. Notice to a township trustee of the insolvency of a debtor to the town is notice to the township. Painter v. Napoleon Tp., 190 Fed. 637. It was held that a corporation was not chargeable with knowledge of the insolvency of the bankrupt acquired by its president as a stockholder thereof, Benner v. Blummer-Frank Drug Co., 198 Fed. 362; *contra* Grandison v. National Bank of Commerce of Rochester, C. C. A., 231 Fed. 800; nor where its general manager fraudulently transferred its funds to the account of

lien was sought and permitted in fraud of the provisions of

the bankrupt a corporation of which he was president and controlling stockholder and subsequently restored part of the same. High v. Opalite Tile Co., C. C. A., 184 Fed. 450; nor where the bankrupt was treasurer of the corporation, Arthur v. Harrington, 211 Fed. 815. But see Collett v. Bronx Nat. Bank, 200 Fed. 111. Knowledge by the president is knowledge of the corporation when he has no conflicting interest, Arthur v. Harrington, 211 Fed. 815. It has been said that it is immaterial how the agent obtained his knowledge, whether through confidential relations with the bankrupt or personal interest that prevented him from disclosing his knowledge to his principal. Campbell v. Balcomb, C. C. A., 183 Fed. When the bankrupt transfers his entire stock of goods to the creditor in payment of the claim, it will be presumed that a preference was intended and accepted; *Re* Knopf, 146 Fed. 109; Allen v. McMannes, 156 Fed. 615; *Re* Thweatt, 199 Fed. 319. The same rule was applied when the creditor took nearly all the bills receivable and a large part of the assets of the debtor, Tilt v. Citizens' Tr. Co., 191 Fed. 441. But see Doxsee v. Waddick, 122 Ia. 599; Bank v. Jewelry Co., 123 Ia. 432; Myers v. Fultz, 124 Ia. 437; Burnham v. Fort Dodge Grocery Co., S. C., 144 Iowa. 577. It was so held, although the creditor held a mortgage thereupon, which both parties presumed to be valid, but it was not allowed. Allen v. McMannes, 156 Fed. 615. It is sufficient evidence of knowledge by the grantee of the bankrupt's insolvency that he had previously received a circular letter advising him that the latter was in failing circumstances and desired to effect a compromise with his creditors; Benjamin v. Chandler, 142 Fed. 217; but see *Re* Varley & Bauman Clothing Co., 191 Fed. 459; also that checks previously given by the bankrupt had been dishonored and the creditor had practically ceased selling the bankrupt goods some time before and had repeatedly pressed for payment of his account. Pittsburgh Plate Glass Co. v. Edwards, C. C. A., 148 Fed. 377. See also Parker v. Black, 143 Fed. 560; Hardy v. Gray, C. C. A., 144 Fed. 922; Hotchkiss v. National City Bank, 200 Fed. 287; aff'd C. C. A., 201 Fed. 664; Ernst v. Mechanics' & Metals Nat. Bank of N. Y. 200 Fed. 295. See Fowler State Bank, of Fowler, Kan. v. White, C. C. A., 198 Fed. 631; *Re* Thomas 199 Fed. 214; Ernst v. Mechanics' & Metals Nat. Bank of N. Y., 200 Fed. 295; Citizens' Tr. Co., of Paterson, N. J. v. Tilt, C. C. A., 200 Fed. 410. Where, after information that a debtor, who was slow in payments, had placed a chattel mortgage on his stock, the creditor sent an attorney to investigate, the latter was informed by the bankrupt that he did not have sufficient capital to meet his bills, but was doing a profitable business, entirely solvent and had an offer for his stock in cash and land, amounting to a sum largely in excess of his indebtedness which he could accept at once the attorney advised its acceptance and meantime took a chattel mortgage upon the stock for the amount of the claim; it was held that this could not be set aside as a preference. Hussey v. Richardson-

this act; or if the dissolution of such lien would militate against

Roberts Dry Goods Co., C. C. C., 148 Fed. 598. *Re* Klein, C. C. A., 197 Fed. 241. The question whether the grantee or payee had reasonable notice of the bankrupt's insolvency depends upon whether the facts that he knew were such as would have excited the attention of an ordinarily intelligent man and put such a man upon inquiry, Wright v. Sampter, 152 Fed. 196; Hamilton Nat. Bank of Chicago v. Balcomb, C. C. A., 177 Fed. 155; *Re* Sanger, 169 Fed. 722; Gering of Leyda, C. C. A., 186 Fed. 110; Stern v. Paper, 183 Fed. 228; Coleman v. Decatur Egg Case Co., C. C. A., 186 Fed. 136; Ragan v. Donovan, 189 Fed. 138; *Re* The Leader, 190 Fed. 624, 629; Alexander v. Redmond, C. C. A., 180 Fed. 92; *Re* Thomas Deutschle & Co. 182 Fed. 435, where the creditors had refused the delivery of goods which they had shipped until they received a certified check for the price. In determining the question, the court will take judicial notice of business customs. McGirr v. Humphreys Grocery Co., 192 Fed. 55; Jacob Y. Shantz & Son Co., 205 Fed. 425; Northern Neck State Bank v. Smith, C. C. A., 205 Fed. 894; *Re* Starkweather & Albert, 206 Fed. 797; R. H. Herron Co. v. Moore, C. C. A., 208 Fed. 134; Arthur v. Harrington, 211 Fed. 215; Aronin v. Security Bank of New York, C. C. A., 228 Fed. 888; *Re* States Printing Co., C. C. A., 238 Fed. 775; Farmers' State Bank v. Freeman, C. C. A., 249 Fed. 579; Fifth Nat. Bank of City of New York v. Lyttle, C. C. A., 250 Fed. 362; Whitmore v. Swank, C. C. A., 252 Fed. 135; *Re* Anderson, 252 Fed. 272; Egner v. Parshelsky Bros., Inc., 254 Fed. 907; McGill v. Commercial Credit Co., 243 Fed. 637. A mere suspicion by the creditor that the debtor is insolvent, without any evidence legal or moral to support it, Stucky v. Masonic Sav. Bank, 108 U. S. 74, 27 L. ed. 640; Sparks v. Marsh, 177 Fed. 739; *Re* Houghton Web Co., 185 Fed. 213; *Re* Thomas Deutschle & Co., 182 Fed. 435, where the creditor knew that notes of the bankrupt had frequently gone to protest during the past year. Debus v. Yates, 193 Fed. 427; Paper v. Stern, C. C. A., 198 Fed. 642; *Re* F. M. & S. Q. Carlisle, 199 Fed. 612; Beall v. Bank of Bowden, 219 Fed. 316; Brookheim v. Greenbaum, 225 Fed. 635; Nichols v. Elken, C. C. A., 225 Fed. 689; Roseman v. Coppard, C. C. A., 228 Fed. 114; *Re* Salmon, C. C. A., 249 Fed. 300; Smith v. Powers, 255 Fed. 582; even if he knows that the latter is "behind in his payments" to his creditors, *Re* Eggert, 98 Fed. 843; S. C., C. C. A., 102 Fed. 735; Sharpe v. Allender, C. C. A., 170 Fed. 589; does not constitute a reasonable cause for belief in the insolvency within the meaning of the statute. In the following cases it was held that the grantee did not have reasonable notice of insolvency. Pyle v. Texas Transport & Terminal Co., 238 U. S. 90; *Re* Frasin, C. C. A., 201 Fed. 86; Carey v. Donohue, C. C. A., 209 Fed. 328; *Re* Chicago Car Equipment Co., C. C. A., 211 Fed. 638; Hyman v. Third Nat. Bank of Jersey City, 216 Fed. 685; Clifford v. Morrill, 230 Fed. 189; *Re* Gaylord, 225 Fed. 234; *Re* French, 231 Fed. 258; Grandison v. Robertson, C. C. A., 231 Fed. 785;

the best interests of the estate of such person the same shall not be dissolved; but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened." [3]

"d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only not be affected by this Act." [4]

Grandison v. National Bank of Commerce of Rochester, C. C. A., 231 Fed. 800; W. S. Peck & Co. v. Whitmer, C. C. A., 231 Fed. 893.

[3] 30 St. at L. 544, 564, § 67*c*, as amended Feb. 5, 1903, ch. 487, §16, 32 St. at L. 800, and June 25, 1910, ch. 412, § 12, 36 St. at L. 842. *Cf.* See § 643, *supra*.

[4] 30 St. at L. 544, 564, § 67*d*, as amended Feb. 5, 1903, ch. 487, § 16, 32 St. at L. 800, and June 25, 1910, ch. 412, § 12, 36 St. at L. 842. Continental Tr. Co. v. Chicago Title Co., 229 U. S. 435; Greey v. Dockendorff, 231 U. S. 513; Withoft v. Andrews, 217 Fed. 421; Nat. Bank of Goldsboro v. Hill, 226 Fed. 102; Marsh v. Leseman, C. C. A., 242 Fed. 48; Lake View State Bank v. Jones, C. C. A., 242 Fed. 826; Angle v. Bankers' Surety Co., C. C. A., 244 Fed. 401; Dean v. Davis, 242 U. S. 43; Steadman v. Bank of Monroe, 117 Fed. 237; *Re* Watson, 201 Fed. 962; Keystone Warehouse Co. v. Bissell, C. C. A., 203 Fed. 652; *Re* Cotton Mfg. Sales Co., 209 Fed. 630; Angle v. Bankers' Surety Co., 210 Fed. 289; *Re* Alabama Coal & Coke Co., 210 Fed. 940; National Bank of Goldsboro v. Hill, 226 Fed. 202; Howland v. Metropolitan Bank, 228 Fed. 542; *Re* Knox Automobile Co., 229 Fed. 241; *Re* Friedman, 241 Fed. 603; *Re* Mobile Chair Mfg. Co., 245 Fed. 216; *Re* Corbitt, 248 Fed. 988; Illinois Parlor Frame Co. v. Goldman, C. C. A., 257 Fed. 300. But see *Re* Braus, 237 Fed. 139; Dean v. Davis, C. C. A., 212 Fed. 89. A conveyance or pledge made within the four months under a previous parol agreement to secure an antecedent debt was sustained. *Re* Sheridan, 98 Fed. 406; *Re* Smith, 176 Fed. 426; *Cf.* Hurley v. Atchison, Topeka & Santa Fe Railroad, 213 U. S. 126, 53 L. ed. 729; *Re* Metropolitan Dairy Co., C. C. A., 224 Fed. 444; Chapman v. Hunt, 248 Fed. 160; Moran v. Morgan, C. C. A., 252 Fed. 719 (where a previous agreement was within the statute of frauds). It has been held that the payment to a bank, when it has reasonable cause to believe that the payer is insolvent, can be recovered as a preference, although it was made in payment of a clearance loan, to be paid before the closing of banking hours on the

"e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such

same day to release securities for sale, and was made out of the proceeds of such securities. Hotchkiss v. National City Bank, 200 Fed. 287; aff'd C. C. A., 201 Fed. 664. See Ernst v. Mechanics' & Metal Nat. Bank of N. Y., 200 Fed. 295. *Contra,* Vitzthus v. Large, 162 Fed. 685; *Re* Empire Cork Co., 193 Fed. 225. Payment to a creditor who has an inchoate lien is not a preference to the extent thereof. *Re* Lynn Camp Coal Co., 168 Fed. 998. See Hurley v. A. T. & S. F. R. R. Co., 213 U. S. 126, 53 L. ed. 729; Sieg v. Greene, 225 Fed. 955. Even though the amount was not ascertained or liquidated until within the four months. Johnson v. Root Mfg. Co., 241 U. S. 160. An annuity company may be required to return the consideration for an annuity bought by the bankrupt in fraud of creditors, although at the time when it received the money it has issued a contract to pay the annuity. Smith v. Mutual Life Ins. Co. of N. Y., 178 Fed. 510. A chattel mortgage, given to secure a contemporaneous loan, will not be set aside. *Re* Wolf, 98 Fed. 84; Martin v. Hulen & Co., 149 Fed. 982, 79 C. C. A., 492, 17 Am. B. R. 510. Nor one given to secure a previous loan if promised when the loan was made. *Re* Metropolitan Dairy Co., C. C. A. 224 Fed. 444. Nor one for future advances, so far as this and subsequent advances are concerned. City Nat. Bank of Greenville v. Bruce, C. C. A., 109 Fed. 69; Stedman v. Bank of Monroe, C. C. A., 117 Fed. 237; *Re* Sayed, 185 Fed. 962; Chapman v. Hunt, C. C. A., 254 Fed. 768. The same rule applies to a chattel mortgage upon property to be subsequently acquired, given to secure the purchase price thereof. *Re* Chantler Cloak & Suit Co., 151 Fed. 952. See Meservey v. Roby, C. C. A., 198 Fed. 844; *Re* Thomas, 199 Fed. 214; *Re* Martin, C. C. A., 200 Fed. 940; Templeton v. Wollens, C. C. A., 200 Fed. 257. A release of other persons from liability is not such a present consideration as will support what would otherwise be a voidable preference. Burgoyne v. McKillip, 182 Fed. 452. It was held that in an action to recover the value of a preference, the defendant's agent had guaranteed part of the indebtedness upon which the preferential payment was applied, Plummer v. Myers, 137 Fed. 660; Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664; Gage Lumber Co. v. McEldowney, C. C. A., 207 Fed. 215; Hagan v. McNeil, C. C. A., 253 Fed. 716; but see Sabien v. Camp, 98 Fed. 974; Harvey v. Stowe, 219 Fed. 17; *Re* Opava, 235 Fed. 785; *Re* Star Spring Bed Co., 257 Fed. 176; *Re* Kerlin, C. C. A., 209 Fed. 42.

debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors.[5] And all conveyances, transfers, or in-

[5] It has been held that to avoid a transfer of property under § 67*e*, the plaintiff must show actual, as distinguished from constructive, fraud. Meservey v. Roby, C. C. A., 198 Fed. 844. That property cannot be recovered by the trustee although its transfer by the bankrupt justified a denial of his discharge. Lewis v. Julius, C. C. A., 212 Fed. 225. In the absence of any State law upon the subject, it seems that a voluntary conveyance made by a debtor to his wife or children while he was insolvent, but in ignorance of that fact, may be set aside. Adams v. Riley, 122 U. S. 382, 30 L. ed. 1207; *Re* Steele, 98 Fed. 78. But see Vetterlein v. Barnes, 124 U. S. 169, 31 L. ed. 400; *Re* Smith, 9 Fed. 592. In the following cases transfers by the bankrupt to his wife were held to be invalid. *Re* Smith, 100 Fed. 795; Pollock v. Simon, 205 Fed. 1005 (an engagement ring); *Re* Snodgrass, 209 Fed. 325; Woodford v. Rice, 207 Fed. 473 (purchase in wife's name); English v. Brown, C. C. A., 219 Fed. 248; Klinger v. Hyman, C. C. A., 223 Fed. 257; Owens v. Daniel, C. C. A., 230 Fed. 101; Manders v. Wilson, C. C. A., 235 Fed. 78; Hursey v. Lane, C. C. A., 238 Fed. 913; Watson v. Adams, C. C. A., 242 Fed. 441; *Re* Victor, 246 Fed. 727; Smith v. Tostevin, C. C. A., 247 Fed. 102; *Re* Hawkins, 243 Fed. 792.

In the following cases such transfers were held to be valid, Stowe v. Harvey 241 U. S. 199; Getman v. Lippert, 171 Fed. 536; *Re* Kayser, C. C. A., 177 Fed. 383; Neumann v. Blake, C. C. A., 178 Fed. 916 (payments for household and family expenses including a set of furs); *Re* Simon, 197 Fed. 102 (a border case); *Re* Cox, 199 Fed. 952 (where a wife's claim for salary was sustained although she had kept the books and omitted reference thereto in the index which referred to other accounts against him); Johnson v. Wilson, 217 Fed. 99; English v. Brown, 219 Fed. 248; Marshall v. Nevins, C. C. A., 242 Fed. 476; Baldwin v. Kingston, 247 Fed. 163; Robertson v. Schlotzhauer, C. C. A., 243 Fed. 324; Young v. Evants, C. C. A., 251 Fed. 181. That suit to compel a stockholder to pay corporate debts, because of participation in a fraudulent over-valuation of the assets in payment for stock, does not fall within the statute and cannot be brought in a court of bankruptcy without the consent of the defendant. *Re* Haley, C. C. A., 158 Fed. 74. See § 643, *supra*.

cumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State or Territory,[6] or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.[7] For the purpose

6 See *infra*, § 649.

7 This invalidates such liens created when the bankrupt was insolvent, irrespective of knowledge by the lienor of such insolvency. Cook v. Robinson, C. C. A., 194 Fed. 785, 792. See Grant v. Nat. Bank of Auburn, 197 Fed. 581. The statute does not impair the vendor's right of stoppage *in transitu; Re* Burke & Co., 140 Fed. 971, 15 Am. B. R. 495; *Re* Portuondo Co., 135 Fed. 592; and to retain possession in case of the buyer's insolvency before he has shipped the goods, *Re* Portuondo Co., 135 Fed. 592; nor his right to rescind a sale for fraud, *Re* Weil, 111 Fed. 897; *Re* O'Connor, 114 Fed. 777; *Re* Patterson & Co., 125 Fed. 562. But the return of goods bought but not paid for when there is no legal ground for a rescission of the sale may be set aside as a preference. *Re* Connolly 204 Fed. 479. See *infra*, § 649a. It has been held that repayment of money paid by an agent without authority is not a preference. Field v. Hafnia, 236 Fed. 599. Where the creditor had notice that the money which he advanced was to be used in making preferential payment, his security was set aside. *Re* Thweatt, 199 Fed. 319; Lumpkin v. Foley, C. C. A., 204 Fed. 372; *Re* Anderson, 252 Fed. 272. When the mortgagee or purchaser for a present consideration had no reasonable cause to believe that the borrower was insolvent, it was not set aside because he knew that the proceeds were to be used to pay the latter's debts, Dean v. Davis, 242 U. S. 438; Van Iderstine v. National Discount Co., C. C. A., 174 Fed. 518; *Re* Kullberg, 176 Fed. 585. To constitute a voidable preference, it is not essential that the transfer be made directly to the creditor. It may be made to another for his benefit and, if preferential, a circuity of arrangement will not avail to save him; Nat. Bank of Newport, N. Y. v. Nat. Herkimer County Bank of Little Falls, 225 U. S. 178, 56 L. ed. 1042; Johnson v. Hanley, Hoye Co., 188 Fed. 752; *Re* Hawkins, 243 Fed. 792; *Re* Harrison Bros., 202 Fed. 343; *Re* Sutherland Co., 245 Fed. 663; Chapman v. Hunt, 248 Fed. 166; Smith v. Tostevin, C. C. A., 247 Fed. 102; First Nat. Bank of Scottdale v. Blackburn, C. C. A., 256 Fed. 257. Payments by a bankrupt upon a note, which its indorsers would otherwise have paid, were held to be a preference. Swarts v. Fourth Nat. Bank, C. C. A., 117 Fed. 1; Kobusch v. Hand, C. C. A., 156 Fed. 660; Huttig Mfg. Co. v. Edwards, C. C. A., 160 Fed. 619;

of such recovery any Court of Bankruptcy hereinbefore defined,

Smith v. Coury, 247 Fed. 168; Chapman v. Hunt, 248 Fed. 160. But not if the indorser did not advise, nor procure the payment, nor know thereof until after it had been made, Reber v. Skulman, C. C. A., 183 Fed. 564. A recovery cannot be had from one indorser because of a preference given to a prior indorser, who is financially responsible. Page v. Moore, 179 Fed. 988. It was held that, the indorser who, after the bankruptcy, pays the balance has no greater rights than the original holder of the note; but that the holder of a note partly paid by the indorser may prove the whole face of the note against the maker. Swarts v. Fourth Nat. Bank, C. C. A., 117 Fed. 1. The cases are in conflict as to whether the payee of a note, who has been compelled to surrender a payment as a fraudulent preference, can still hold sureties thereupon. That he may do so, although he has known of the debtor's insolvency, is held in Hooker v. Blount, 44 Tex. Civ. App. 162, 97 S. W. 1083. See Petty v. Cook, (L. R.) 6 Q. B. 790; Williams v. Gilchrist, 11 N. H. 535; West Phila. Nat. Bank v. Field, 140 Pa. St. 473. The safer practice for a creditor is to notify the surety of the facts and ask what he shall do; and if the latter does not advise a course to pursue, to proceed and receive the payment without prejudice, Northern Bank of Kentucky v. Cooke, 13 Bush (Ky.) 340; since if the former refuses to accept a payment tendered at maturity of the note and bankruptcy does not follow, the surety is to that extent discharged, Smith v. Old Dominion B. & L. Ass'n, 119 N. C. 257; Second Nat. Bank v. Pruett (Tenn.), 96 S. W. 334. See XVII Harv. Law Rev., 205, and cases cited. It was held that money collected through a preferential lien can be recovered in the same manner as if it had been directly paid by the bankrupt. *Re* Belding, 116 Fed. 1016. "A company was hiring laborers to gather ties. The insolvent was operating stores and supplying the men. For many months an inspector had sent a pay roll once in about two weeks to the company, upon which the name of each laborer, his earnings, and the amount furnished him by the insolvent appeared. The company had uniformly deducted the price of the supplies from the earnings of each man, had sent him a check for the balance, and had sent the insolvent check for the supplies furnished. The insolvent owed the company more than $20,000, when, within four months of the filing of the petition in bankruptcy, it retained the amount owing the insolvent for the supplies furnished for three months and credited him with this amount, $2,210.73, on its claim against him. Held: that this was not a preference, and could not be set off against its claim; but that it received the money thus, retained as trustee for the bankrupt and the court below had power to protect the bankrupt's estate in respect to dividends to the corporation in case it should not discharge its obligations. Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571. So held of fire insurance when contemporaneous with the preferential security expressed to be for the benefit of the mortgagor, with a provision that any loss should

and any State court which would have had jurisdiction if bank-

be payable to the mortgagee, as his interest might appear, the premium having been paid by the mortgagee. Brown City Sav. Bank v. Windsor, C. C. A., 198 Fed. 28. As regards a newspaper route, see *Re* Martin, C. C. A., 200 Fed. 940. A bankrupt, within four months prior to his bankruptcy, contracted to sell certain real estate and to give a clear title thereto. The property was encumbered by liens which the purchaser undertook to pay out of the purchase money, but before these payments were completed or the property was conveyed defendant, who held judgment notes of the bankrupt, entered judgment, thus obtaining a lien on the property which the purchaser paid in order to clear the title, although this payment, together with those made to remove the prior liens, exceeded the purchase price. It was held that such payment to defendant constituted a voidable preference to the full amount received. Benjamin v. Chandler, 142 Fed. 217. A payment on account of an antecedent debt, made while the bankrupt was insolvent within the four months, can be recovered by the trustee in bankruptcy, if the creditor had reasonable cause to believe that it was intended thereby to give a preference; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 45 L. ed. 1171. The burden of proof, that the creditor had reasonable cause to believe of the intention to give a preference, rests upon the trustee in bankruptcy, when he sues or objects to the allowance of a claim. Calhoun County Bank v. Cain, C. C. A., 152 Fed. 983; *Re* Pfaffinger, 154 Fed. 523; *Re* Sanger, 169 Fed. 722; Reber v. Louis Shulman & Bro., 179 Fed. 574; Alter v. Clark, 193 Fed. 153; *Re* F. M. & S. Q. Carlile, 199 Fed. 612. It has been held that the passive receipt of a payment on account for a loan without a request or independent action to collect the same, in the absence of notice of insolvency, does not justify the setting aside of the transaction. Wright v. Sampter, 152 Fed. 196. See *Re* Oppenheimer, 140 Fed. 51. The payment of a loan upon demand does not constitute a preference, when there is no proof that the creditor had reasonable cause to believe that the debtor was insolvent. *Re* Pfaffinger, 154 Fed. 523; but not if the payment was made upon an open account, in which the bankrupt's interest was subsequently increased by at least the amount thus paid. Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717; *Re* Dickson, C. C. A., 111 Fed. 726; Kimball v. E. A. Rosenham Co., C. C. A., 114 Fed. 85; C. S. Morey Mercantile Co. v. Schiffer, C. C. A., 114 Fed. 447; *Re* Maher, 144 Fed. 503. *Cf.* Wild & Co. v. Provident Life & Tr. Co., 214 U. S. 292, 53 L. ed. 1003. It was held: that an increase of a bankrupt's estate as a net result of transactions between the bankrupt and a creditor within four months prior to the bankruptcy, where the last transaction was a payment on account of the indebtedness, was not sufficient to relieve the creditor from surrendering this last payment as preferential before he was permitted to prove the balance of his claim, when the account ran far back beyond the four months' period, and the transactions ended with a large payment on account of

the whole indebtedness. *Re* Colton Export & Import Co., 115 Fed. 158. The deposit of money by an insolvent within four months prior to his bankruptcy on an open account, subject to a check, does not constitute a preference, although the bank was at that time a creditor, and the latter may set off so much of its claim as equals the balance of such account, provided it had no reasonable cause to believe that a preference was intended. N. Y. County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380; *Re* George M. Hill Co., C. C. A., 130 Fed. 315. *Re* Percy Ford Co., 199 Fed. 334; Studley v. Boylston Nat. Bank of Boston, C. C. A., 200 Fed. 249; aff'd 229 U. S. 523, 33 Sup. Ct. 806, — L. ed. —; Am. Bank of Alaska v. Johnson, C. C. A., 245 Fed. 312. See Ernst v. Mechanics' & Metals Nat. Bank of New York, 200 Fed. 295, *infra*, § 648. It has been held that the payment to a bank by an insolvent, within the four months' period, of notes given to third persons, which were indorsed to and owned by the bank, constitutes a preference when the bank had reasonable ground to believe that a preference was thereby intended. *Re* George M. Hill Co., C. C. A., 130 Fed. 315. See Continental & Commercial Tr. & Sav. Bank v. Chicago Title & Tr. Co., C. C. A., 199 Fed. 704. See Ernst v. Mechanics' & Metals Nat. Bank, C. C. A., 201 Fed. 664. A trustee may sue a municipal corporation or the trustees of a township to recover a preferential payment, received by or on behalf of the municipal corporation or township, under such circumstances as would render an individual liable. Painter v. Napoleon Tp., 156 Fed. 289. A bankrupt is liable, in a representative capacity, for individual payments which were preferential. Clarke v. Rogers, 228 U. S. 534, affirming C. C. A., 183 Fed. 518. See, also, Block v. Rice, 167 Fed. 693; *Re* Dorr, C. C. A., 196 Fed. 292. Hookway v. McKnight, C. C .A., 232 Fed. 129; Watson v. Adams, C. C. A., 242 Fed. 441; *Re* Gottlieb & Co., 245 Fed. 139; Frederick v. People's Bank of California, C. C. A., 246 Fed. 84; Smith v. Coury, 247 Fed. 168; Donohue v. Dykstra, 247 Fed. 593; Bank of Commerce v. Brown, C. C. A., 249 Fed. 37; *Re* Salmon C. C. A., 249 Fed. 300; *Re* Cramer & Rogers Grocery Co., C. C. A., 252 Fed. 112; Bassett v. Evans, C. C. A., 253 Fed. 532; Bridgeton Nat. Bank v. Way, C. C. A., 253 Fed. 731. *Contra*, *Re* Star Spring Bed Co., 243 Fed. 957, where an unsuccessful attempt was made to stop payment of a check. The fact that the consideration of the preferential transfer was a previous conversion of property similar to that transferred will not prevent the court from setting it aside. McGill v. Commercial Credit Co., 243 Fed. 637. It has been held that an assignment for the benefit of creditors, made more than four months before the filing of the petition, is not invalidated thereby, unless it was forbidden by the State law. *Re* Shinn, 185 Fed. 990. See § 613, *supra*. The statute does not invalidate a transfer to secure or pay pre-existing debts which is not voidable as a preference or otherwise contrary to law. Sargent v. Blake, C. C. A., 160 Fed. 57, an application of partnership property to the payment of an individual debt of a partner, when the firm was insolvent and the creditor had no reasonable cause to believe that a preference was thereby intended.

ruptcy had not intervened, shall have concurrent jurisdiction."[8]

f. "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."[9] In so far as they

Where a general creditor brought under the West Virginia statute, within the four months' period, a suit to set aside a deed previously executed; it was held that he thereby acquired a statutory lien upon the property thereby covered, which was not affected by the bankruptcy proceedings. Moore v. Green, C. C. A., 145 Fed. 472. See *Re* Kavanaugh, 99 Fed. 928. The landlord's lien upon the tenant's property, given by the laws of Georgia, exists from the time of the lease, and a distress warrant to enforce the same, issued within the four months, will not be set aside. Henderson v. Mayer, 225 U. S. 631, 56 L. ed. 1233. So in Kentucky, Courtney v. Fidelity Trust Co., C. C. A., 219 Fed. 57. In Iowa by taking other security the landlord waives the lien, *Re* Wolf, 98 Fed. 74; In Illinois the landlord has no lien prior to levy of the distress warrant which is the equivalent of a lien "obtained through legal proceedings." *Re* United Motor Chicago Co., C. C. A., 220 Fed. 772. In Missouri the landlord's attachment for rent has a similar effect. Jones v. Ford, C. C. A., 254 Fed. 635. See *infra*, § 649. A conveyance of exempt property cannot be set aside as a preference. Vitzthum v. Large, 162 Fed. 685; *Re* Bailey, 176 Fed. 990; Huntington v. Baskerville, C. C. A., 192 Fed. 813.

[8] 30 St. at L. 544, § 64, § 67e. See *supra*, §§ 610, 613.

[9] 30 St. at L. 544, 564, § 67f. All levies, judgments, attachments, and other liens obtained through legal proceedings are avoided if the levy was made or the lien first came into existence within four months before

the petition was filed, although the suit in which they were made or issued was previously begun, *Re* Richards, C. C. A., 96 Fed. 935; *Re* Higgins, 97 Fed. 775; *Re* Burrus, 97 Fed. 926. Moore v. Smith & Sons, 205 Fed. 431; *Re* Leigh, 208 Fed. 486; *Re* Cefola, 222 Fed. 171; Dreyer v. Kicklighter 228 Fed. 744; *Re* Southern Arizona Smelting Co., C. C. A., 231 Fed. 87; Grant v. National Bank of Auburn, 232 Fed. 201. *Contra, Re* De Lue, 9 Fed. 510; *Re* Easley, 93 Fed. 419; Benjamin v. Chandler, 142 Fed. 217; whether or not the defendant cooperated in the obtaining of the same. *Re* Richards, C. C. A., 96 Fed. 935; *Re* Burrus, 97 Fed. 926; or the creditor had knowledge of the debtor's insolveney, Ibid; in cases of voluntary as well as of involuntary bankruptcy, *Re* Vaughan, 97 Fed. 560. But see *Re* O'Connor, 95 Fed. 943. This rule does not apply to exempt property which can not be administered as part of the bankrupt's estate. *Re* Snyder, 216 Fed. 989. In such a case the transfer is voidable as to so much of the property as is not exempt. Sieg v. Greene, 225 Fed. 955. Where a sale has been made under such a levy prior to the adjudication of bankruptcy and within four months before the filing of the petition, the rights of a purchaser are not affected, *Re* Kenney, 95 Fed. 427; Weitzel, 191 Fed. 463; but the proceeds in the hands of the sheriff are part of the bankrupt's estate, Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555; *Re* Kenney, 97 Fed. 554. It was held that the proceeds of an execution sale, which had been consummated, could not be recovered, although paid within the four months, when the proceeding was *in invitum*. Nelson v. Svea Pub. Co., 178 Fed. 136; *contra* Golden Hill Distilling Co. v. Logue, C. C. A., 243 Fed. 342; Ordinarily the test is the date of the judgment, not the date of the execution. Owen v. Brown, C. C. A., 120 Fed. 812. For a case where an execution issued more than four months before the bankruptcy proceeding had become dormant and was consequently invalidated by the adjudication in bankruptcy, see *Re* Monarch Acetylene Co., 229 Fed. 474. The enforcement of an execution against the bankrupt's salary, issued under such a judgment, may be enjoined. *Re* Harrington, 200 Fed. 1010; *supra*, § 633. A judgment of dispossession is not affected by this statute. Plant v. Gorham Mfg. Co., 174 Fed. 852. Where the judgment was not a lien upon personal property until the levy of an execution, and although the judgment was previously entered the writ was not issued nor levied until within the four months; it was held that the latter should be set aside. *Re* Harrington, 200 Fed. 1010. A judgment entered within the four months upon a judgment note previously given is avoided. *Re* Rhoads, 98 Fed. 399. Where the lien of the judgment does not take effect until it is docketed in the county, it is avoided if not docketed there till within the four months. *Re* Dunavant, 96 Fed. 542. Creditors of a bankrupt who have obtained a judgment prior to the four months' period, can maintain a judgment creditors' action, which they began previously thereto, although judgment enforcing their lien was not entered within the four months. Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122. A judgment entered within the four

conflict, subdivision c is nullified by subdivision f.[10] A transfer may be invalid both as a preference and as fraudulent.[11] A transfer which is preferential is not necessarily fraudulent.[12] By "§ 60. a. A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of a petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditor of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer if by law such recording or registering is required."[13]

months' period, to enforce an attachment prior thereto, will not be set aside in the absence of fraud. *Re* Beaver Coal Co., C. C. A., 113 Fed. 889. *Contra*, *Re* Lesser, 108 Fed. 201. But when the judgment was recovered within the four months' period, any liens acquired thereunder may be set aside as an unlawful preference. Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363.

10 *Re* Richard, C. C. A., 96 Fed. 935; *Re* Tune, 115 Fed. 906; Cook v. Robinson, C. C. A., 194 Fed. 785, 792; Folger v. Putnam, C. C. A., 194 Fed. 793.

11 Chapman v. Hunt, 248 Fed. 160.

12 Watson v. Adams, C. C. A., 242 Fed. 441. A preference and a fraudulent transfer are not the same. In a preferential transfer the fraud is technical and consists in a violation of the rule of equal distribution among all creditors. In a fraudulent transfer the fraud is acutal, in that the bankrupt has secured thereby an advantage for himself out of what in law should belong to his creditors. Van Iderstine v. Nat. Discount Co., C. C. A., 174 Fed. 518.

13 30 St. at L. 454, 562, § 60*a*, as amended by 32 St. at L. 797; 32 St. at L. 842. A guarantor is such a creditor, Stern v. Paper, 183 Fed. 228. So is a surety, United Surety Co. v. Iowa Mfg. Co., C. C. A., 179 Fed. 55; Johnson v. Wilson, 217 Fed. 99; or indorser, McAtee v. Shade, C. C. A., 185 Fed. 442; *Re* Harrison Bros., 202 Fed. 243; Chapman v. Hunt, 248 Fed. 160. It has been held that the transfer may be avoided if the creditor had reasonable cause to believe that a preference was intended, irrespective of the actual intent of the debtor. Hotchkiss v. Nat. City Bank, 200 Fed. 287; aff'd C. C. A., 201 Fed. 664; Alexander v. Redmond, C. C. A., 180 Fed. 92; Collett v. Bronx Nat. Bank, 200 Fed. 111; *Re* Harrison Bros., 202 Fed. 243; *Re* Gaylord, 225 Fed. 234; *contra*, Hardy v. Gray, C. C. A., 144 Fed. 922, 75 C. C. A., 562, 16 Am. Br. 387; *Re*

"b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined,

First Nat. Bank of Louisville, C. C. A., 155 Fed. 100, 84 C. C. A. 16, 18 Am. Br. 766; Debus v. Yates, 193 Fed. 427. *Re* The Leader, 190 Fed. 624, 629, states evidence held to be sufficient to establish the debtor's intent. Under the New York mechanic's lien law, the lien of a material man is good against a bankrupt contractor, although the notice was filed within the four months' period, *Re* Emslie, C. C. A., 102 Fed. 291; *Re* Grissler, C. C. A., 136 Fed. 754; and the same may be enforced by him in the State court. Ibid. It has been held that a statutory lien for wages, *Re* Kerby-Dennis Co., C. C. A., 95 Fed. 116 (Michigan lumber law); is not avoided by the filing of the petition and the adjudication of bankruptcy, unless the lienor has taken other security within the four months, by which he waives his rights under the State statute. *Re* Wolf, 98 Fed. 84; Henderson v. Mayer, 225 U. S. 631, 56 L. ed. 1233. See § 649, *infra*. Upon the question of its validity as a preference, a deed is considered to take effect from the date of its record and not from the date of its delivery. English v. Ross, 140 Fed. 630. For cases where deeds were held to be preferential because not recorded within the four months, although previously executed, see Page v. Rogers, 211 U. S. 575, 53 L. ed. 332; Ragan v. Donovan, 189 Fed. 138. For similar rulings as regards, bonds of title, see *Re* Rosenthal, 238 Fed. 597; chattel mortgages, see Mattley v. Giesler, C. C. A., 187 Fed. 970; reversing 175 Fed. 619. The rule does not apply where the instrument was given for a present consideration, although not recorded until later. *Re* Jackson Brick & Tile Co., 189 Fed. 636, a deed; Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, a bill of sale; *Re* Sturtevant, C. C. A., 188 Fed. 196, a chattel mortgage; *Re* Sayed, 185 Fed. 962, an assignment of a land contract; Debus v. Yates, 193 Fed. 427; a deed. See Hinchman v. Consolidated Arizona Smelting Co., 198 Fed. 907.

and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."[14]

[14] 30 St. at L. § 454, 562, § 60*b*, as amended, 36 St. at L. 838, 842. For cases where *chattel mortgages* were held to be *invalid*, see Frank v. Vellkommer, 205 U. S. 521, 51 L. ed. 911, N. Y., in which the author was counsel, Knapp v. Milwaukee Tr. Co., 216 U. S. 545, 54 L. ed. 610, Wisc.; Fairbanks Shovel Co. v. Wills, 240 U. S. 642, Ill.; Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee, C. C. A., 172 Fed. 177, Pa.; *Re* Hammond, 188 Fed. 1020, Ohio; *Re* Geiver, 193 Fed. 128, S. D.; *Re* Smith, 198 Fed. 876, Misc.; Sattler v. Slonimsky, 199 Fed. 592, Pa.; Skilton v. Codington, 185 N. Y. 80; 113 Am. St. Rep. 885; *Re* Shiebler, 165 Fed. 363, N. Y.; *Re* Bothe, C. C. A., 173 Fed. 597, Mo.; *Re* Beckhaus, C. C. A., 177 Fed. 141, Ill.; *Re* Oxley, 182 Fed. 1019, Wash.; *Re* Watts-Woodward Press, C. C. A., 181 Fed. 71, N. Y.; *Re* Jules & Frederic Co., 193 Fed. 533, Mass.; *Re* New Galt House Co., 199 Fed. 533, Ky.; *Re* Williamsburg Knitting Mill, 190 Fed. 871, Va.; *Re* Jacobson & Perrill, 200 Fed. 812, Ga.; *Re* Noethen, C. C. A., 201 Fed. 97, N. Y.; Pacific State Bank v. Coats, 205 Fed. 618, Wash.; L. A. Becker Co. v. Gill, 206 Fed. 36, Miss.; Millikin v. Second Nat. Bank of Baltimore, C. C. A., 206 Fed. 14, Md.; Schaupp v. Miller, 206 Fed. 575, Oregon; *Re* Manning, 206 Fed. 685, S. C.; National Bank of Athens v. Shackelford, C. C. A., 208 Fed. 677, Ga.; *Re* Rouse, C. C. A., 208 Fed. 881, Mich.; Covington v. Brigman, 210 Fed. 499, N. C.; *Re* Soforenko, 210 Fed. 562, Mass.; Fourth Nat. Bank v. Willingham, C. C. A., 213 Fed. 219, Ga.; Deupree v. Watson, C. C. A., 216 Fed. 483, Ky.; *Re* Palmer, 218 Fed. 74, N. Y.; Williams v. German American Trust Co., 219 Fed. 507, Colo.; Brigman v. Covington, C. C. A., 219 Fed. 500, N. C.; William v. German-American Trust Co., C. C. A., 219 Fed. 507, Colo.; *in Re* T. H. Bunch Commission Co., 225 Fed. 243; *Re* Cooper's Estate, 226 Fed. 317, Iowa; Scandinavian-American Bank v. Sabin, C. C. A., 227 Fed. 579, Oregon; *Re* Novelty Web Co., 228 Fed. 1007, N. J.; *Re* Caslon Press, C. C. A., 229 Fed. 133, Ill.; Tepel v. Coleman, 229 Fed. 300, Penn.; *Re* Progressive Wall Paper Corp., 230 Fed. 171, N. Y.; *Re* French, 231 Fed. 255, 257, N. Y.; Clark v. Grimes, 232 Fed. 190, Md.; Hawkins v. Dannenberg Co., 234 Fed. 752, Ga.; Grimes v. Clark, C. C. A., 234 Fed. 604, Md.; *Re* Novelty Web Co., C. C. A., 236 Fed. 501, N. J.; *Re* Mossler Co., C. C. A., 239 Fed. 262, Ill.; *Re* Webster Loose Leaf Filing Co., 240 Fed. 779, N. J.; Lake View State Bank v. Jones, C. C. A., 242 Fed. 82, Wisc.; *Re* Best, 248 Fed. 250, Ala.; *Re* Steiner, 249 Fed. 880, N. Y.; Calkins v. Lichtig, C. C. A., 251 Fed. 844, Mich; *Re* Schilling, 251 Fed. 966, Ohio; *Re* Petersen, 252 Fed. 849, Nev.; *Re* P. J. Sullivan Co., C. C. A., 254 Fed. 660, N. Y. For *chattel mortgages* which were *sustained*, see Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, Mass.; York Mfg. Co. v. Cassell, 201 U. S. 334, 351, 50 L. ed. 782, Ohio; Holt v. Crucible Steel Co. of America, 224 U. S. 262, Ky.; Mar-

"Such trustees, as to all property in the custody or coming into

tin v. Commercial Nat. Bank of Macon, Georgia, 245 U. S. 513, Ga.; *Re* Shaw, 146 Fed. 273, Me.; *Re* Doran, 148 Fed. 327, Ky.; *Re* Standard Telephone & El. Co., 157 Fed. 106, Wisc.; *Re* Columbia Fire D. & T. Co., 169 Fed. 159, N. Y.; Mattley v. Wolfe, 175 Fed. 619, Neb.; *Re* Lausman, 183 Fed. 647, Ky.; *Re* Endlar, C. C. A., 192 Fed. 762, Mass.; *Re* Riehl, 200 Fed. 455, Md.; Lindley v. Ross, C. C. A., 200 Fed. 733, Ill.; *Re* Nuckols, 201 Fed. 437, Tenn.; *Re* Hawks, 204 Fed. 309, Kan.; Anderson v. J. O. & N. B. Chenault, C. C. A., 208 Fed. 400, Ga.; Davis v. Hanover Savings Fund Society, C. C. A., 210 Fed. 768, S. C.; Sheppard-Strassheim Co., v. Black, C. C. A., 211 Fed. 643, Ill.; Peterson v. Sabin, C. C. A., 214 Fed. 234, Ore.; Deupree v. Watson, C. C. A., 216 Fed. 484, Ky.; *Re* Lane Lumber Co., C. C. A., 217 Fed. 550, Idaho; Stellwagen v. Clum, C. C. A., 218 Fed. 730, Ohio; *Re* Marriner, 220 Fed. 542, Me.; Marsh v. Walters, 220 Fed. C. C. A. 805, Ohio; *Re* Henry Siegel Co., 223 Fed. 369, Mass.; *Re* Virgin, 224 Fed. 128, Ga.; *Re* Johnson, 224 Fed. 180, Wash.; *Re* Bolstad, 224 Fed. 283, Wash.; *Re* Mosher, 224 Fed. 739, N. Y.; Sieg v. Greene, 225 Fed. 955, C. C. A., Iowa; *Re* Roberts, 227 Fed. 177, Ga.; Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, C. C. A., 237 Fed. 763, Utah; Border Nat. Bank v. Coupland, C. C. A., 240 Fed. 355, Tex.; *Re* Stucky Trucking & Rigging Co., 240 Fed. 427, N. J.; Johnstone v. Babb, C. C. A., 240 Fed. 668, S. C.; *Re* Pearlman, 246 Fed. 874, N. Y.; *Re* East Stroudsburg Glass Co., 247 Fed. 614, Penn.; *Re* R. E. Taylor Corp., C. C. A., 248 Fed. 223, N. Y.; Garrison v. Kurt, C. C. A., 249 Fed. 672, Kan.; *Re* Schilling, 251 Fed. 966, Ohio; Karasik v. People's Trust Co., 252 Fed. 324, N. Y.; *Re* Roseboom, 253 Fed. 136, N. Y.; *Re* Drag, 254 Fed. 474, Mich; *Re* Davies, 256 Fed. 52, Tenn.; *Re* F. & D. Co., C. C. A., 256 Fed. 73, N. Y.; *Re* Campion, 256 Fed. 902, N. Y.; *Re* Bradley, 263 Fed. 446, Conn. For cases where transactions were *set aside* as preferential, see McElvain v. Hardesty, C. C. A., 169 Fed. 31; Ludvigu v. Am. Woolen Co., 176 Fed. 145. In the following cases, the transactions were *not sustained;* Rogers v. Fidelity Sav. Bank & Loan Co., 172 Fed. 735; *Re* Medina Quarry Co., 179 Fed. 929; Nelson v. Svea Pub. Co., 178 Fed. 136; Chicago Title & T. Co. v. Federal Tr. & Sav. Bank, 192 Fed. 967; Continental & C. T. & S. Bank v. Chicago T. & T. Co., C. C. A., 199 Fed. 704; *Re* Hawkins, 243 Fed 792; John A. Schmitt's Sons v. Shadraeh, C. C. A., 251 Fed. 874. Where the State statute permits, § 60 as amended establishes a different rule for the computation of time within which an unrecorded transfer may be set aside as a preference and the time within which after such a transfer a petition for involuntary bankruptcy may be filed. Cf. Bankruptcy Law, § 3*b*. Where the State statute permits, but does not require the record of the transfer, the period of four months is calculated from the date of the transfer and not from the date of record. Carey v. Donohue, 240 U. S. 430; Getman v. Lippert, 171 N. Y. App. Div. 536; Robertson v. Schlotzhauer, C. C. A., 243 Fed. 324; even when

the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."[15] "The trustees may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.

the State statute provides that if the record is delayed the instrument shall be deemed fraudulent so far as relates to subsequent purchasers in good faith without notice. Ibid, Marsh v. Leseman, C. C. A., 242 Fed. 484; Hoshaw v. Cosgriff, C. C. A., 247 Fed. 22; *Re* Anderson, 257 Fed. 272; or to subsequent lienors; Bonner v. First Nat. Bank of Athens, C. C. A., 248 Fed. 692, but if the failure to record was made with the intent to support the credit of the party subsequently adjudged a bankrupt, the transfer may be set aside as fraudulent. National Bank of Athens v. Shackleford, 239 U. S. 81; Manders v. Wilson, C. C. A., 235 Fed. 878; Cooper Grocery Co. v. Penland C. C. A., 247 Fed. 480; Hawkins v. Dannenberg Co., C. C. A., 253 Fed. 529. But see Bean v. Orr, C. C. A., 182 Fed. 599; Martin v. Commercial Nat. Bank, C. C. A., 228 Fed. 651; Robertson v. Schlotzhauer, C. C. A., 243 Fed. 324; Getman v. Lippert, 171 N. Y. App. Div. 536. In the following cases, the transactions were *sustained;* Powell v. Gate City Bank, C. C. A., 178 Fed. 609; Pyle v. Texas Transport & Terminal Co., 192 Fed. 725; Sexton v. Kessler & Co., 225 U. S. 90; Mills v. Virginia-Carolina Lumber Co., C. C. A., 164 Fed. 168; *Re* Kessler & Co., 174 Fed. 906; *Re* Bird, 108 Fed. 229; Mason v. National Herkimer County Bank, C. C. A., 172 Fed. 529, reversing 163 Fed. 920; Germania Sav. Bank & Tr. Co. v. Loeb, C. C. A., 188 Fed. 285; Stennick v. Jones, C. C. A., 252 Fed. 345.

[15] 36 St. at L. 838, amending 30 St. at L. 544, 557, § 47; Kelley v. Gill; 245 U. S. 116; Stellwagen v. Clum, 245 U. S. 605; *Re* Whatley Bros., 199 Fed. 336, cf. § 643, *supra; Re* Snelling, 202 Fed. 259; *Re* Farmers' Co-Operative Co. of Barlow, N. D., 202 Fed. 1008; *Re* Morris, C. C. A., 204 Fed. 770; *Re* Rutland-Perry Co., 205 Fed. 200; Pacific State Bank v. Coats, C. C. A., 205 Fed. 618; *Re* Superior Drop Forge & Mfg. Co., 208 Fed. 813; *Re* Lane Lumber Co., 210 Fed. 82, S. C., C. C. A., 217 Fed. 550; Cooper Grocery Co. v. Park, C. C. A., 218 Fed. 42; Martin v. Commercial Nat. Bank of Macon, Ga., C. C. A., 228 Fed. 651; *Re* Zeis, 229 Fed. 472; *Re* Collins, 235 Fed. 937, 939; Cohen v. Nixon & Wright, 236 Fed. 407; *Re* American Candy Mfg. Co., 248 Fed. 145; Brown v. Crawford, 252 Fed. 248. But see *Re* Anson Mercantile Co., 203 Fed. 871.

Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any Court of Bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."[16] "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."[17] Preferences, under

[16] 30 St. at L. 544, § 70, as amended by 32 St. at L. 797. This gives a right of action to the trustee when the property was fraudulently conveyed more than four months before the institution of the proceedings. Bush v. Export Storage Co., 136 Fed. 918; Mueller v. Bruss, 112 Wis. 406; Andrews v. Mather, 134 Ala. 358; Beasley v. Coggins, 48 Fla. 215. In the latter case, it has been held, that without the defendant's consent the proceedings cannot be instituted in the Court of Bankruptcy. Gregory v. Atkinson, 127 Fed. 183, by Referee Geiger; *supra*, § 608. Except, at least, when there was no consideration for the conveyance, fraudulent intent on the part of the grantee, as well as on the part of the bankrupt, must be shown, Bush v. Expert Storage Co., 136 Fed. 918, 922; unless the conveyance is made within four months prior to the filing of the petition in bankruptcy and while the bankrupt was insolvent, when no proof of fraud is necessary if such a conveyance is void by the laws of the State as against the creditors of the debtor. 30 St. at L. 544, § 67*e*. "'A sale may be void for bad faith, though the buyer pays the full value of the property bought.' This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditor, and where he buys recklessly, with guilty knowledge." *Re* Pease, 129 Fed. 446, 448, citing Clements v. Moore, 6 Wall. 312, 18 L. ed. 786. See *supra*, § 621. For cases where sales of all the bankrupt's property or of his entire stock of goods were held to be fraudulent, see *Re* Knopf, 146 Fed. 109; Ott v. Doroshow, 147 Fed. 762; *Re* Lipman, 201 Fed. 166; *Re* Julius Bros., 209 Fed. 376; Bentley v. Young, 210 Fed. 202; aff'd C. C. A., 223 Fed. 536; Maires v. Northside Metal & Machinery Co., 221 Fed. 115.

[17] 30 St. at L. 544, 562, § 60. It has been held that it is not a preference for the bankrupt to give his attorney a mortgage to secure payment of a reasonable fee for services to be subsequently rendered in relation to his indebtedness, *Re* Pangborn, 185 Fed. 673; *Re* Cum-

a general deed of assignment, executed within the four months' period, are set aside by the bankruptcy proceedings.[18] A preferential transfer of accounts or other property, made more than four months prior to the filing of the petition in bankruptcy, cannot be set aside in bankruptcy as a preference.[19] The time is ordinarily calculated from the date when the lien actually accrues, although it relates back to a prior time.[20] The assets of a partnership upon its insolvency should first be applied to the payment of liabilities of the firm and assets of the individual partners to their respective individual liabilities. A transfer by one of the partners of his property in payment of a partnership debt may be set aside as preferential.[21] It has been held

mins, 196 Fed. 224, *infra*, § 647; nor for defending the bankrupt in a criminal prosecution, *Re* Pangborn, 185 Fed. 673. See §§ 608a, 611, *supra*.

18 Randolph v. Scruggs, 190 U. S. 533, 47 L. ed. 1165.

19 Jackson v. Sedgwick, 189 Fed. 508. *Contra,* Tilt v. Citizens' Tr. Co., 191 Fed. 441; Blair v. Brailey, C. C. A., 221 Fed. 1; Broach v. Mullis, 228 Fed. 551; Hagar v. Watt, 232 Fed. 373.

20 Freedman's Saving and Trust Co. v. Earle, 110 U. S. 74; Metcalf v. Barker, 187 U. S. 165; *Re* Darwin, 117 Fed. 407. But see Fisher v. Zollinger, C. C. A., 149 Fed. 54; Remington on Bankruptcy, § 1384. Since an order by a bankrupt for the payment of money by his debtor to a third person does not take effect until it is presented to his debtor, consequently it may be set aside if not presented for payment within the four months, although executed *previous* thereto. Johnston v. Huff, Andrews & Moyler Co., C. C. A., 133 Fed. 704; Long v. Farmers' State Bank, C. C. A., 147 Fed. 360 (a written contract to assign fire insurance as collateral security when the policies themselves were not assigned). But see Lowell v. International Tr. Co., C. C. A., 158 Fed. 781; or certification until within such time. *Re* Frazin, C. C. A., 201 Fed. 86. Where a judgment by confession was entered within the four months' period upon an irrevocable power of attorney, given previously thereto, it was held that the judgment and execution thereunder were a preference suffered or permitted by the debtor, Wilson v. Nelson, 183 U. S. 191, 46 L. ed. 147. Where record is not necessary, in the absence of fraud, the four months' period begins to run from the date when the transfer was first valid and not from the date when the grantee took possession or the bankrupt's creditors acquired notice. Little v. Holley-Brooks Hardware Co., C. C. A., 133 Fed. 874; *Re* Hunt, 139 Fed. 283; *Re* Evans Lumber Co., 176 Fed. 643; *Re* Watson, 201 Fed. 962; Davis v. Hanover Savings Fund Society, C. C. A., 210 Fed. 768. But see Carey v. Dowling, C. C. A., 209 Fed. 328; Ovington v. Brigman, 210 Fed. 499; *Re* Alden, 233 Fed. 161.

21 Mayes v. Palmer, C. C. A., 208 Fed. 97; *Re* Frazer, 221 Fed. 83.

that a trustee can recover a secret preference paid a creditor upon a former composition.[22] It has been held that a suit to recover a preference should be brought in equity, although it is simply to recover a sum of money.[23] It must be a plenary suit, not a summary proceeding.[24] It cannot be begun before the

22 *Re* Chaplin, 115 Fed. 162. But see Crowder v. Allen-West Commission Co., 213 Fed. 177.

23 Pond v. New York Nat. Exch. Bank, 124 Fed. 992; *Re* Plant, 148 Fed. 37; Wall v. Cox, 101 Fed. 403; Off v. Hakes, 142 Fed. 364; Parker v. Black, 151 Fed. 18; Mason v. Herkimer County Bank, 163 Fed. 920; Parker v. Sherman, C. C. A., 212 Fed. 917; Taylor v. Fram, 243 Fed. 735. See Parker v. Black, 143 Fed. 560; Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190. *Contra,* Warmath v. O'Daniel, C. C. A., 159 Fed. 87; First State Bank v. Spencer, C. C. A., 219 Fed. 503; Simpson v. Western Hardware & Metal Co., 227 Fed. 304; Plumb v. Lyell Ave. Lumber Co., 202 N. Y. 617; Allen v. Gray, 201 N. Y. 504, a suit to set aside fraudulent transfers under § 70; Reber v. Ellis Bros., 185 Fed. 313.

24 *Re* Knickerbocker, 121 Fed. 1004. See §§ 610, 635, *Supra.* The trustee's right to recover property transferred by the bankrupt as a preference is not assignable. Lovell v. Latham & Co., 211 Fed. 374. But in a proper case creditors may be authorized to sue in the trustee's name at their own expense with the right to indemnity out of any property that may be recovered. It has been held that before the election of a trustee, such a suit may be instituted by a creditor; and that, in such case, the trustee upon his election should be made plaintiff in the same. Frost v. Latham & Co., 181 Fed. 866. See *supra,* § 643. The trustee need not obtain judgment before beginning such a suit. Davis v. Gates, 235 Fed. 192; Sherwood v. Holbrook, 178 N. Y. App. Div. 462. No previous demand by the trustee is required before a suit to recover a preferential payment. Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190; Wright v. Skinner, 136 Fed. 694. As to a demand held to be sufficient, see Grant v. National Bank of Auburn, 197 Fed. 581. For cases where such a suit was held not to be an election that prevented the trustee from afterwards pursuing another remedy, see Rock Island Plow Co. v. Reardon, 222 U. S. 354, 56 L. ed. 231, § 368, *supra. Contra, Re* Hurst, C. C. A., 194 Fed. 830. Where the preference was made by the sale of property for less than its value, the trustee may recover the surplus without a previous tender of the purchase money. Stern v. Louisville Trust Co., C. C. A., 112 Fed. 501. The trustee may join in the same suit, a claim to set aside a fraudulent transfer of property and one to recover back a preferential payment. French v. R. P. Smith & Sons, 81 Minn. 341. See note 12, *supra.* The bill must contain four essential allegations: (1) that the bankrupt was insolvent when the alleged preference was given; (2) that it was within four months prior to the institution of the bankruptcy proceedings; (3) that the effect of the endorsement of the judgment or

transfer, or the retention of the property or money, as the case may be, will be to enable the defendant to obtain a greater percentage of his debt than any other creditor of the same class; and (4) that defendant had reasonable grounds to believe that a preference was intended. Painter v. Napoleon Tp., 156 Fed. 289; *Re* Sanger, 169 Fed. 722; Watson v. Adams, C. C. A., 242 Fed. 441; Hoshaw v. Cosgriff, C. C. A., 247 Fed. 22. But it has been held that when the trustee sues to enjoin the enforcement of a judgment recovered within the statutory four months he need not allege that the judgment creditor at the time of its entry had reasonable cause to believe that its enforcement would effect a preference. *Re* Petersen, C. C. A., 200 Fed. 739. It has been held that the bill need not allege the intent of the bankrupt in making the payments. Cohen v. Goldman, C. C. A., 250 Fed. 599. It seems that a trustee is not required to make any tender in his bill of complaint. Stern v. Louisville Trust Co., C. C. A., 112 Fed. 501; Dreyer v. Kicklighter, 228 Fed. 744. But the defendant will be allowed any credit to which in equity he is entitled. Ibid. Toof v. City Nat. Bank of Paducah, Ky., C. C. A., 206 Fed. 250. Woodford v. Rice, 207 Fed. 473. The complaint was held to be demurrable when it failed to show the amount of the preferred and unsecured claims. Grant v. National Bank of Auburn, 197 Fed. 581. In a suit to set aside a preference obtained by the confession of a judgment and the purchase of property at an execution sale, subject to prior judgments which were paid, the trustee in bankruptcy need not make the sheriff nor the holders of the prior judgments parties, unless they are charged to have been guilty of misconduct in connection with the transaction. Ibid. The plaintiff need not plead, nor offer evidence, that claims have been proved against the estate of the bankrupt, but he should plead and offer evidence to show that the bankrupt is indebted to general creditors. Gering v. Leyda, C. C. A., 186 Fed. 119. *Cf.* Miller v. New Orleans, A. & F. Co., 211 U. S. 496, 505. The burden of proof is upon the trustee to establish the facts which constitute a preference. Pyle v. Texas Transport & Terminal Co., 238 U. S. 90; Angle v. Bankers' Surety Co., C. C. A.; Mayes v .Palmer, C. C. A., 208 Fed. 97; Baxter v. Ord, C. C. A., 239 Fed. 503. But see Winslow v. Staab, 233 Fed. 305. But when the defendant claims to be a purchaser he has the burden of proving that he paid a valuable consideration. Owens v. Daniel, C. C. A., 230 Fed. 101; Watson v. Adams, C. C. A., 242 Fed. 441; Woodford v. Rice, 207 Fed. 473. See Klinger v. Hyman, C. C. A., 223 Fed. 257; and when the preference charged is an application of firm assets to payment of individual debt of a partner the burden is on the defendant to prove that the other partner consented. Ryan v. Cavanagh, C. C. A., 238 Fed. 604. A previous ruling in the bankruptcy proceedings will be regarded as the law of the case and will usually be followed in an independent suit in equity. Lewis v. Julius, 212 Fed. 225. In such a suit, the creditor is precluded by the adjudication, in so far as it determines that the bankrupt committed an act of bankruptcy within four months prior to

the filing of the petition, Cook v. Robinson, C. C. A., 194 Fed. 785. The fact that a debtor was adjudged a bankrupt on the ground that a chattel mortgage was a preference and an act of bankruptcy does not affect the mortgage in an action to set aside the same as a preference, Hussey v. Richardson-Roberts Dry Goods Co., C. C. A., 148 Fed. 598. A judgment or order of a referee disallowing a claim against the bankrupt's estate on the ground that the claimant had received a preference is res adjudicata and admissible in evidence in a subsequent suit by the trustee to recover the preference, Ullman, Stern & Krausse v. Coppard, C. C. A., 246 Fed. 124. An order directing that the proceeds of a sale be paid into court to await the final decree does not estop the trustee from suing to set aside the sale as fraudulent, Faulkner v. Kaplon, 203 Fed. 114. It was held that the dismissal of a bill to set aside a preference by a firm, because of the failure to prove that the individual partner as well as the co-partnership were insolvent, was *res adjudicata* against a subsequent suit for the same relief alleging the insolvency of both the firm and its individual members, although the former bill did not contain the latter allegation. Worrell v. Kemmerer, C. C. A., 192 Fed. 911. The fact that a transfer is set aside as fraudulent does not deprive the defendant of the right to participate in the proceeds of the sale of the property recovered, so far as concerns a debt incurred previous to the execution of the fraudulent conveyance and not connected with the sale. *Re* Hurst, 188 Fed. 707. The defendant cannot set off the amount of any dividend to which he would be entitled from the estate of the bankrupt, Templeton v. Kehler, 173 Fed. 574; Ommen v. Talcott, 175 Fed. 259; and the day of judgment will not be postponed until he has proved his claim and the dividend has been declared, Templeton v. Kehler, 173 Fed. 574. The fact that creditors have filed their claims and taken part in the election of the trustee does not estop them from asserting their right to attack a preferential transfer. International Silver Co. v. N. Y. Jewelry Co. C. C. A., 233 Fed. 945. Extreme insolvency at the time the petition is filed unless shown to arise in the absence of evidence to the contrary justifies the inference that it existed during the preceding four months. McGill v. Commercial Credit Co., 243 Fed. 637. Evidence of statements made by the bankrupt subsequent to the transfer is usually inadmissible against another defendant, First State Bank v. Lowry, C. C. A., 227 Fed. 846. Roseman v. Coppard, C. C. A., 228 Fed. 114. Evidence of previous transactions between the parties is usually inadmissible as irrelevant, Hanck v. Frey, 228 Fed. 779. As to the charge to the jury in such a case see Campbell v. Krauss, C. C. A., 249 Fed. 670. In a suit to set aside a sale where the property sold had deteriorated in value its value at the time of the sale was adopted as the basis of the decree. Dreyer v. Kicklighter, 228 Fed. 744. But where it was agreed by the receiver or trustee that the defendant should hold the property pending the litigation it was held that such defendant was liable only for such property and not for its value

referee.[25] The defendant in an action to recover a preference is not liable for more than he actually received from the proceeds of the sale of the property, provided that he acted in good faith and exercised reasonable diligence in selling the same.[26] Interest is recoverable from the beginning of the suit.[27] It has been held that a judgment in such a suit may be enforced by contempt proceedings.[28]

§ 645. Proof and allowance of claims. "(*a*) Proof of claims shall consist of a statement under oath,[1] in writing, signed by

at the time the agreement was made. National City Bank v. Hotchkiss, 231 U. S. 50; Ernst v. Mechanics & Metals Nat. Bank, C. C. A., 201 Fed. 664. Where a conveyance of a husband's real estate is set aside as preferential, it cannot be enforced so far as concerns the contemporary transfer of the wife's right of dower in the same property. *Re* Lingafelter, C. C. A., 32 L.R.A. (N.S.) 103, 181 Fed. 24. Where the preference consists of a payment of money the judgment should not direct the bankrupt to pay the money to the trustee. *Re* Cunney, 225 Fed. 426. The finding of the referee and judge in such a case will not usually be disturbed upon appeal. Owens v. Farmers' Bank of Abbeville, C. C. A., 228 Fed. 508; Lake View State Bank v. Jones, C. C. A., 242 Fed. 821.

25 Weidhorn v. Levy, 253 U. S. 268, *supra*, § 638.

26 Allen v. McMannes, 156 Fed. 615.

27 Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190.

28 *Re* Plant, 148 Fed. 37. A trustee cannot make a settlement with a preferential creditor that will give the latter's contested lien priority to the rights of a purchaser for value in good faith, and, where the trustee was unwilling to continue the litigation, it was held that he should accept the offer of such a purchaser to pay the expenses of its further prosecution and the cost already incurred. *Re* Geiselhart, 181 Fed. 622. Where there are insufficient funds to justify litigation and no creditor is willing to pay such expenses, the trustee may sell his interest in real estate which has been preferentially or fraudulently transferred. *Re* Downing, 192 Fed. 683.

§ 645. 1 The claim may be verified before a foreign counsul of the United States (*Re* Sugenheimer, 91 Fed. 744), or before the creditor's attorney, *Re* Kimball, 100 Fed. 777. It has been held that the official seal and signature of a notary public is a sufficient authentication of his authority in another state. *Re* Pancoast, 129 Fed. 643. The oath may be made by the creditor or his agent, *Re* McCarthy Portable Elevator Co., 205 Fed. 986. When assigned after the institution of the proceedings in bankruptcy the claim should be supported by the oath of the person who owned it at the time the proceedings were begun. Ibid. An objection that the attorney who verified the claim failed to assign the reason why the claimant did not personally swear to the

a creditor[2] setting forth the claim, the consideration therefor,[3]

same, may be cured by amendment. *Re* Medina Quarry Co., 179 Fed. 929; *Re* Stradley & Co., 187 Fed. 285. It is too late to make such an objection after the claimant has voted. *Re* Stradley & Co., 187 Fed. 285.

[2] The signature may be made in the owner's name by his agent, J. & S. Ferguson v. Lyle, C. C. A., 267 Fed. 817; attorney or proxy, *Re* H. E. Ploof Machinery Co., 243 Fed. 421; but it has been held that an attorney should not sign several proofs of claims for different persons. Ibid. The father of a minor may prove a claim for the latter's wages. *Re* Haskell, 228 Fed. 819. Where an agent proves a claim in his own name without disclosing the fact that he is acting for another the proof may be disallowed as false, *Re* Collins, 235 Fed. 937. It seems that a creditor cannot be compelled to prove his claim, *Re* Kligerman, 219 Fed. 258; a claim may be presented in the name of the real party in interest although he is not the owner at common law. *Re* Worcester County, C. C. A., 102 Fed. 808. If the claim has been assigned before bankruptcy, the assignee should make the proof in his own name. *Re* Worcester County, C. C. A., 102 Fed. 808. This is the case although the assignment was made as collateral security. *Re* Am. Specialty Co., C. C. A., 191 Fed. 807. An assignment of a claim gives the assignor any right of intervention which was held by the assignor, *Re* Fitzgerald, 191 Fed. 95. The bankrupt may prove against himself, a claim, which he holds in a representative capacity, Warner v. Spooner, 3 Fed. 890. Ordinarily a claim for a deficiency after the foreclosure of a mortgage to a trustee for the benefit of bondholders should be made by the latter and not by the former. U. S. Tr. Co. v. Gordon, 216 Fed. 929; *Re* A. J. Ellis, Inc., C. C. A., 252 Fed. 483; affirming 242 Fed. 156. A claim may be proved by the next friend of a creditor who is *non compos mentis* although not actually insane, *Re* Kronberg, 208 Fed. 203. The true owner of a claim is not estopped from proving it because it was previously proved by another to whom it did not belong, *Re* Dunlap Carpet Co., 206 Fed. 726; Assets Realization Co. v. Sovereign Bank of Canada, C. C. A., 210 Fed. 156; *Re* Louis J. Bergdoll Motor Co., 230 Fed. 248.

[3] By General Order XXI, as amended Nov 1, 1915. "1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge

and whether any, and, if so what, securities are held therefor,

of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.'' 239 U. S. 623; Flower v. Commercial Trust Co., C. C. A., 223 Fed. 318; *Re* Hudson Porcelain Co., 225 Fed. 325. It has been held that the failure to insert, at the head of the proof of claim, the title of the court is not a fatal defect. *Re* Blue Ridge Packing Co., 125 Fed. 619. Different claims by the same creditor need not be included in the same proof. *Re* Ball, 123 Fed. 164. The holder of several notes made by a bankrupt should prove them as a single claim, Frederick v. Citizens' Nat. Bank, C. C. A., 231 Fed. 667. A claim in the form of a petition which sets forth the matter required by the statute and order, when duly verified was allowed, Kilpatrick v. U. S. Fidelity & Guaranty Co., C. C. A., 228 Fed. 587; but not a claim in the form of a letter to the receiver in bankruptcy; *Re* Thompson, 222 Fed. 167. A claim for interest owing at the time when the petition was filed may be included, *Re* McAusland, 235 Fed. 173; J. & S. Ferguson v. Lyle, C. C. A., 267 Fed. 817. If no date of a payment on account of the debt is specified, it will be presumed not to have been made within the period allowed by the statutes of limitations, *Re* Ballantine, 232 Fed. 271. The claim must be specific, and, if for several services or payments, it must be itemized. *Re* Scott, 93 Fed. 418; *Re* Globe Boat Co., 190 Fed. 92; *Re* United Wireless Telegraph Co., 201 Fed. 445. Under the Act of 1867, it was held: that a general statement of the consideration ''for goods, wares and merchandise'' or ''for hay, barley and board'' was not sufficient; but that the kinds of goods, the quantity, the price, the approximate date of the sale and the time or period of the delivery should be stated. *Re* Elder, Fed. Cas. No. 4,326, 1 Sawy. 73. The statement that there was a consideration for a note is insufficient. *Re* Coventry Evans Furniture Co., 166 Fed. 516. So, where the sole statement of consideration was stated to be for ''services, mdse., etc.,'' ''bal. of wages,'' ''for goods sold and delivered,'' and the like. *Re* Morris, 154 Fed. 211. A proof of claim was held to be insufficient when it set forth that the consideration was for legal services during several months, during which the claimant appeared for the bankrupt and prepared the schedules filed, without showing the time consumed, the nature of the other services rendered or anything from which their value could be determined. *Re* Hudson Porcelain Co., 225 Fed. 325. It has been held: that, where the bankrupt is charged as an indorser, notice of dishonor and any other facts necessary to establish his liability must be stated. *Re* Stevens, 104 Fed.

and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.[4] (*b*) Whenever a claim is founded

323; criticised in Remington on Bankruptcy, § 602; and that, where the claim is for a balance due on various collateral notes, upon which the bankrupt was maker or indorser, some of which became due after discount, the date of the discount, the amount advanced and the person to whom the advancement was made must be stated in the proof. *Re* Stevens, 104 Fed. 323. A mortgagee of property sold free of his encumbrance, who intervenes to prove his lien upon the proceeds, is not bound to prove his claim in the same manner as if it were one against the general estate of the bankrupt; but he need only plead and prove his debt and security in the manner required in an ordinary suit in equity. *Re* Goldsmith, 118 Fed. 763. The same rule seems to apply to a claimant for taxes. *Re* Kallak, 147 Fed. 276.

[4] A proof of claim may be amended by leave of the court or of the referee, upon proof of an error or omission, due to inadvertence or to a mistake of fact or law. Hutchinson v. Otis, 190 U. S. 552, 555, 47 L. ed. 1179, 1181; *Re* Baxter, 12 Fed. 72; *Re* Myers, 99 Fed. 691; *Re* Roeber, C. C. A., 127 Fed. 122; *Re* Haskell, 128 Fed. 819; *Re* Robinson, 136 Fed. 994; *Re* Salvator Brewing Co., C. C. A., 193 Fed. 980; *Re* McCarthy Portable El. Co., 205 Fed. 986; § 646, *infra*. But see, Booth, 216 Fed. 57. Or because a preference has been set aside, *Re* Hamilton Automobile Co., C. C. A., 209 Fed. 596. By such an amendment, a claim may be increased, *Re* Shiebler, 165 Fed. 363; *Re* Hamilton Automobile Co., C. C. A., 209 Fed. 596; *Re* Soltmann, 238 Fed. 241; or the benefit of a lien preserved, *Re* Falls City Shirt Mfg. Co., 98 Fed. 592, *contra*, *Re* Wilder, 101 Fed. 104; an application may be made of the funds of the bankrupt in the hands of claimant, *Re* Myers, 90 Fed. 691; or a claim for security, *Re* James Carothers & Co., 182 Fed. 501; *Re* Fisk & Robinson, 185 Fed. 974; or set off included, *Re* Progressive Wall Paper Corp., 240 Fed. 897, *infra*, § 648; or a new claimant may be substituted for one who made proof on his behalf, *Re* A. J. Ellis, Inc., 252 Fed. 483; or the claim may be conformed to the proof, *Re* Watertown Paper Co., C. C. A., 169 Fed. 252. A claim may be amended after the referee has recommended that a composition be accepted *Re* Soloway & Katz, C. C. A., 211 Fed. 333. A claim may be amended more than a year after the adjudication. *Re* Faulkner, C. C. A., 161 Fed. 900; *Re* Kessler, C. C. A., 184 Fed. 51; *Re* Fairlamb, 199 Fed. 278; *Re* Basha, 200 Fed. 951. But an amendment bringing in a new cause of action cannot, under ordinary circumstances be made more than a year after the adjudication. *Re* McCallum v. McCallum, 127 Fed. 768 (where it was sought to amend a claim upon a promissory note, made by the firm, so as to charge, upon his indorsement thereof, the individual estate of one of the partners). See Hutchinson v. Otis, 190 U. S. 552, 555. Permission was given after the ex-

upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim.[5] After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[6] (*c*) Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.[7] (*d*) Claims which have been duly proved [8] shall be allowed, upon receipt by

piration of the year, to amend a claim in the form of a book account, so as to base this upon promissory notes of the bankrupt. Brown v. O'Connell, C. C. A., 200 Fed. 229. A letter to a receiver or his attorney cannot be treated as an informal proof of a claim which can be supplemented by an amendment more than one year after the adjudication, *Re* Thompson, C. C. A., 227 Fed. 981; but the filing of an assignment within the statutory period was held to be sufficient for this. Bennett v. Am. Credit Indemity Co., C. C. A., 159 Fed. 624.

5 There is no need of filing checks with which loans were made, *Re* Keller, 252 Fed. 942; or book accounts, *Re* Gottlieb & Co., 245 Fed. 139. Where the payee of a note of the bankrupt, upon which payments by an endorser were endorsed filed such note with his proof of claim it was considered to have been filed on behalf of the endorser as well, *Re* Keller, 252 Fed. 942. It has been held that the fact that a written instrument is not filed with a proof of claim raises no presumption against its existence, when it is not required by the statute or general orders. *Re* Dresser, C. C. A., 135 Fed. 495. See Kelsey v. Munson, C. C. A., 198 Fed. 841. Where no objection to a claim was made upon the ground that the original notes and mortgages, which were the basis thereof, were not attached thereto; it was subsequently presumed that the original securities were presented at the trial, or that their presentation was waived. *Re* Carter, 138 Fed. 846.

6 *Re* Loden, 184 Fed. 965; *Re* Strickland, 167 Fed. 867.

7 It has been held that the creditor may move to compel the referee to accept the claim, and that the formalities of an order and petition of review are unnecessary. *Re* John A. Baker Notion Co., 180 Fed. 922.

"8 There is apparently a distinction between the proving of a claim under section 57a of the Bankruptcy Act and its allowance under section 57e, resulting in the right to prove a secured claim when the ultimate necessity for its allowance appears reasonably possible, even though it may turn out to be unnecessary because the security proves adequate to pay the debt in full." Emerine v. Terault, C. C. A., 219 Fed. 68, 71. Where in a consolidated proceeding against a

or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.[9]

firm and one of the partners, the referee entered a general order allowing numerous claims without specifying whether the allowance was against the firm or the individual or both; this did not operate as an allowance against the former of a claim which in the proof was made against the latter alone, Adams v. Brown, C. C. A., 226 Fed. 688. The order of a referee allowing or disallowing a claim is a final judgment in the absence of review, Stearns Salt & Lumber Co. v. Hammond, C. C. A., 217 Fed. 559. The disallowance of a claim is *res adjudicata* against a subsequent suit thereupon, Hargadine-McKittrick D. G. Co. v. Hudson, C. C. A., 122 Fed. 232; *supra* § 186j. But see Stearns Salt & Lumber Co. v. Hammond, C. C. A., 217 Fed. 559. An allowance of a claim against the individual estate of a partner is not a determination of priorities as between firm and individual creditors. International Agr. Corp. v. Cary, C. C. A., 240 Fed. 101.

9 Before the election of a trustee, objection to a claim may be made by any creditor, *Re* Lafferty & Bro., 122 Fed. 558. See *Re* Lipman, 94 Fed. 353; *Re* Sully, C. C. A., 152 Fed. 619; or by stockholders of a bankrupt who are liable to an assessment, Rosenbaum v. Dutton, C. C. A., 203 Fed. 838; or by the bankrupt, *Re* Ankeny, 100 Fed. 614; *Re* Lane, 125 Fed. 772; *Re* French, 181 Fed. 583; but not by a debtor of the estate, *Re* Sully, C. C. A., 152 Fed. 619. The referee may disallow the claim of his own motion, *Re* James Dunlap Carpet Co., 171 Fed. 532. It has been held that, after the election and qualification of the trustee, all objections and applications for the re-examination of claims should be made in his name, *Re* Lewensohn, C. C. A., 121 Fed. 538; *Re* Knox Automobile Co., 229 Fed. 241. Where no objection was raised by the claimant because the petition was made by creditors instead of the trustee, until subsequent to the order of the referee, it was not disturbed, *Re* Canton Iron & Steel Co., 197 Fed. 767. See *Re* Mexico Hardware Co., 197 Fed. 650. Defects in the form of objections and applications for the reconsideration of the claim, are waived by the taking of the testimony without objection. Orr v. Park, C. C. A., 183 Fed. 683; *Re* Effinger, 184 Fed. 724; *Re* Canton Iron & Steel Co., 197 Fed. 767. Upon the refusal of the trustee to move for the re-examination of a claim he may, in a proper case, be ordered to do so. Chatfield v. O'Dwyer, C. C. A., 101 Fed. 797; McDaniel v. Stroud, C. C. A., 106 Fed. 486; *Re* Stern, C. C. A., 144 Fed. 956. It has been held that, in such a case, the creditor may himself proceed, *Re* Little River Lumber Co., 101 Fed. 558; *Re* Sully, C. C. A., 152 Fed. 619, upon indemnifying the trustee against his costs; Chatfield v. O'Dwyer, C. C. A., 101 Fed. 797; *Re* Sully, C. C. A., 152 Fed. 619; *Re* Bailey, 151 Fed. 953; but the proper practice seems to be for the creditor to make his objections or

(*c*) Claims of secured creditors, and those who have priority

application in the name of the trustee by leave of the court. McDaniel v. Stroud, C. C. A., 106 Fed. 486; *Re* Sully, C. C. A., 152 Fed. 619; *Re* Bailey, 151 Fed. 953; *Re* Mexico Hardware Co., 197 Fed. 650, holding that a creditor may move in his own name for a reconsideration of the claim. A claim may be disallowed, or if allowed may be reexamined and expunged, because it is barred by the statute of limitations, *Re* Lipman, 94 Fed. 353; and because the claimant has joined with it other claims that are fraudulent, *Re* Flick, 105 Fed. 503; but not, it has been held, because it was acquired from the original claimant after the adjudication of bankruptcy for the purpose of controlling the proceedings, *Re* Headley, 97 Fed. 765. It is the better practice to make objections to claims in writing; *Re* Royce Dry Goods Co., 133 Fed. 100; but this is not indispensable, *Re* Cannon, 133 Fed. 837; unless the referee so requires, *Re* Cannon, 133 Fed. 837. An oral objection is sufficient when a claimant makes no objection to the form thereof, Orr v. Park, C. C. A., 183 Fed. 683. They need not be under oath, *Re* Wooten, 118 Fed. 670. They "should be sufficiently explicit to indicate to the claimant the nature and character thereof," *Re* Royce Dry Goods Co., 133 Fed. 100, 101; they may be amended; *Re* Royce Dry Goods Co., 133 Fed, 100; and an amendment may be allowed to conform to evidence, which has been admitted without objection. Ibid. The statute of limitations may be interposed against the allowance of a claim by the trustee, *Re* Wooten, 118 Fed. 670; or, it seems, by any creditor, *Re* Lafferty & Bros., 122 Fed, 558; Remington on Bankruptcy, § 786. The inclusion of a claim in Schedule A by bankrupt does not take it out of the statute of limitations, so far as the trustee and other creditors are concerned, *Re* Lipman, 94 Fed. 353; *Re* Resler, 95 Fed. 804; *Re* Wooten, 118 Fed. 670. A creditor may attack a judgment as fraudulent and collusive, when proof of these is offered, Chandler v. Thompson, C. C. A., 120 Fed. 940. The presentation of a deposition proving a debt, in accordance with the rules and the statute, establishes a *prima facie* case; Whitney v. Dresser, 200 U. S. 532, 50 L. ed. 584, affirming *Re* Dresser, C. C. A., 135 Fed. 495; West v. W. A. McLaughlin & Co.'s Trustee, C. C. A., 162 Fed. 124. See *Re* Halsey El. Generator Co., 163 Fed. 118; *Re* Elk Valley Coal Mining Co., 210 Fed. 386; *Re* United Wireless Telegraph Co., 201 Fed. 445; Board of Commerce of Ann Arbor, Mich., v. Security Trust Co., C. C. A., 225 Fed. 454; International Agr. Corp. v. Cary, C. C. A., 240 Fed. 101; *Re* Arthur E. Pratt Company, 252 Fed. 917; except perhaps when made by the bankrupt's wife, *Re* Crumbling, 214 Fed. 503; but see Moore v. Crandall, C. C. A., 205 Fed. 689; or near relation, *Re* Blanchard, 253 Fed. 758; when no documentary evidence is therein contained; but not a *prima facie* case for the allowance of a priority, when that is claimed, *Re* Jones, 151 Fed. 108, 18 Am. B. R. 206. If the claimant is present, subject to cross-examination, no testimony by him, in addition to his deposition, is required,

may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.[10] (*f*) Objec-

Baumhauer v. Austin, C. C. A., 186 Fed. 260, although he is a near relation of the bankrupt, Ibid. It has been held that the trustee has the burden of proof to establish a set-off. *Re* Harper, 175 Fed. 412. But see *Re* Graves, 182 Fed. 443. Where a petition to expunge a claim is filed, a reply to the same is required or the claim will be expunged. *Re* Goble Boat Co., 190 Fed. 92. The failure of the bankrupt to deny an allegation in the petition that the petitioner is a creditor, does not relieve the latter from the necessity of proving his claim. *Re* Harper, 175 Fed. 412. For a case where a claim was disallowed because the evidence in its support was improbable, see *Re* Baumhauer, 179 Fed. 966. Upon the hearing of a claim, the claimant may be required to produce papers relevant to the same which are in his possession, and he may be punished for contempt if he disobeys an order to that effect. Baumhauer v. Austin, C. C. A., 186 Fed. 260. For a case where a claim, not mentioned in the bankrupt's schedules and supported only by the claimant's affidavit, was disallowed for insufficient proof, see *Re* Shaw, 112 Fed. 847. Mortgages which are void may be put in evidence as admissions of antecedent debts therein described. *Re* New Brunswick Carpet Co., 4 Fed. 514. But see Wilson v. Pennsylvania Tr. Co., C. C. A., 114 Fed. 742; Orr v. Park, C. C. A., 183 Fed. 683. The evidence in support of a claim must be consistent with the claimant's allegations therein, *Re* Lansaw, 118 Fed. 365.

[10] "'Secured Creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;" 30 St. at L. 544-546, § 2, subd. 23; *Re* Thompson, 208 Fed. 207; *Re* Shatz, 251 Fed. 351. Where the property held as security does not belong to the bankrupt, no deduction for the value thereof should be made from the claim. *Re* Noyes Bros., C. C. A., 127 Fed. 286; *Re* Mertens, C. C. A., 142 Fed. 445, affirmed Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945; *Re* J. G. Reichard & Bros., 230 Fed. 525; New York Commercial Co., C. C. A., 233 Fed. 906. Where the liability of the bankrupt is an indorser, a creditor is not obliged to credit the proceeds of collateral securities, given by the maker of the obligation, before being allowed to participate in the distribution of the indorser's estate. Gorman v. Wright, C. C. A., 136 Fed. 164, reversing *Re* Matthews, 132 Fed, 274. Securities held on exempt property of the bankrupt must be deducted. *Re* Little, 110 Fed. 621; Fenley v. Poor, C. C. A., 121 Fed. 739; *Re* Lantzenheimer,

tions to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estates and the claimants will permit. (*g*) The claims of creditors who have received preferences voidable under section 60, subdivision b, or to whom conveyances, transfers, assignments or incumbrances void or voidable under section 67, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, assignments or incumbrances.[11] (*h*) The value of securities held by secured creditors

124 Fed. 716; *Re* Meredith, 144 Fed. 230. But see *Re* Bailey, 176 Fed. 990. The secret renewal of a lease, given the creditor as security, is considered to be a continuance of the security. Fitch v. Richardson, C. C. A., 147 Fed. 197; *Re* Sig. H. Rosenblatt & Co., C. C. A., 193 Fed. 638. When the security is surrendered, the claim may be allowed without deduction, *Re* Eagles & Crisp, 33 Fed. 695; *Re* Hurlbutt, Hatch & Co., C. C. A., 143 Fed. 958, 16 Am. B. R. 198. An adjudication that a security is void is equalivent to a voluntary surrender by the creditor. *Re* Pollmann, 156 Fed. 221; *Re* Otto F. Lange Co., 170 Fed. 114; *Re* Elletson Co., 193 Fed. 84. The filing of a claim and the receipt of dividends upon its full amount is a waiver of the creditor's security, *Re* Fisk & Robinson, 185 Fed. 974. *Cf. Re* Abell, C. C. A., 198 Fed. 484. So it has been held is proof of the claim without mention of the security, *Re* Burr Mfg. & Supply Co., 47 Fed. 16; Morrison v. Rieman, C. C. A., 249 Fed. 97. But see *Re* Zitron, 203 Fed. 79. The creditor may however, be allowed to amend so as to claim his security, Britton v. Thomas, C. C. A., 238 Fed. 123. The settlement of a claim by the transfer to the creditor of the legal title to the security, *Re* M. I. Hibbler Mach. Supply Co., 192 Fed. 741 (a release after the bankruptcy proceedings had been begun), or otherwise, *Re* Norris, 190 Fed. 101. prevents the creditor from proving the debt. A secured creditor need not file a proof of claim although when the trustee has interfered with his security he may petition the court for relief, *Re* Goldsmith, 118 Fed. 763; Hartman v. Swiger, 215 Fed. 986; Courtney v. Fidelity Tr. Co., 219 Fed. 571; Butterfield v. Woodman, C. C. A., 223 Fed. 956; *Re* North Star Ice & Coal Co., 252 Fed. 301. A secured creditor who files a proof of claim without alleging any insufficiency in his security or instituting proceedings to have the value thereof determined is not entitled to have his claim allowed in any amount so that he may participate in creditors' meetings, *Re* North Star Ice & Coal Co., 252 Fed. 301.

[11] It seems that this clause applies only to a creditor who has received a voidable preference and not to one who has a valid security, *Re* Keystone Press, 203 Fed. 710. On a petition of a trustee in bankruptcy to expunge the claim of a creditor on the ground that it had received a preference, the burden is on the trustee to prove that the

shall be determined by converting the same into money, accord-

preferential payment was made after the creditor received information of the insolvency of the bankrupt. *Re* Frazin, C. C. A., 201 Fed. 86. See *Re* Greenberger, 203 Fed. 583; First. Nat. Bank v. Harper, C. C. A., 254 Fed. 641; *Re* Keller, 252 Fed. 942. A creditor who has returned a preference can prove his claim notwithstanding his satisfaction of a judgment against the bankrupt at the time when he received the preference and the expiration of the time allowed by the State law of the vacation of such satisfaction. Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179. The holder of an invalid mortgage can prove the claim for the debt thereby secured, if otherwise good. Post v. Berry, C. C. A., 175 Fed. 564. See *Re* Elletson Co., 193 Fed. 84. Payment of a judgment for the return of a preference is equivalent to a surrender thereof. *Re* Louis J. Bergdoll Motor Co., 230 Fed. 248; State Bank v. Ingham, C. C. A., 237 Fed. 76. It has been said that a creditor, who holds a preference that is voidable, may file formal written proof, although it cannot be allowed until the preference is surrendered, Stevens v. Nave-McCord Mercantile Co., C. C. A., 150 Fed. 71. Where a creditor holds several claims, some of which are preferred, and some not, he cannot prove any of them unless his preference is surrendered, Dunn v. Gans, C. C. A., 129 Fed. 750; *Re* Mayo Contracting Co., 157 Fed. 469. But, it has been held that, in the case of a bankrupt partnership, where he holds securities, which are the individual property of a partner, he may apply these upon his claim against the latter's individual estate and prove against the partnership estate his entire claim against the firm, *Re* Mertens, C. C. A., 144 Fed. 818. An unlawful preference cannot be set off against a claim, but must be surrendered before the claim is proved; even if it relates to an independent transaction; *Re* Chaplin 115 Fed. 162. But see *Re* Wright-Dana Hardware Co., C. C. A., 212 Fed. 397. The fact that a lien is obtained in a foreign country does not prevent its being a preference, which must be surrendered before the creditor's claim is proved. It has been held that a sale of goods, to be paid for in ten days, cannot be treated as a cash transaction, so as to prevent a payment within the period from being treated as a preference. *Re* John Morrow & Co., 134 Fed. 686. A payment is no less a preference because some other creditors have obtained larger proportional payments upon their claims during the same period. *Re* Mayo Contracting Co., 157 Fed. 469. Amounts paid on a debt of the bankrupt by a surety are not deducted from the creditor's claim; but, if the dividend exceeds the balance due him, the creditor holds the excess in trust for the surety. Swarts v. Fourth Nat. Bank, C. C. A., 117 Fed. 1. See *Re* Noyes Bros., C. C. A., 127 Fed. 286. A surety, who has paid the bankrupt's debt, stands in the shoes of the creditor and cannot prove the claim without surrendering all preference that the creditor has received thereupon, Livingstone v. Heinman, C. C. A., 120 Fed. 786.

ing to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.[12] (*i*) Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.[13] (*j*) Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.[14] (*k*) Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part, according to the equities of the case,

[12] *Re* Peerless Shoe Co., 226 Fed. 1020; *Re* McAusland, 235 Fed. 173; *Re* Soltmann, C. C. A., 240 Fed. 455; *Re* Isaacs, C. C. A., 246 Fed. 820; *Re* Clark Realty Co., 253 Fed. 938. It has been said to be the better practice upon the filing of an objection by the trustee to the proof of a secured debt, to try the issue and allow the claim as secured or unsecured before the alleged security is converted into money. *Re* Quinn, C. C. A., 165 Fed. 144. *Cf.* § 652, *infra*. A Court of Bankruptcy, when it rejects the proof of a claim because the creditor is secured, has no jurisdiction, without his consent, to value the security and enter a decree against him for the excess of the value of the same over the debt due him. Fitch v. Richardson, C. C. A., 147 Fed. 197.

[13] *Re* Manhattan Brush Mfg. Co., 209 Fed. 997; Sauve v. Fleschutz, C. C. A., 219 Fed. 542; Kilpatrick v. U. S. Fidelity & Guaranty Co., C. C. A., 228 Fed. 587; *Re* Astoroga Paper Co., 234 Fed. 792. When a surety proves a claim, he must make the proof in the name of the creditor, Livingstone v. Heineman, C. C. A., 12 Fed. 786; unless, before the filing of the petition he has paid money or suffered pecuniary loss, when he may make the proof in his own name, Boyce v. U. S. Fidelity & Guaranty Co. of Maryland, C. C. A., 111 Fed. 138.

[14] A claim for taxes, State; *Re* Hefferon Co., 216 Fed. 642; *Re* United Five & Ten Cent Store, 242 Fed. 1005; *Re* Simcox, Inc. Fed. 479; or Federal; *Re* W. P. Williams Oil Corporation, 256 Fed. 401, may be liquidated by a revision and correction of the assessment thereof.

before but not after the estate has been closed.[15] (*l*) Whenever

[15] By General Order XXI. "6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail address to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly." The petition may ask for a re-examination of claims presented by different persons, *Re* Caledonia Coal Co., 254 Fed. 742, 745. Copies of the petition need not be sent to the claimants, provided that they are duly notified that the application has been made. Ibid. The referee may upon his own motion reconsider his action in allowing a claim, provided that he gives due notice to the parties in interest, Cary v. International Agr. Corp., 243 Fed. 475. The claim may be allowed in whole or in part, and, in the latter case, without any requirement of an amendment or new verification thereof, *Re* Goldstein, 199 Fed. 665. The trustee is not bound to move for a reconsideration of a claim that has been filed until after a direct or indirect order has been made for an allowance of the same. *Re* Two Rivers Woodenware Co., C. C. A., 199 Fed. 877. For a case where an adjustment of the controversy was held not to deprive the trustee of the right to resist claims filed against the estate, see Ibid.

The rules of the District Courts sometimes limit the time for the presentation of an application for the re-examination of a claim. When there is no such rule in force the application will rarely, if ever, be denied for laches, provided that it was made before the estate has been closed. *Re* Globe Laundry, 198 Fed. 365; *Re* Caledonia Coal Co., 254 Fed. 742; *Re* Star Spring Bed Co., C. C. A., 265 Fed. 133. For a case where stockholders were held to be estopped by laches see *Re* Pittsburg Lead & Zinc Co., Consolidated, 198 Fed. 316. A delay of several months when the trustee was ignorant of the ground of the objection was held not to estop him although meanwhile the statute of limitation had run against security surrendered by the claimant; *Re* Star Spring Bed Co., 257 Fed. 176. But see *Re* Octave Mining Co., 212 Fed. 457. It was held that there was no authority for the referee upon such an application to allow the claim on condition of a payment by the claimant to the trustee; *Re* United Grocery Co., 253 Fed. 267; *contra Re* W. A. Paterson & Co., C. C. A., 186 Fed. 64, 34 L.R.A. (N.S.) 31. Upon the re-examination of a claim that has been allowed, the burden of proof is upon the objector, *Re* Felter, 7 Fed. 904; *Re* Howard, 100 Fed. 630. *Cf. Re* Ankeny, 100 Fed. 614; *Re* Pittsburg Lead & Zinc Co., Consolidated, 198 Fed. 316. Upon a petition to re-examine a claim, the objectors should have an opportunity to ex-

a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. (*m*) The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors." [16] "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." [17]

amine the claimant, *Re* Sumner, 101 Fed. 224; *Re* Castle Braid Co., 145 Fed. 224; as well as other witnesses, *Re* Sumner, 101 Fed. 224. It is said to be improper for the attorney for the trustee, *Re* Stern, C. C. A., 144 Fed. 956; or for the attorney for the bankrupt, *Re* Wooten, 118 Fed. 670; to represent the claimant when objections to the same are interposed. A rehearing was denied where it was made solely for the purpose of renewing the petitioner's right of appeal. *Re* Girard Glazed Kid Co., 129 Fed. 841. See § 667, *infra*.

16 30 St. at L. 544, § 57.

17 Ibid, § 63*b*, *Re* Heinsfurter, 97 Fed. 198; Henry Siegel Co., 223 Fed. 368. A claim not provable cannot thus be liquidated, Moore v. Douglas, C. C. A., 230 Fed. 399; *Re* Hutcheraft, 247 Fed. 187. There may be a liquidation of a claim for damages for a breach of promise of marriage. *Re* Martin, C. C. A., 228 Fed. 184. The claim may be liquidated before the referee, *Re* Duquesne Incandescent Light Co., 176 Fed. 785, or in a State court, *Re* Havens, 182 Fed. 367; *Re* Martin, C. C A.., 228 Fed. 184. The liquidation of a claim should ordinarily be before the judge or referee in bankruptcy, *Re* Heim Milk Product Co., 183 Fed. 787. They should not be liquidated by a proceeding in the State court taken subsequent to the institution of the bankruptcy proceedings, unless the judge or referee so directs. Under the Act of 1867 (14 St. at L. 517) it was held that the filing of a proof of claim in bankruptcy is not a waiver of a right of action upon the same in another court, and that if the trustee does not apply for a stay of a suit pending before the petition was filed, judgment therein is proper proof of the amount claimed as liquidated. *Re* Buchan's Soap Corp., 169 Fed. 1017. A judgment against the bankrupt by default in a State court a few days before the bankruptcy was held not to be conclusive. *Re* Stuck Trucking & Rigging Co., 243 Fed. 287. The trustee cannot without the consent of the court of bankruptcy consent to liquidation in a State court. *Re* Soltman, 238 Fed. 241. Where the holder of an unliquidated claim is one of the petitioning creditors, the liquidation

§ 646. Time for proof of claim. "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication;[1] or if they are liquidated by litigation and the

may be made before the adjudication. F. L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445.

§ 646. [1] The time to prove claims against the estate in general cannot be limited to a shorter period. *Re* Lathrop, Haskins & Co., C. C. A., 223 Fed. 912; *Re* Dunlap Carpet Co., 206 Fed. 726; but the court may limit the time for the presentation of claims to certain assets provided that due notice and a reasonable time is given to all the parties interested. Ibid. *Re* T. A. McIntyre & Co., C. C. A., 176 Fed. 552. The time cannot be extended for any cause not specified in the statute, *Re* Trion Mfg. Co., 224 Fed. 521; nor because of accident or mistake, *Re* Sanderson, 160 Fed. 278; nor because of the concealment of assets, *Re* Peck, C. C. A., 168 Fed. 48; *Re* Meyer, 181 Fed. 904; *Re* Shaffer, 104 Fed. 982; Chapman v. Whitsett, C. C. A., 236 Fed. 573. *Contra*, *Re* Pierson, 174 Fed. 160; nor it has been held, by the filing of a supplemental petition showing new assets, *Re* Shaffer, 104 Fed. 982. See *Re* Peck, C. C. A., 168 Fed. 48. But where, through the fraud of the bankrupt, the schedule stated no assets and consequently no claims were proved, no trustee appointed, the bankrupt discharged and the estate closed, upon the discovery of assets, the estate was reopened and the filing of claims was permitted subsequent to the year. *Re* Pierson, 174 Fed. 160. Where no creditor objected, a single creditor who had been thus deceived by the bankrupt was allowed to prove his claim after the statutory period. *Re* Towne, 122 Fed. 313 But see, *Re* Kansco, 208 Fed. 201. The time cannot be extended because the claim was scheduled by the bankrupt, although in proceedings for a composition, he has deposited sufficient to pay a dividend upon the claim if proved, *Re* Bland, 188 Fed. 452. The time cannot be extended by an order *nunc pro tunc*, *Re* Co-operative Knitting Mills, 202 Fed. 1016. The limitation does not apply to a claim for an expense of administration of the estate, *Re* Green, 231 Fed. 253; nor to a claim of ownership of property adverse to the bankrupt, Nauman Co. v. Bradshaw, C. C. A., 193 Fed. 350; nor affect a creditor's right to plead his claim as a set-off or counter-claim in an action by the trustee to recover his indebtedness to the estate; Norfolk & W. Ry. Co. v. Graham, C. C. A., 145 Fed. 809; nor, it has been held, does it apply to the United States, *Re* Stoever, 127 Fed. 394; nor it has been held to beneficiaries of a trust when a trustee has made proof in time without due authority, *Re* A. J. Ellis, Inc., C. C. A., 252 Fed. 483; nor to an assignee whose assignor has made proof in due time; *Re* Breakwater Co., 232 Fed. 375.

In case of an appeal or writ of error to review the adjudication, the time to prove claims was extended until one year after the affirmance of the order below or the dismissal of the writ or appeal, *Re* Lee, 171 Fed. 266. Where an order vacating an adjudication was reversed; the

final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment:[2] *Provided*, that the right of

time was deemed to run for a year thereafter, *Re* Malkan, 265 Fed. 867. Claims may be assigned, *Re* Miner, 114 Fed. 998; even after the year allowed for proof of claim, Hutchinson v. Otis, C. C. A., 115 Fed. 937.

[2] 30 St. at L. 544, 566, § 57, subd. *n*. Where a claim is liquidated by litigation, proof thereof may be made within sixty days after the rendition of the judgment, no matter how long subsequent to the order such judgment was entered. Powell v. Leavitt, C. C. A., 150 Fed. 89, 80 C. C. A., 43; *Re* Strobel, 163 Fed. 787. *Contra Re* Edelen, 248 Fed. 580. Where a claimant is in good faith engaged in litigation either in a court of bankruptcy, Powell v. Leavitt, C. C. A., 150 Fed. 89, 80 C. C. A., 43; *Re* Landis, 156 Fed. 318; *Re* Strobel, 163 Fed. 787; *Re* Otto F. Lange Co., 170 Fed. 114; *Re* Standard Telephone & Electric Co., 186 Fed. 586. See Page v. Rogers, 211 U. S. 575, 581, 53 L. ed. 332, or a State court, *Re* Baird, 154 Fed. 215; *Re* Keyes, 160 Fed. 763. See Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 49 L. ed. 790; to enforce, Powell v. Leavitt, C. C. A., 150 Fed. 89, 80 C. C. A., 43; *Re* Baird, 154 Fed. 215, overruling *Re* Baird, February 6, 1907; *Re* Strobel, 163 Fed. 787; *Re* Otto F. Lange Co., 170 Fed. 114; *Re* Standard Telephone & Electric Co., 186 Fed. 586. See Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 49 L. ed. 790; Page v. Rogers, 211 U. S. 575, 581, 53 L. ed. 332. *Contra, Re* Fagan, 140 Fed. 758; *Re* Kemper, 142 Fed. 210; or defend, Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct., 443, 49 L. ed. 790; Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct., 778, 47 L. ed. 1179; Page v. Rogers, 211 U. S. 575, 581, 29 Sup. Ct., 159, 53 L. ed. 332; *Re* Shiebler, 165 Fed. 363; *Re* John A. Baker Notion Co., 180 Fed. 922; *Re* Clark, 176 Fed. 955; *Re* Cahill, 208 Fed. 193; *Re* Louis J. Bergdoll Motor Co., C. C. A., 233 Fed. 410; a preference or a claim to security, *Re* Salvator Brewing Co., C. C. A., 193 Fed. 989, where it does not clearly appear whether the claimant was a party to the litigation, his claim is not liquidated so as to set the statute in motion until the final judgment therein is entered. Where security for part of the claim was set aside by the State court and the Supreme Court of the United States more than a year before the attempt to prove the claim, and the claimants had since then continually insisted in bankruptcy proceedings that they had security for the rest, and notes given to them were shown by the bankrupts' schedules; it was held that they might prove the part not solely secured by the mortgage that was set aside. *Re* Vogt, 188 Fed. 764, in which the writer was counsel. Where as a result of the litigation, each party recovered a judgment for costs; it was held that the time for filing the claim expired at least sixty days after an order off-setting those judgments and that it was not extended by

infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.'' [3]

§ 647. Provable claims. ''Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in

the fact that the balance was not paid until later. *Re* Clover Creamery Ass'n., C. C. A., 176 Fed. 907. Where a suit to set aside a preference was not brought until more than a year after the adjudication, it was held that the creditor was entitled to rely upon his preference until that time and that he could prove his claim within sixty days after his defeat in such litigation. *Re* Clark, 176 Fed. 955. But see *Re* Havens, 182 Fed. 367. It has been said, that the clause of the bankruptcy act containing this short statute of limitations does not apply to the claims of creditors who have been deprived of preferences which are merely voidable, but that such may be proved and allowed after the preference has been surrendered at any time before the estate is finally settled. *Re* Otto F. Lange Co., 170 Fed. 114, 116. An agreement made between the trustee and a creditor as to the value of the latter's security made pending a suit in which this question was involved is a liquidation by litigation within the meaning of the statute, Kansas City Southern Ry Co. v. Maynor, C. C. A., 209 Fed. 611. But not, it has been held, litigation to which neither the bankrupt or his receiver or trustee was a party, Moore v. Simms, C. C. A., 257 Fed. 540; *Re* Edelen, 248 Fed. 580; nor does a foreclosure action brought in a State court within the year, not justify the proof of a judgment for a deficiency thereafter, *Re* Sampter, C. C. A., 170 Fed. 938.

[3] See *Re* Co-operative Knitting Mills, 202 Fed. 1016. The delivery of the claim to the trustee within the year is sufficient, although he fails to file it with the referee. J. B. Orchutt v. Green, 204 U. S. 96, 27 Sup. Ct., 195, 51 L. ed. 390; Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40. It has been held that relief cannot be given to a creditor who handed his claim to an employee of the trustee in the trustee's office within the year and the latter failed to file the same, it not appearing in what capacity such person was employed by the trustee. *Re* Lathrop, Haskins & Co., C. C. A., 197 Fed. 164. Nor is it sufficient for the trustee to file his own claim with himself, or to give it to his attorney for filing with the referee when such attorney fails to do so. J. B. Orchutt v. Green, 204 U. S. 96, 27 Sup. Ct. 196, 51 L. ed. 390. So where the claimant sent the receiver an unverified account showing a general balance and its attorney testified that the receiver, who was afterwards trustee, shortly thereafter said that ''it was all right,'' which conversation the receiver testified that he did not recollect. *Re* Alfred Kessler & Co., 176 Fed. 647; *Re* French, 181 Fed. 583. The filing is sufficient, although it is returned by the referee for correction and not refiled within the statutory period. *Re* Haskell, 128 Fed. 819.

writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;[1] (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;[2] (4) founded upon an open account, or upon a contract express or implied;[3] and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. (*b*) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."[4] A claim may be proved which is purely equitable and not recognized by a court of common law.[5] It seems that a debt barred by the statute of limitations may be proved when the bankrupt interposes no objection to the same,[6] but that it is not entitled to any dividend until the other creditors have been paid in full.[7] The provability of a debt

§ 647. [1] Beaven v. Stuart, C. C. A., 250 Fed. 972.

[2] Stenographers' and referees' fees, when taxable by the State law, may be proved as such costs. *Re* J. B. Brewster & Co., C. C. A., 180 Fed. 109. The right to costs is not lost because the creditor knew or believed, when the suit was brought, that the debtor was in financial difficulty. *Re* Harnden, 200 Fed. 172. A surety upon the bankrupt's bond for costs on appeal may prove his claim for the costs that he has paid. *Re* Lyons Beet Sugar Refining Co., 192 Fed. 445. *Cf.* § 649, *infra*.

[3] *Re* D. C. Clark Shoe Co., 211 Fed. 341; *Re* R. R. Hutcheraft, 247 Fed. 187.

[4] 30 St. at L. 544, 562, 563, § 63; *Re* Heinsfurter, 97 Fed. 198.

[5] *Re* Putnam, 193 Fed. 464.

[6] *Re* Currier, 192 Fed. 695, *Contra, Re* Putnam, 193 Fed. 464.

[7] *Re* Currier, 192 Fed. 695. *Cf.* § 652, *infra*. It has been held that a payment upon such a debt made after the bankrupt has become insolvent, *Re* Salmon, C. C. A., 249 Fed. 300; *Re* Banks, 207 Fed. 662; or an acknowledgement thereof in writing, *Re* Blankenship, 220 Fed. 395; will authorize the creditor to

depends upon its status at the time the petition in bankruptcy is filed.[8] Contingent debts or liabilities, the valuation or estimation of which it is substantially impossible to fix, cannot be proved in bankruptcy.[9]

prove it if he had no knowledge of the insolvency.

[8] *Re* Swift, C. C. A., 112 Fed. 315; *Re* Pettingill & Co., C. C. A., 137 Fed. 840; *Re* Reading Hosiery Co., 171 Fed. 195; *Re* Progressive Wall Paper Corp., C. C. A., 229 Fed. 489; *Re* Mullings Clothing Co., 230 Fed. 681; *Re* Henry & S. G. Lindeman, 238 Fed. 639. But see *Re* Shatz, 251 Fed. 351.

[9] Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. ed. 1084; Schall v. Camors, 251 U. S. 239; Harv. Law Rev. XVIII, 469. The amount of a note may be proved although it does not mature until subsequent to the filing of the petition. *Re* Percy Ford Co., 199 Fed. 334. *Re* Wisconsin Engine Co., C. C. A., 234 Fed. 281. See Matter of Fleet v. Yawger, or People v. Metropolitan Surety Co., 205 N. Y. 135; and *supra*, § 320. The notes of a bankrupt corporation, given to its officers are provable. Spencer v. Lowe, C. C. A., 198 Fed. 961. So is a note given to a stockholder for money borrowed to effect a composition. *Re* C. H. Bennett Shoe Co., 162 Fed. 691. The liability of the bankrupt as indorser or surety is a provable debt, although default is not made by the principal until after the filing of the petition and the adjudication. Moch v. Market Street Bank, C. C. A., 107 Fed. 897, *Re* Philip Semmer Glass Co., C. C. A., 135 Fed. 77; *Re* Rothenberg, 140 Fed. 798. But see *Re* O'Donnell, 131 Fed. 150; *Re* Pettingill & Co., 137 Fed. 143; Morgan v. Wordell, 178 Mass. 350, 55 L.R.A. 33; Goding v. Rosenthal, 180 Mass. 43. It seems that this can only be done when the liability becomes fixed and absolute, within one year from the date of adjudication. Ibid.; Remington on Bankruptcy, § 643. Where a surety or indorser is liable upon the obligation of the bankrupt for the absolute and unconditional payment of a sum of money, the claim may be proved in bankruptcy, and the obligation takes effect from the date when the surety signed the obligation. *Re* Stout, 109 Fed. 794; Swarts v. Siegel, C. C. A., 117 Fed. 13; Livingstone v. Heineman, C. C. A., 120 Fed. 786; Cohen v. Goldman, C. C. A., 250 Fed. 599. The fact that the surety makes no payment until after the adjudication in bankruptcy does not deprive him of the right to prove his claim. Ibid. Williams v. U. S. Fidelity & Guaranty Co., 236 U. S. 549; *Re* Schmeehel Co., 104 Fed. 64; Moch v. Market Street Bank, C. C. A., 107 Fed. 897, affirming *Re* Gerson, 5 Am. B. R. 89. It has been held: that where the surety's obligation is conditional upon the failure of the bankrupt to perform some other act than the payment of money, the surety cannot prove his claim unless it matures before the petition in bankruptcy. Clemmons v. Brinn, 36 Misc. (N. Y.) 157, 35 Misc. (N. Y.) 844, 7 Am. B. R. 714 (a forthcoming bond in replevin). *Re* Merrill & Baker, C. C. A., 186 Fed. 312. But see Williams v. U. S.

§ 648. Set-offs and counter-claims. "(*a*) In all cases of mutual debts or mutual credits between the estate of a bankrupt

Fidelity & Guaranty Co., 236 U. S. 549. It seems that when there is a condition to the surety's liability, such as the recovery of a judgment, or decree, it is not provable if no judgment was obtained before the petition in bankruptcy. Hibberd v. Bailey, C. C. A., 129 Fed. 575, reversing *Re* Wiseman, 123 Fed. 185. Directors who have endorsed the notes of a bankrupt corporation may prove the amount they have paid thereupon, *Re* Salvator Brewing Co., C. C. A., 193 Fed. 989; but it has been held, can prove no claim until after payment by them, *Re* Dr. Voorhees Awning Hood Co., 187 Fed. 611. A judgment for a deficiency after a foreclosure, which was entered within a year after the bankruptcy, may be proved. *Re* Fitzgerald, 191 Fed. 95. Where such a judgment was obtained by a trustee for bondholders prior to the bankruptcy and afterwards proved by such trustee, the bondholders were allowed to prove their individual claims upon the bonds in their own name so that they might be able to protect their rights. Mackay v. Randolph Macon Coal Co., C. C. A., 178 Fed. 881. Claims have been proved which were based upon the liability of the bankrupt upon a stock subscription, Farnsworth v. Union Trust & Deposit Co., C. C. A., 211 Fed. 914. Proof has been denied to the holders of what purported to be bonds of a bankrupt corporation when these by their terms gave the holders no greater right than an annual payment out of the profits and a right to share in the assets upon the final distribution thereof. Synnott v. Tombstone Consol. Mines Co., C. C. A., 208 Fed. 251. *Re* Feehheimer Fishel Co., C. C. A., 212 Fed. 357, certiorari denied 234 U. S. 760, in which the author was counsel. But see Re Interborough Realty Co., C. C. A., 223 Fed. 646; Burt v. Rattle, 41 Ohio St. 116; Hilson Co. v. State Board of Assessors, 82 N. J. Law 2; Cass v. Realty Sec. Co., 148 App. Div. 96; s. c., 149 App. Div. 43, aff'd 206 N. Y. 649. Creditors have been allowed to prove dividends declared by a corporation before its bankruptcy, Spencer v. Lowe, C. C. A., 198 Fed. 961; but not a guarantee of dividends so far as concerned those which fell due after the petition in bankruptcy, *Re* Pettingill & Co., 137 Fed. 143; the liability upon a bond to secure the payment of an annuity may be proved while the annuity is still alive. Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084; Cobb v. Overman C. C. A., 54 L.R.A. 369, 109 Fed. 65. But see *Re* Hartman, 166 Fed. 776. Where an annuity is to cease upon the marriage of the annuitant, it is not a provable claim. Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084. *Contra*, Ex parte Blakemore, 5 Ch. Div. 372. It has been held that a claim for damages for breach of a contract to pay royalties on a minimum number of patented articles during the term of the patent, can be proved, but that claim for future royalties cannot. *Re* Dr. Voorhees Awning Hood Co., 187 Fed. 611. The amount due for work under a building contract, performed after the petition in bankruptcy, may be

and a creditor the account shall be stated and one debt shall be

proved as a claim for a breach of contract, if there is such a liability therefor; but not upon a *quantum meruit*. *Re* Adams, 130 Fed. 788. Where, by his contract, a subcontractor had no claim against the builder until the owners had made a payment on account of the labor and material, which he had furnished, and no such payments had been made; it was held that the claim could not be proved. *Re* Ellis, C. C. A., 143 Fed. 103. It has been held that a materialman cannot prove against the estate of a contractor with the United States, his claim under a contract with a subcontractor, but that his remedy is confined to the bond. *Re* Hawley, 194 Fed. 751. Where bankruptcy, either voluntary or involuntary, disables the bankrupt from the performance of an executory contract this may be treated as an anticipatory breach thereof, and the damages, if capable of liquidation may be proved, Central Trust Co. v. Chicago Auditorium, 240 U. S. 581; Board of Commerce of Ann Arbor v. Security Trust Co., C. C. A., 225 Fed. 454; *Re* Spengler, 238 Fed. 862. It was so held where the contract itself liquidated the damages for a breach thereof, Board of Commerce of Ann Arbor v. Security Trust Co., C. C. A., 225 Fed. 454. Bankruptcy may mature the obligation for installments which would not otherwise be due until subsequently and justify the proof of a claim therefor; *Re* Swift, C. C. A., 112 Fed. 315; *Re* Adams, 130 Fed. 788; *Re* Pettingill & Co., 137 Fed. 143. But see *Re* Imperial Brewing Co., 143 Fed. 579. It will not always justify the rescission of an executory contract, *Re* 35% Automobile Supply Co., 247 Fed. 379. Damages for the breach of a contract of employment may be proved, although the term of service has not expired; *Re* Silverman Bros., 101 Fed. 219; *Re* Miller, 225 Fed. 331; *Re* Schultz & Guthrie, 235 Fed. 907. If not, it has been held, the salary of an officer of the corporation. *Re* Dr. Voorhees Awning Hood Co., 187 Fed. 611; *Re* Montague & Gillet, 212 Fed. 452; *Contra, Re* Inman & Co., 171 Fed. 185; *Re* Am. Vacuum Cleaner Co., 192 Fed. 939. But see *Cf., Re* D. Levy & Sons Co., 208 Fed. 479. Minor children are allowed to prove claims for the value of their services to a bankrupt father when he had given them their time, *Re* Kanter, 215 Fed. 276. Proof may be made of damages for the breach of a continuing contract to supply goods, *Re* Stern, C. C. A., 116 Fed. 604; *Re* Glick, 184 Fed. 967; *Contra, Re* Inman & Co., 175 Fed. 312, or to buy property, where the trustee does not assume it; *Re* Saxton Furnace Co., 142 Fed. 293; *Re* Imperial Brewing Co., 143 Fed. 579; *Re* Spittler, 151 Fed. 942; *Re* Neff, C. C. A., 28 L.R.A. (N.S.) 349, 157 Fed. 57; *Contra*, Phenix National Bank v. Waterbury, 123 App. Div. (N. Y.) 453, see *Re* Duquesne Incandescent Light Co., 176 Fed. 785; and damages for a breach of warranty, although the amount has not yet been fixed, *Re* Grant Shoe Co., C. C. A., 130 Fed. 881; Switzer v. Henking, C. C. A., 15 L.R.A. (N.S.) 1151, 158 Fed. 784. It is settled that bankruptcy does not cancel a lease, Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950; *Re* Pen-

set off against the other, and the balance only shall be allowed

newell, C. C. A., 119 Fed. 139; Watson v. Merrill, C. C. A., 69 L.R.A. 719, 136 Fed. 359; even though it is forfeited by an assignment by the lessee, or by the sale of his interest under execution, or other legal process. Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950.

Rent, which has accrued prior to the filing of the petition, may be proved, *Re* Arnstein, 101 Fed. 706; *Re* Sherwoods, Inc., C. C. A., 210 Fed. 754; *Re* Mullings Clothing Co., 230 Fed. 681; although it is payable in advance for a period which has not then expired. Wilson v. Pennsylvania Trust Co., C. C. A., 114 Fed. 742; *Re* Mitchell, 116 Fed. 87; *Re* Roth & Appel, 174 Fed. 64. It has been held that a claim for rent accruing before the adjudication but after the filing of the petition may be proved. *Re* Hinckel Brewing Co., 123 Fed. 942. *Contra, Re* Adams, 130 Fed. 788. Where the lease, by its terms, is terminated by the tenant's bankruptcy, neither future rent nor damages for loss may be proved. *Re* Shaffer, 124 Fed. 111; South Side Trust Co. v. Watson, C. C. A., 200 Fed. 50. A number of authorities hold that claims for rent, which is not due before the adjudication, are not provable against the estate unless the trustee has assumed the lease or accepted the premises, *Re* Jefferson, 93 Fed. 948; *Re* Mahler, 105 Fed. 428; Atkins v. Wilcox, C. C. A., 53 L.R.A. 118, 105 Fed. 595; *Re* Hays, Foster & Ward Co., 117 Fed. 879; *Re* Hinckel Brewing Co., 123 Fed. 942; *Re* Adams, 130 Fed. 788; Watson v. Merrill, C. C. A., 69 L.R.A. 719, 136 Fed. 359; *Re* Rubel, 166 Fed. 131; Colman Co. v. Withoft, C. C. A., 195 Fed. 250; even where the lease provides that rent, subsequently accruing, shall become due upon default in one installment, *Re* Quaker Drug Co., 204 Fed. 689; *Re* Merwin & Willoughby Co., 206 Fed. 116; or upon the bankruptcy of the tenant; *Re* Winfield Mfg. Co., 137 Fed. 984; s. c., 140 Fed. 185; Wm. Filene's Sons Co. v. Weed, C. C. A., 230 Fed. 31. But see Atkins v. Wilcox, C. C. A., 105 Fed. 595, 598; *Re* Keith-Gara Co., 203 Fed. 585; *Re* Caswell-Massey Co., 208 Fed. 571; *Re* Miller Bros. Grocery Co., C. C. A., 219 Fed. 851. In cases of leases of machinery with clauses that they might be terminated by the bankruptcy of the lessees whereupon a fixed sum for deterioration, freight and return charges should become due, the lessors have been permitted to prove claims therefor; *Re* D. C. Clark Shoe Co., 211 Fed. 341; *Re* Jorolemon-Oliver Co., 213 Fed. 625; *Re* Desnoyers Shoe Co., C. C. A., 227 Fed. 401. The landlord is not allowed to prove the cost of pumping a mine necessitated by the lessor's abandonment of work upon the latter's bankruptcy. *Re* Gallacher Coal Co., 205 Fed. 183. It has been held that the same rule applies to notes for future rent, which are in the hands of the landlord, Atkins v. Wilcox, C. C. A., 53 L.R.A. 118, 105 Fed. 595; *Contra, Re* Wisconsin Engine Co., C. C. A., 234 Fed. 281, notes for royalties; that a person jointly liable with the bankrupt upon a lease cannot prove his claim for contribution against the bankrupt. Colman Co. v. Withoft, C. C. A., 195 Fed. 250. But see *Re* Baker & Edwards, 224 Fed.

or paid. (*b*) A set-off or counter-claim shall not be allowed in

611. Landlords have been permitted to prove claims for damages based upon the difference between the rent which the tenant covenanted to pay and what he was able subsequently to collect from another, *Re* Caloris Mfg. Co., 179 Fed. 722; *Re* Sherwoods, Inc., C. C. A., 210 Fed. 754; *Re* Mullings Clothing Co., C. C. A., 238 Fed. 58; reversing 230 Fed. 681; s. c., 252 Fed. 667. But see *Re* Gallacher Coal Co., 205 Fed. 183; *Re* Leslie & Griffith Co., 230 Fed. 465; but not when they had accepted a surrender; or enforced a forfeiture of the lease; Wilson v. Pennsylvania Trust Co., C. C. A., 114 Fed. 742; *Re* H. M. Lasker Co., C. C. A., 251 Fed. 53; Ratshesky v. Whiting, C. C. A., 251 Fed. 268; even when there was a covenant to indemnify the landlord for damages in such a case. *Re* Shaffer, 124 Fed. 111. As to tenant's improvements. See *Re* O'Malley, 191 Fed. 999. But these decisions have not yet been approved by the Supreme Court of the United States. It has been held that sureties for rent, subsequently accruing, are not released by the bankruptcy of the tenant. Witthaus v. Zimmerman, 91 App. Div. (N. Y.) 202, 11 Am. B. R. 314. See *Re* Baker & Edwards, 224 Fed. 611. In a recent case the Supreme Court has said that damages for a *tort* which constitutes neither a breach of contract nor results in an unjust enrichment of the wrongdoer upon which a contract might be implied are not provable in bankruptcy. Schall v. Camors, 251 U. S. 239. Previous decisions of the inferior courts are to the same effect. *Re* Yates, 114 Fed. 365; *Re* N. Y. Tunnel Co., 159 Fed. 688; s. c., C. C. A., 166 Fed. 284; Brown & Adams v. United Button Co., C. C. A., 8 L.R.A. (N.S.) 961, 149 Fed. 48; *Re* Hutchcraft, 247 Fed. 187. The case in the Supreme Court is distinguishable since it might have been decided upon another ground mentioned in the opinion. There is a possibility that this unjust doctrine which leaves without relief those most injured by the bankruptcy of corporations may not eventually prevail. Such claims which have been reduced to judgment before the petition in bankruptcy adjudication may be proved. *Re* Yates, 114 Fed. 365; Burnham v. Pidcock, 58 App. Div. (N. Y.) 273, 68 N. Y. Supp. 1007; Moore v. Douglas, C. C. A., 230 Fed. 399; *Re* Lockwood, 240 Fed. 159. It has been held that a verdict for damages is not a sufficient liquidation to authorize the proof of the claim; *Re* Ostrom, 185 Fed. 988. That the liability for a statutory penalty cannot be proved. *Re* Southern Steel Co., 183 Fed. 498; even if it has been reduced to judgment, *Re* Abramson, C. C. A., 210 Fed. 878. Where the tort may be waived and the suit brought upon an express contract, or an implied contract deduced from an unjust enrichment, the claim for damages therefrom resulting may be proved, Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762; *Re* Swift, 114 Fed. 947; *Re* Upson, 123 Fed. 807; *Re* Arnold & Co., 133 Fed. 789; Brown & Adams v. United Button Co., C. C. A., 149 Fed. 48, affirming *Re* United Button Co., 140 Fed. 495; *Re* Nuttall, 201 Fed.

favor of any debtor of the bankrupt which (1) is not provable

557. It was held that upon a conversion by a firm, no proof could be made against the individual members upon an implied contract therefrom arising. Reynolds v. N. Y. Trust Co., C. C. A., 39 L.R.A. (N.S.) 391, 188 Fed. 611. It was so held of the conversion of chattels, Reynolds v. N. Y. Trust Co., C. C. A., 39 L.R.A. (N.S.) 391, 188 Fed. 611, of an embezzlement of money, Burgoyne v. McKillip, C. C. A., 182 Fed. 452; Clarke v. Rogers, C. C. A., 183 Fed. 518; and of the sale through fraudulent representation of commercial paper drawn by the firm, Schall v. Camors, 251 U. S. 239. Where a firm, after accepting bills of lading, converted money which they were bound to apply to the payment thereof, the holder of the bills was allowed to prove two claims, one against the firm upon the acceptance and the other against the firm and its individual members upon an implied contract to repay the money which they thus converted. *Re* Coe, C. C. A., 183 Fed. 745. It has been held that a creditor cannot rescind any part of a contract for fraud, so as to recover or retain specific property; and then prove his claim for the purchase price of the rest, upon a contract, express or implied, *Re* Heinsfurter, 97 Fed. 198; Standard Varnish Works v. Haydock, C. C. A., 143 Fed. 318; but he has been allowed to petition the Bankruptcy Court for an order for the return of part of the property, which is in the court's possession, and at the same time to present a claim for the value of that already sold. *Re* Hildebrant, 120 Fed. 992. See *Re* Hirschman, 104 Fed. 69. These cases are criticized in Remington on Bankruptcy, § 638. It has been said that claims upon the same instrument are to be regarded as single; and, if one of them is unliquidated, the whole is to be treated as an unliquidated claim. *Re* Big Meadows Gas Co., 113 Fed. 974. Where a creditor who had sold goods to the bankrupt, for which a stranger became surety, afterwards received from the latter as security a note of the bankrupt arising upon a separate transaction, it was held that he might prove both claims, *Re* H. V. Keep Shirt Co., 200 Fed. 80. *Contra*, First Nat. Bank of Beaumont v. Eason, C. C. A., 149 Fed. 204. Where a note does not mature until after the filing of the petition in bankruptcy, the provision for an attorney's fee for its collection cannot be proved. *Re* T. H. Thompson Milling Co., 144 Fed. 314; *Re* Hersey, 171 Fed. 1004; *Re* Hershberger, 208 Fed. 94; British & American Mortgage Co. v. Stuart, C. C. A., 210 Fed. 425. For cases where less than the stipulated attorney's fee was allowed, see *Re* Fabacher, 193 Fed. 556; *Re* Hershberger, 208 Fed. 94, $100. Nor, it has been held, if they previously matured, but no attorney has been employed. *Re* Garlington, 115 Fed. 999; *Re* Keeton, Stell & Co., 126 Fed. 429; *Re* Gebhard, 140 Fed. 571. But where they matured and were placed in the hands of an attorney before the petition in bankruptcy was filed, the attorney's fee is provable. Merchants' Bank v. Thomas, C. C. A., 121 Fed. 306; *Re* Edens Co., 151 Fed. 940. But see *Re* V. & M. Lumber Co., 182 Fed. 231. *Contra*, McCabe v.

against the estate;[1] or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."[2] "If a creditor has been preferred, and

Patton, C. C. A., 174 Fed. 217. So where the attorney defended the validity of the mortgage which was attached in the bankruptcy proceedings, *Re* Liberty Doll Co., C. C. A., 242 Fed. 695. Fees for an attorney for services not connected with the bankruptcy proceeding, which were rendered after the filing of the petition and before the adjudication, cannot be proved, *Re* Burka, 107 Fed. 674; although, when they have benefited the estate, the court might perhaps make an allowance for the same. Where the mortgage gave a right to attorneys' fees upon notice of intention to foreclose at a specified term, and bankruptcy intervened before the beginning of the suit, they were not allowed. *Re* Weiland, 197 Fed. 116. Where a mortgage contained a covenant for the payment of attorneys' fees in case the mortgagee was required to employ counsel, and the attorney proved the claim and lien against the estate, the mortgagee was given a priority of payment for the same. *Re* Ferreri, 188 Fed. 675. Where there was a covenant for attorneys' fees in case legal services became necessary to protect the interest of the mortgagee, he was allowed those incurred for filing petition of foreclosure, subsequent to the petition in bankruptcy and appearance upon the petition by the trustee, for leave to sell free from liens. *Re* Holmes Lumber Co., 189 Fed. 178.

§ 648. [1] 30 St. at L. 544, 565, § 68; Germania Sav. Bank & Tr. Co. v. Loeb, C. C. A., 188 Fed. 285; *Re* Howe Mfg. Co., 193 Fed. 524; *Re* White, 17 Fed. 723. It has been held, that there can be no set-off of a claim for a tort not reduced to judgment, Pindel v. Holgate, 221 Fed. 342; *supra*, § 647. Set-off was allowed of a claim by the bankrupt because of unlawful possession taken by his mortgagees against their claim upon the mortgage debt, Roger v. J. B. Levert Co., C. C. A., 237 Fed. 737; and of a right of action againt a creditor for injury to the bankrupt's property. *Re* Harper, 175 Fed. 412. For a case of bailment where it was held that the right of set-off might be enforced, see Walther v. Williams Mercantile Co., C. C. A., 169 Fed. 270. The owner of the equity of redemption although not personally liable for the mortgage debt may offset against interest a previous judgment against the bankrupt mortgagee, *Re* Colwell Lead Co., 241 Fed. 922. It has been held that there can be no set-off which requires a general accounting with a stranger to the proceeding, *Re* Dunlap Carpet Co., 206 Fed. 726.

[2] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571; Chicago Title & Tr. Co. v. Federal Tr. & Sav. Bank, 192 Fed. 967; Continental & C. T. & S. Bank v. Chicago T. & T. Co., C. C. A., 199 Fed. 704; Mason v. Nat. Herkimer County Bank, C. C. A., 172 Fed. 529.

afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.''[3] An indebtedness of the bankrupt cannot be set off against a debt due the trustee.[4]

[3] 30 St. at L. 544, § 60. A deposit may be set off against the promissory notes held by the bank which is the depositary of the bankrupt, N. Y. County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380; *Re* Myers, 99 Fed. 691; Chicago Title & Tr. Co. v. Federal Tr. & Sav. Bank, 192 Fed. 967; Toof v. City Nat. Bank of Paducah, Ky., C. C. A., 206 Fed. 250; *Re* Radley Steel Const. Co., 212 Fed. 462; Walsh v. First Nat. Bank of Maysville, Ky., C. C. A., 201 Fed. 522. See Shutts v. Florida Nat. Bank of Jacksonville, C. C. A., 193 Fed. 1022; Clearwater County v. Pfeffer, C. C. A., 236 Fed. 183; although made within four months before the petition and while the bankrupt was insolvent; when the bank had no reason to believe that a preference was intended. Studley v. Boylston Bank, 229 U. S. 523; Germania Sav. Bank & Tr. Co. v. Loeb, C. C. A., 188 Fed. 285; Fourth National Bank v. Smith, C. C. A., 240 Fed. 19; *Re* Octave Mining Co., 212 Fed. 457; German-American State Bank v. Larimer, C. C. A., 235 Fed. 501. When the deposits were made under such circumstances to constitute preference there can be no set-off; *Re* Wright-Dana Hardware Co., C. C. A., 212 Fed. 397; *Re* National Lumber Co., C. C. A., 212 Fed. 928; Wilson v. Citizens' Trust Co., 233 Fed. 697; German-American State Bank v. Larimer, C. C. A., 235 Fed. 501. See Chicago Title & T. Co. v. Federal Tr. & Sav. Bank, 192 Fed. 967; Continental & C. T. & S. Bank v. Chicago T. & T. Co., C. C. A., 199 Fed. 704, *supra*, § 644, nor can there be a set-off against a general account of a special deposit for specified purposes, Continental & C. T. & S. Bank v. Chicago T. & T. Co., C. C. A., 19 Fed. 704; Farmers' & Merchants' State Bank of Waco, Tex. v. Park, C. C. A., 209 Fed. 613; or deposits made subsequent to the petition in bankruptcy in ignorance by the bank and the depositor of such petition, *Re* Michaelis & Lindeman, 196 Fed. 718. The set-off may be made against notes or other obligations of the depositor which are not yet due, Germania Sav. Bank & Tr. Co. v. Loeb, C. C. A., 188 Fed. 285; William De Long v. The Mechanics and Metals Nat. Bank of the City of N. Y., 168 App. Div. (N. Y.) 525. It seems that a surety who pays the debt of his principal after the latter's adjudication in bankruptcy may offset such payment, *Re* Dillon, 100 Fed. 627; but it has been held that a person jointly indebted with the bankrupt, who pays the debt after the adjudication, cannot set it off against a debt due by him to the latter, although he is subrogated to the right of the payee to dividends. *Re* Bing-

ham, 94 Fed. 796. But see Williams v. U. S. Fidelity & Guaranty Co., 236 U. S. 549. An unliquidated claim held by the bankrupt may be the subject of set-off, provided that it is capable of liquidation in the proceedings in bankruptcy. *Re* Harper, 175 Fed. 412, damages for false representation, which by the State statute, could have been set up by a counter-claim. Nor a claim for the balance due upon a subscription to the stock of a bankrupt corporation when no assessment has been ordered, *Re* Bass, 215 Fed. 275; Moise v. Scheibel, C. C. A., 245 Fed. 546. *Contra*, *Re* Caledonia Coal Co., 254 Fed. 742; but the allowance of the claim may be postponed until an assessment has been made and the termination of a suit brought to collect this; Kiskadden v. Steinle, C. C. A., 208 Fed. 374. A stockholder cannot set-off his claim against such a corporation, against his liability for an unpaid stock subscription, *Re* Wiener & Goodman Shoe Co., 96 Fed. 949; Babbitt v. Read, 173 Fed. 712. *Re* Howe Mfg. Co., 193 Fed. 524. The claims set-off against each other must be held by the parties in the same right. *Re* Howe Mfg. Co., 193 Fed. 524. Money held by the creditor as trustee cannot be applied as a set-off upon its claim. Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571; Lehigh Valley Coal Sales Co. v. Maguire, C. C. A., 251 Fed. 581. A debt due a firm cannot be set-off against the individual debt of a partner. *Re* Neaderthal, 225 Fed. 38; nor *vice versa*, *Re* T. M. Lesher & Son, 176 Fed. 650. If the debt has been incurred before the adjudication in bankruptcy, it may be set-off, although it is not yet due. *Re* Philip Semmer Glass Co., C. C. A., 135 Fed. 77; but, if it subsequently arises, it cannot be offset, *Re* Bingham, 94 Fed. 796; Germania Sav. Bank & Tr. Co. v. Loeb, C. C. A., 188 Fed. 285. It has been held that a claim, which was not proved within the year, can be used as a set-off, Norfolk & W. Ry. Co., v. Graham, C. C. A., 145 Fed. 809. But not if it has been barred by the Statute of Limitations; Pindel v. Holgate, 221 Fed. 342. Where the bankrupt's claim exceeds that of his creditors, it has been said that the latter should not attempt to prove his claim in a Court of Bankruptcy, but should assert the same in the court in which proceedings are taken to enforce the claim against him. *Re* T. M. Lesher & Son, 176 Fed. 650. But where such a creditor filed a claim, it was held that he thereby consented to the jurisdiction of the Court of Bankruptcy to determine the amount due from him and enter judgment therefor. *Re* White, C. C. A., 177 Fed. 194. The set-off is not automatic, Cumberland Glass Mfg. Co. v. De Witt & Co., 237 U. S. 447; *Re* Am. Paper Co., C. C. A., 246 Fed. 790. The action of the court of bankruptcy is essential to make it effective, Ibid. After a composition, the bankrupt may collect a debt due from a creditor which is not connected with the claim settled by the composition, and has not been considered in the bankruptcy proceedings, Cumberland Glass Mfg. Co. v. De Witt & Co., 237 U. S. 447. *Re* Am. Paper Co., C. C. A., 246 Fed. 790.

[4] *Re* Barnes Gear Co., 251 Fed. 764.

§ 649. Priorities and liens. "(*a*) The court shall order the trustee to pay all taxes[1] legally due and owing by the bankrupt to the United States,[2] State,[3] county, district, or municipality

§ 649. [1] It has been said: that the word "tax" is used in a broad sense and includes all obligations imposed by the State and general governments under their respective taxing or police power for governmental or public purposes. *Re* Otto F. Lange Co., 159 Fed. 586. The fact that the tax can only be collected from the property and that no action will lie to recover the same, makes no difference in this respect. Heeox v. Teller County, C. C. A., 198 Fed. 634. It includes assessments for betterments, Dayton v. Stanard, 241 U. S. 588, and duties due the United States, *Re* Rosenthal Bros., 235 Fed. 315. A franchise tax, which accrued before the adjudication in bankruptcy, must be paid, although the assessment was subsequently made, and the bankrupt has no property within the State. New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, reversing *Re* Cosmopolitan Power Co., C. C. A., 137 Fed. 858. But not one subsequently accruing, *Re* Halsey El. Generator Co., 175 Fed. 825. Nor a bonus paid the State for the privilege of increasing the capital stock of a corporation, *Re* York Silk Mfg. Co., 188 Fed. 735. Nor assessments of employers due under a Workmen's Compensation Law, *Re* Farrell, 211 Fed. 212, Washington. And, it has been held, that a State license fee for selling liquor, although denominated a tax, is not. *Re* Ott, 95 Fed. 274. *Contra*, *Re* Otto F. Lange Co., 159 Fed. 586, holding that the word "tax" includes a license to sell cigarettes. It has been held, that the claim of a county against a bankrupt for taxes, received by him as a tax collector, is not entitled to a priority. Waller, 142 Fed. 883. This section includes taxes assessed against land after the bankrupt had agreed to sell it although by the State law the only remedy for their collection is against the land. *Re* Wenatchee Heights Orchard Co., 212 Fed. 787.

[2] U. S. R. S. § 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." Comp. St. § 6372. It has been held: that this section has been repealed in part by the Bankruptcy Act. *Re* Jacobson, C. C. A., 263 Fed. 883. That claims for taxes are not entitled to priority over the expenses of administration. Ibid. The United States have no priority over labor claims for any indebtedness due them, except for taxes. Guar-

in advance of the payment of dividends to creditors, and upon

antee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 56 L. ed. 706, reversing C. C. A., 174 Fed. 385. That unpaid freight charges for shipments over a railroad while it was under Federal Control are entitled to a priority over claims for ordinary indebtedness. *Re* E. J. Hibner Oil Co., C. C. A., 264 Fed. 667.

3 That where State taxes are not a lien by the State Law they have no preference over a lien created by a State statute. See City of Richmond v. Bird, 249 U. S. 174; affirming C. C. A., 240 Fed. 545; (a landlord's lien); *Re* Hosmer, 233 Fed. 318; Polk County, Iowa, v. Burns, C. C. A., 247 Fed. 399; nor over the cost of bankruptcy administration in the disposition of the general assets of the bankrupt, *Re* Hosmer, 233 Fed. 318; Polk County, Iowa, v. Burns, C. C. A. 247 Fed. 399. When taxes are a lien they must be paid by the trustee, although they are imposed upon mortgaged property, which he relinquished to the mortgagors. Chattanooga v. Hill, C. C. A., 139 Fed. 600; *Re* Prince & Walter, 131 Fed. 546; or upon exempt property, *Re* Tilden, 91 Fed. 500; or upon other property that did not come into his hands, Waco v. Bryan, C. C. A., 127 Fed. 79. But it has been held that where county taxes are a lien on property the greater part of which has been taken to satisfy a mortgage the court has power to require the county to collect the taxes from the mortgaged property, *Re* Oxley, 204 Fed. 826. See Delahunt v. Oklahoma County, C. C. A., 226 Fed. 31. Where mortgaged property belonging to the bankrupt was sold for unpaid taxes it was held that the mortgagees who had asserted no right to the rents collected after the bankruptcy and before the sale were not entitled to a direction that such rents should be used in redeeming the property from the purchasers at the tax sale, *Re* Clark Realty Co., C. C. A., 234 Fed. 576. When a purchaser at a tax sale received a tax certificate such certificate was given a priority, *Re* Clark Realty Co., 253 Fed. 938. Penalties and interest that have accrued under the laws of the State upon taxes must also be paid as a priority. New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284; *Re* Kallak, 147 Fed. 276; *Re* Ashland Emery & Corundum Co., 229 Fed. 829. The accumulation of taxes and interest thereupon, through the negligence of the public officers, does not deprive the State or one of its subdivisions of its preference. *Re* Weissman, 178 Fed. 115. Property in the hands of the trustee is not exempt from State and municipal taxation. Swarts v. Hammer, 194 U. S. 441, 24 Sup. Ct. 695; *Re* Sims, 118 Fed. 356. The trustee is not bound to pay taxes assessed against land which became a lien subsequent to its sale by him. *Re* Crowell, 199 Fed. 659. Unless the purchaser of a bankrupt's land has agreed to pay the taxes in addition to his bid, the trustee cannot compel him to do so. *Re* Reading Hat Mfg. Co., 224 Fed. 786; *Re* Reading Hat Mfg. Co., 259 Fed. 357. When real estate is sold subject to the payment of taxes, the purchaser has no

filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. (*b*) The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition;[4] (2) the filing fees paid by creditors in involuntary cases; and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration,[5] including the

right of subrogation to the right to a preferential payment of the same. *Re* M. I. Hibbler Mach. Supply Co., 192 Fed. 741. Where a bankrupt tenant had covenanted in his lease to pay the taxes this did not give his landlord a priority for his claim for such taxes which the landlord had paid. *Re* Family Laundry Co., 193 Fed. 297. *Re* William A. Harris Steam Engine Co., 225 Fed. 609; Kaw Boiler Works v. Schull, C. C. A., 230 Fed. 587.

[4] This section provides that taxes shall be paid before any preferred claim. The Court of Bankruptcy may review the proceedings of a State court or board assessing taxes. New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284; *Re* Conhaim, 100 Fed. 268; *Re* Selwyn Importing Co., 18 Am. B. R. 190, by Referee Townsend. The court of bankruptcy may inquire into the validity of the tax and refuse to allow a claim for personal taxes assessed against property that did not belong to the bankrupt. *Re* Otto Freund Arnold Yeast Co., 178 Fed. 305. And it has been held, a corporation tax proportioned upon the market value of its stock which is excessive. Tax sales of a bankrupt's property made after the adjudication in bankruptcy, may be set aside. Stanard v. Dayton, C. C. A., 220 Fed. 441. Purchasers who are holders of tax certificates which are cancelled should be reimbursed out of the general fund of the bankrupt's estate the amount paid by them with legal interest, but not with a larger interest or penalties imposed by the State Statute upon redemptions after tax sales. Dayton v. Stanard, 241 U. S. 588, reversing 220 Fed. 441; *Re* Ashland Emery & Corundum Co., 229 Fed. 829. Taxes, need not, like the claims of creditors, be proved. *Re* Kallack, 147 Fed. 276.

[5] The costs of the previous administration in a State court are not entitled to a priority except to the extent that they were reasonable and necessary disbursements for the preservation of the estate, *Re* Lewis, 99 Fed. 935; *Re* Heller, 176 Fed. 656; unless the State law gives them a preference, *Re* Goldberg & Bros.,

fees and mileage payable to witnesses as now or hereafter pro-

144 Fed. 566. *Contra, Re* The Copper King, Ld., 143 Fed. 649. *Cf.* § 647, *supra*. Thus the counsel fees and costs of an attaching creditor, *Re* Allen, 96 Fed. 512; *Re* Shoemaker, C. C. A., 205 Fed. 113; *Re* Romm, 235 Fed. 383, and, it has been said, the fees of a State sheriff, *Re* Francis-Valentine Co., 93 Fed. 953; s. c., C. C. A., 94 Fed. 793; when their proceedings are set aside, are not entitled to a priority, except to the extent of reasonable and necessary disbursements for the preservation of the estate. As to sheriff's fees, see *Re* W. J. Schmidt & Co., C. C. A., 165 Fed. 1006, *Re* Hopper, S. D., N. Y., Nov. 1, 1916, per Mayer, J.; Wilkinson v. Raymond, 80 App. Div. (N. Y.), 378. A claim by the appraiser for an appraisal of the estate under the employment of an assignee in insolvency was allowed a preference. *Re* Cooper, 243 Fed. 797. An assignee in insolvency may be allowed reasonable compensation for his services in taking care of the estate. *Re* Chase, C. C. A., 124 Fed. 753; *Re* Pattee, 143 Fed. 994. See Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, *Re* Creech Bros. Lumber Co., C. C. A., 240 Fed. 8, where he was paid for services subsequent to the filing of the petition in bankruptcy, his commissions were adjusted in accordance with the Bankruptcy Law, and the State statute was not followed. *Re* Stewart, C. C. A., 170 Fed. 222. *Contra, Re* Mays, 114 Fed. 600. It has been held that he will not be required to account in a Court of Bankruptcy for disbursement made by him more than four months before the institution of the bankruptcy proceedings, *Re* Carver, 113 Fed. 138. A lawyer, who has a claim for professional advice and services rendered to an assignee in insolvency, when the assignment provides that the costs and expenses of administering the trust shall be first paid, is not entitled to prove the same as a preferential claim against the estate of the bankrupt; but, so far as the assignee might be credited for the payment of the claim, it may be preferred in the right of such assignee. Randolph v. Scruggs, 190 U. S. 533, 47 L. ed. 1165; *Re* Marble Products Co., 199 Fed. 668. A claim for professional services to the assignee in resisting an adjudication of involuntary bankruptcy was disallowed as a preferred claim. Ibid., *Re* Stewart C. C. A., 179 Fed. 222. A claim for services to the bankrupt for drawing the assignment may be proved as an unsecured claim, but it is not entitled to any preference, Ibid. Orders of the State court subsequent to the adjudication, providing for the compensation of receivers in insolvency proceedings and their attorneys, will be disregarded. *Re* Rogers, 116 Fed. 435; *Re* Standard Fuller's Earth Co., 186 Fed. 578. It has been held that a receiver appointed by a State court for an insolvent corporation, *Re* J. H. Alison Lumber Co., 137 Fed. 643; or for a partnership, *Re* Rogers & Stefani, 156 Fed. 267, is not entitled to compensation for his services or disbursements, which have not benefited the estate. When they have been beneficial to the estate, they are allowed a preference. *Re*

vided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;[6] (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant;[7] and (5) debts owning to any person who

Standard Fuller's Earth Co., 186 Fed. 578. It has been held that an attorney for a creditors' committee has no lien upon the assets for his services, although the agreement by the bankrupt made within the four months' period so provides, unless the members of the committee are insolvent. *Re* Crave & Martin Co., C. C. A., 183 Fed. 769. Where there was no express contract, but the insolvent and the attorney both expected that the latter would be paid for his services out of the proceeds of a foreclosure suit, it was held that that was equivalent to an equitable assignment. *Re* Coney Island Lumber Co., 199 Fed. 803. There the attorney was allowed $300 for collecting about $690. Allowances to the attorneys of bankrupts, and of their receivers, trustees and creditors are subsequently considered, *Infra*, § 665.

6 See § 659, *infra*.

7 The test to determine priority is whether the employee is in a subordinate or a supervisory capacity. The subordinate is entitled to priority. The supervisor is not. *Re* Crown Point Brush Co., 200 Fed. 882. A workman who is a titular officer of a corporation may be entitled to a priority when his duties as officer are nominal. *Re* Capital Paint Co., 239 Fed. 424. So may be a bookkeeper acting as director and treasurer, *Re* H. O. Roberts Co., 193 Fed. 294; steward acting as director and secretary and a nominal stockholder, *Re Swain Co.*, 194 Fed. 749; Clerk and salesman acting as president and manager, *Re* Capital Paint Co., 239 Fed. 424. Priorities have been given to claims for the compensation of a bookkeeper who also worked for others; *Re* Baumblatt, 156 Fed. 422; Bell v. Arledge, C. C. A., 192 Fed. 837; a shipping clerk, Bell v. Arledge, C. C. A., 192 Fed. 837; a lumber checker, Ibid.; a carpenter, who is paid by the day, although not regularly in the employ of the bankrupt, *Re* Yoder, 127 Fed. 894; *Re* Dexter, C. C. A., 158 Fed. 788; *Re* Fink, 163 Fed. 135; a salesman who supervised the installation of what he sold, a salesman paid by commissions, *Re* Roebuck Weather Strip & Wire Screen Co., 180 Fed. 497, a salesman who was manager of a branch office, *Re* Gay, 188 Fed. 392; or maintained an office at his own expense, *Re* Dexter, C. C. A., 158 Fed. 788. Priorities have been refused in claims for compensation

for the services of the president of a business corporation, *Re* Grubbs-Wiley Grocery Co., 96 Fed. 183; *Re* Carolina Cooperage Co., 96 Fed. 950; *Re* Crown Point Brush Co., 200 Fed. 882; *Re* Eagle Ice & Coal Co., 241 Fed. 393, who also drove an ice wagon and rendered clerical services of the manager of a mercantile corporation, *Re* Metropolitan Jewelry Co., 216 Fed. 385; of a manufacturing company, Blessing v. Blanchard, C. C. A., 223 Fed. 35; Keyes v. Davie, C. C. A., 231 Fed. 688; *Re* Crown Point Brush Co., 200 Fed. 882. Wintermote v. McLafferty, C. C. A., 233 Fed. 95 (Wash. Statute). An assistant manager who took the place of the general manager in the latter's absence, *Re* Crown Point Brush Co., 200 Fed. 882, 885; although he did physical work in the factory and kept the books, *Re* Metropolitan Jewelry Co., 216 Fed. 384, of an investigator authorized to act as State manager, *Re* Union Dredging Co., 225 Fed. 188; of a manager of a branch store, *Re* Greenberger, 203 Fed. 583, although he cleaned the store, kept the books and acted as salesman. Of a treasurer and director who owned a large interest in the corporation although he performed manual labor, Boston French Range Co., 235 Fed. 916; of a superintendent, Blessing v. Blanchard, 223 Fed. 35; or a mining engineer who advised and assisted the superintendent in the development and operation of the mine, *Re* Gay & Sturgis, 233 Fed. 604; or of contractors in charge of a department of the bankrupt's factory, *Re* Thomas Deutschle & Co., 182 Fed. 430. Commission merchants who were selling agents for the bankrupt, *Re* Crawford Woolen Co., 218 Fed. 951; *Re* Kominers, 252 Fed. 183; of an actress who furnished her own costumes. *Re* All Star Feature Corp., 231 Fed. 251, or of the driver of a wagon who furnished his own team when a lump sum was paid for the services of both, Spruks v. Lackawanna Dairy Co., 189 Fed. 287; Footville Condensed Milk Co., 237 Fed. 136. Irrespective of the State statutes, those who have earned wages within the three months period are entitled to a priority to the extent of $300, *Re* McDavid Lumber Co., 190 Fed. 97; but not over valid fixed liens recognized by the State law, *Re* Yoke Vitrified Brick Co., 180 Fed. 235; *Re* Proudfoot, 123 Fed. 733; Lott v. Salsbury, C. C. A., 237 Fed. 1. That the claimant's salary exceeds $1,500 a year, does not deprive him of his right to a priority for $300 earned during the three months, Blessing v. Blanchard, C. C. A., 223 Fed. 35; *Re* Schultz & Guthrie, 235 Fed. 907. Where it is doubtful whether the claimants are entitled to a preference upon their claim for services the referee may permit the filing of a claim for $300 as a claim for priority and of another claim for the balance as a general claim, *Re* Crawford Woolen Co., 218 Fed. 981. Future damages, or breach of a contract of employment can be proved as a claim not entitled to a priority, *Re* Schultze & Guthrie, 235 Fed. 917. Payments made during the three months, in the absence of any specific agreement, may be applied to arrears previously accrued and will not affect the preference, *Re* Van Wert Mach. Co., 186 Fed. 607. Where the bookkeeper marked upon

by the laws of the States or the United States is entitled to priority."[8]

pay envelopes the weeks to which their contents applied, this was held notice to the employees that the payments were for current wages and did not apply on account of back wages. *Re* Jacob Y. Shantz & Son Co., 205 Fed. 405. The priority is not lost by reducing the claims of judgment, *Re* Haskell, 128 Fed. 819. Book accounts for supplies furnished by the bankrupt to the laborers do not cancel, in whole or in part, any liens of the mechanics who owe them. A statement in the proof that the claim is for "wages due deponent as clerk and manager and is a preferred claim," is insufficient when it is not shown that the wages were earned within the three months. *Re* Dunn, 181 Fed. 701. Where the stockholders consented that part of their wages should be withheld and loaned to the association they thereby lost their priority, *Re* Caledonia Coal Co., 254 Fed. 742; that a salesman was not allowed priority for a part of his salary, retained by agreement as a fund, to be used later for his benefit, *Re* Flick, 105 Fed. 503; but he was given it, entitled to a priority for his commissions within the time. *Re* Dexter, 158 Fed. 788; *Re* Fink, 163 Fed. 135. A State statute giving a preference to wages, earned more than three months before insolvency, was not followed, *Re* Rouse, Hazard & Co., C. C. A., 91 Fed. 96; *Re* Caledonia Coal Co., 254 Fed. 742. A State statute granting a lien for services was held not to permit a priority for more than $300, *Re* Crawford Woolen Co., 218 Fed. 951. As to the Kentucky statute, see Central Trust Co. v. George Leuders & Co., C. C. A., 219 Fed. 830; but, when the State statute gave a lien to certain claims for wages within the prescribed time, provided they were filed in a specified office, the filed claims were paid in priority to those of the same class not filed, *Re* Rouse, 91 Fed. 514; *Re* Kerby-Dennis Co., C. C. A., 95 Fed. 116; *Re* Byrne, 97 Fed. 762. As to the California statute see Blessing v. Blanchard, C. C. A., 223 Fed. 35. As to Kentucky statute, see *Re* Floyd & Bohr Co., 200 Fed. 1016; Central Trust v. Geo. Leuders & Co., C. C. A., 221 Fed. 829; as to the Michigan statute see, *Re* Caledonia Coal Co., 254 Fed. 742; as to the Mississippi statute, see *Re* Monroe Lumber Co., 186 Fed. 25; as to the Washington statute see, Keyes v. Davie, C. C. A., 231 Fed. 688.

[8] 30 St. at L. 544, 563, § 64, as amended by 32 St. at L. 797, and by 34 St. at L. 267; *Re* Iroquois Mach. Co., 166 Fed. 629; *Re* Amoratis, C. C. A., 178 Fed. 919; Johnson v. Garner, 233 Fed. 756; *Re* McAusland, 235 Fed. 173; *Re* Rosett, 203 Fed. 67. The word State, includes Porto Rico, *Re* Vidal, C. C. A., 233 Fed. 733. This does not preserve the remedies for the enforcement of the lien contained in the State statute. *Re* Hasie, 206 Fed. 789. In Minnesota, the State is entitled to such priority for all indebtedness due to it. *Re* Western Implement Co., 166 Fed. 577. In Alabama, not;

"Claims which, for want of record, or for other reasons,

State of Alabama v. Martin, 256 Fed. 313. Statutory provisions giving the State a priority in the distribution of the assets of a decedent do not give the State a priority in bankruptcy. *Re* Devlin, 180 Fed. 170. *For landlord's liens, Re* Southern Hardware & Supply Co., 210 Fed. 381; *Re* Quality Shoe Shop, Inc., 212 Fed. 321; Ludlow v. Pugh, C. C. A., 213 Fed. 450; *Re* Bell Engraving Co., 214 Fed. 510; *Re* Federal Biscuit Co., C. C. A., 218 Fed. 753; *Re* Simon Hotel Co., 223 Fed. 664; *Re* Grovenstein-Bishop Co., 223 Fed. 879; *Re* City Drug Store, 224 Fed. 133; *Re* Place, 244 Fed. 778; *Re* W. R. Kuhn Co., C. C. A., 225 Fed. 13; *Re* Mock, 228 Fed. 94; *Re* Mt. Winans Lumber Co., 228 Fed. 831; *Re* Spies-Alper Co., 231 Fed. 535; Southern Ry. Co. v. Wilder, C. C. A., 231 Fed. 933; *Re* All Star Feature Corp., 233 Fed. 1004; *Re* Hosmer, 233 Fed. 318; Preetorius v. Anderson, 236 Fed. 723; *Re* Gerrow, 233 Fed. 845; Fudickar v. Glenn, C. C. A., 233 Fed. 808; *Re* Woulfe & Co., 239 Fed. 128; *Re* Mossler Co., C. C. A., 239 Fed. 262; Bird v. City of Richmond, C. C. A., 240 Fed. 545; *Re* Cole Jewelry Co., 243 Fed. 790; Bank of Ragland v. Hudson, C. C. A., 247 Fed. 241; *Re* Delaney, 251 Fed. 425; *Re* Chambers, 254 Fed. 506; *Re* West, 253 Fed. 963.

For *vendor's liens*, see Cullen v. Armstrong, 209 Fed. 704; *Re* Lane Lumber Co., C. C. A., 217 Fed. 550; Taylor v. Kimmerle, C. C. A., 232 Fed. 134; *Re* French, 231 Fed. 257, 258; Farrell v. Wysong, C. C. A., 246 Fed. 281.

For *mechanics' liens*, see Hobbs v. Head and Dowst Company, 231 U. S. 693, N. H.; Louisville Woolen Mills v. Johnson, C. C. A., 228 Fed. 606, Ky.; McGraw v. Walsh, C. C. A., 232 Fed. 122, W. Va., Kemp Lumber Co. v. Howard, C. C. A., 237 Fed. 574, N. M.; Bank of Follansbee v. Follansbee Lumber Co., C. C. A., 248 Fed. 645, Ky.; Fels v. Geo. Lueders & Co., C. C. A., 246 Fed. 436; Whitney Central Trust & Savings Bank v. United States Construction Co., C. C. A., 250 Fed. 784, La.; *Re* Dubosky, 253 Fed. 794; C. C. Hartwell Co. v. Miller, C. C. A., 256 Fed. 273; Danville Ben. & Bldg. Ass'n v. Huff, C. C. A., 262 Fed. 403, Ill.; Gates & Co. v. Stevens Construction Co., 220 N. Y. 38.

For *pledges*, see Dale v. Pattison, 234 U. S. 399, Ohio; *Re* Dreuil & Co., 205 Fed. 573, La.; Cullen v. Armstrong, 209 Fed. 704, Md.; Davis v. Hanover Savings Fund Society, 210 Fed. 768, W. Va.; *Re* Harvey, 212 Fed. 340, Ala.; *Re* Cross, 244 Fed. 844, N. Y.; *Re* H. B. Hollins & Co., 230 Fed. 917, N. Y.; Worth v. Marshall Field & Co., 240 Fed. 395; *Re* P. J. Sullivan Co., 247 Fed. 139; *Re* Germantown Almegum Mfg. Co., 257 Fed. 755.

For *bankers' liens*, see National City Bank v. Hotchkiss, 231 U. S. 50; Ward v. First Nat. Bank C. C. A., 202 Fed. 609; Vaughan v. Massachusetts Hide Corporation, 209 Fed. 667; *Re* Hollins, C. C. A., 215 Fed. 41; Sterne v. Merchants' Nat. Bank, C. C. A., 216 Fed. 862; Dodge v. Harris, C. C. A., 224 Fed. 434; *Re* Richheimer, C. C. A., 221

could not have been valid liens as against the claims of the

Fed. 16; *Re* K. Marks & Co., C. C. A., 222 Fed. 52; Brown Bros. Co. v. Smith Bros. Co., 231 Fed. 475; Ward v. Am. Agri. Chem. Co., C. C. A., 232 Fed. 119; Citizens' Trust Co. v. Mullinix, C. C. A., 235 Fed. 875 (no lien); Dalton v. Humphreys, C. C. A., 242 Fed. 777; *Re* H. & L. Jarmulowsky, 243 Fed. 632.

For *warehouse receipts*, see: Taney v. Penn Bank, 232 U. S. 174; Commercial Nat. Bank v. Canal-Louisiana Bank & Tr. Co., 239 U. S. 520; Merchants' Nat. Bank of Baltimore v. Corr, C. C. A., 221 Fed. 419; Interstate Banking & Tr. Co. v. Brown, C. C. A., 235 Fed. 32; First Nat. Bank v. Yerkes, C. C. A., 238 Fed. 278; *Re* P. J. Sullivan Co., 247 Fed. 139; *Re* Germantown Almegum Mfg. Co., 251 Fed. 755.

An *attorney's lien* upon a cause of action, when given by a State statute, has been enforced by refusing the trustee permission to discontinue the same without satisfying the attorney's claim. *Re* Adamo, 151 Fed. 716. Under the New York statute, an attorney was given a lien as employee, Gay v. Hudson River El. Power Co., 178 Fed. 499. See *supra*, § 422a. Partnership creditors have a lien upon partnership property and a right to payment out of the same prior to that of individual creditors of the partnership. B'k'cy Act, § 5, *supra*, § 618. *Re* Linforth, 87 Fed. 386; *Re* Mills, 95 Fed. 269; *Re* Jones, 100 Fed. 781; *Re* Hull, 224 Fed. 796; *Re* Cobb's Consol. Cos., 233 Fed. 458; aff'd, C. C. A., 238 Fed. 543; *Re* Evans, 235 Fed. 635; *Re* Nashville Laundry Co., 240 Fed. 795; Stringer v. Stevenson, C. C. A., 240 Fed. 892; *Re* W. S. Kuhn & Co., 241 Fed. 935; but see *Re* Gartman, 242 Fed. 595; and *supra*, § 644.

Upon the insolvency of a member of the firm his personal creditors have a right to be paid out of his individual estate before the application of any of his individual assets to the payment of partnership debts. Ibid. Farmers' & Mechanics' Nat. Bank v. Ridge Avenue Bank, 240 U. S. 492. The fact that the partnership has no assets does not change this rule, *Re* Henderson, 142 Fed. 588. See § 618, *supra*. It has been held that the question whether a claimant is entitled to priority of payment, on the ground that the trustee has received money held in trust for the former by the bankrupt, is not a question to be determined by the priorities under the State insolvency law. Smith v. Mottley, C. C. A., 150 Fed. 266. For cases where it was held there was no such priority, see Block v. Rice, 167 Fed. 693; Clarke v. Rogers, C. C. A., 183 Fed. 518; *Re* Dorr, C. C. A., 196 Fed. 292. In the following cases it was held that it could not be thus traced: Schuyler v. Littlefield, 232 U. S. 707; Knauth, Nachod & Kuhne v. Latham & Co., 242 U. S. 426; affirming Knauth, Nachod & Kuhne v. Lovell, 212 Fed. 337; *Re* Yungbluth, 209 Fed. 116; Macy v. Roedenbeck, C. C. A., 227 Fed. 346; Titlow v. McCormick, C. C. A., 236 Fed. 209; Wuerpel v. Commercial Germania Trust & Savings Bank, C. C. A.,

creditors of the bankrupt shall not be liens against this estate."[9] "In case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."[10] Admiralty liens are enforced by Courts of Bankruptcy.[11] Ordinarily their holders are not

238 Fed. 269; Venor v. McFarlin, C. C. A., 238 Fed. 721; *Re* A. D. Matthews' Sons, C. C. A., 238 Fed. 785; U. S. Nat. Bank v. City of Centralia, C. C. A., 240 Fed. 93; Barnes v. Martin, 246 Fed. 76; *Re* Leigh, 208 Fed. 487; *Re* See, C. C. A., 209 Fed. 172; Knauth v. Knight, C. C. A., 755 Fed. 677. Where the bankrupt had received a preferential payment from another bankrupt, it was held, that this could not be collected in full as a prior claim upon his assets either by the trustee of the former bankrupt or upon a composition, *Re* Alpert, 237 Fed. 295. For liens created by an implied trust or by a breach of trust, see Carpenter v. Southworth, C. C. A., 165 Fed. 428; *Re* Brunsing, Tolle & Postel, 169 Fed. 668; *Re* J. M. Acheson Co., C. C. A., 170 Fed. 427; *Re* McCord, C. C. A., 174 Fed. 820; Burgoyne v. McKillip, C. C. A., 182 Fed. 452; *Re* City Bank of Dowagiac, 186 Fed. 250; Gay v. Hudson River El. Power Co., 190 Fed. 773; *Re* M. E. Dunn & Co., 193 Fed. 212; *Re* Manistee Watch Co., 197 Fed. 455; *Re* Stewart, C. C. A., 178 Fed. 463; *Re* Benz, 218 Fed. 50; Southern Cotton Oil Co. v. Elliotte, C. C. A., 218 Fed. 567; Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bank, 230 Fed. 738; *Re* Syracuse Gardens Co., 231 Fed. 284; Brown Bros. Co. v. Smith Bros. Co., 231 Fed. 475; *Re* Howe, 235 Fed. 908; Titlow v. McCormick, C. C. A., 236 Fed. 209; *Re* Gayette & Lavigne, 244 Fed. 638; Cox v. New England Equitable Ins. Co., C. C. A., 247 Fed. 955; Gealey v. South Side Trust Co., C. C. A., 249 Fed. 189; *Re* A. Bolognesi & Co., C. C. A., 254 Fed. 770; Cook v. Flagg, C. C. A., 251 Fed. 5; *Re* American Candy Mfg. Co., C. C. A., 256 Fed. 87; reversing 248 Fed. 145. Where the receiver and trustee in bankruptcy performed a contract made by the bankrupt, the rights, under which had been assigned by the bankrupt, the trustee was directed to pay to the assignee the money collected. *Re* De Long Furniture Co., 188 Fed. 686.

[9] 30 St. at L. 544, 564, 565, § 67a; Security Warehousing Co. v. Hand, C. C. A., 143 Fed. 32. *Cf.* § 644, *supra.* Bradley v. Robie, C. C. A., 266 Fed. 884; Groner v. Babcock Printing Press Mfg. Co., C. C. A., 267 Fed. 882.

[10] 30 St. at L. 544, 546, §8. The proceedings do not abate by the bankrupt's death; but the widow and minor children of the bankrupt are entitled to such an allowance for their support as the State statute prescribes which is to be paid out of so much property as remains undistributed in the hands of the trustee who is entitled to a hearing upon the application for the allowance. Hull v. Dicks, 235 U. S. 584. *Cf. Re* Scott, C. C. A., 226 Fed. 201.

[11] *Re* New England Transp. Co., 220 Fed. 203. *Supra*, §§ 60e, 560b.

required to contribute toward the general expenses of the administration of the bankruptcy proceedings.[12] The lien of an attachment obtained more than four months before the filing of the petition, will be recognized.[13] The validity and extent,[14] of mortgages,[15] chattel mortgages,[16] and conditional sales,[17] which are not preferential,[18] is determined by the law of the State. The right to a priority may be assigned with the claim.[19]

12 Ibid.

13 *Re* Crafts-Riordon Shoe Co., 185 Fed. 931. *Supra*, § 644. The rights of the attaching creditor are governed by the State law as declared by the highest court of the State. Loewe v. Savings Bank of Danbury, C. C. A., 236 Fed. 444.

14 *Re* Bros, C. C. A., 254 Fed. 664.

15 Bean v. Orr, C. C. A., 182 Fed. 599; *Re* Hasie, 206 Fed. 789; *Re* Jarmulowsky, 224 Fed. 141. Where the mortgage provides for insurance, the mortgagee has a preference for insurance premiums which he has paid. *Re* Fabacher, 193 Fed. 556. For attorney's fees of mortgagees, see § 647, *supra;* for preference as to interest, § 652, *infra.*

16 Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577. For cases where such instruments have been sustained or set aside, see § 644, *supra.*

17 Bryant v. Swofford Bros. Dry Good Co., 214 U. S. 279, L. ed. 997. For cases where such instruments have been sustained or set aside, see § 649a *infra.*

18 See § 644, *supra.*

19 Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 51 L. ed. 436; *Re* Bennett, C. C. A., 153 Fed. 673. Cashing at the bankrupt's request checks given by him to his workmen for wages was held to create a right to priority as assignee of the latter's claims although presentation of the checks for payment had been delayed a few days at the employer's request. *Re* Shultz Bros., 226 Fed. 989. But under the circumstances of several cases those who had honored store orders given by the bankrupt in payment of wages were not allowed a priority. *Re* Long Leaf Lumber Co., C. C. A., 219 Fed. 675; *Re* McGowin Lumber Co., 223 Fed. 553; J. C. Stewart & Co. v. McLeod, C. C. A., 222 Fed. 253. For a case where the enforcement of such assignments were enjoined as collusive and fraudulent, see *Re* Kyte, 182 Fed. 166. It has been held that an assignment of wages to be earned in the future, made as security for a debt, creates no lien until they have been earned; and that where, prior to that time, the debtor is adjudged a bankrupt, the debt is extinguished upon his subsequent discharge, and the wages become the bankrupt's property; and that pending proceedings for a discharge, the assignee may be enjoined from collecting or receiving the same. *Re* Lineberry, 183 Fed. 338. *Re* Green, 213 Fed. 542; *Re* Wodzicki, 238 Fed. 571. See Cohen v. Bacharach, C. C. A., 229 Fed. 385. Where the bankrupt had without consideration when insol-

A parol assignment of choses in action as security by a bankrupt prior to the bankruptcy; may be established by the testimony of the parties alone where such testimony is uncontradicted and credible, the witnesses are not impeached, and there are no circumstances which cast doubt upon their truthfulness; and, in the absence of a State statute to the contrary they will be sustained.[20] Where the estate is insufficient to pay in full all

vent, transferred his property to a corporation which borrowed money and paid judgments, liens upon his property, it was held that the company was not entitled to subrogation, *Re* Liller, 253 Fed. 845.

[20] Union Trust Co. v. Bulkeley, C. C. A., 150 Fed. 510. For parol agreements for subrogation to the lenders of money to discharge encumbrances that have been sustained, see *Re* MacDougall, 175 Fed. 400; *Re* Lee, C. C. A., 182 Fed. 579. *Contra*, J. P. Browder & Co. v. Hill, C. C. A., 136 Fed. 821. It has been held that the lender of money to a bankrupt, for the express purpose of paying such claimants, is not entitled to be subrogated to the priority of those who are thus paid. *Re* General Automobile & Mfg. Co., C. C. A., 133 Fed. 525; J. P. Browder & Co. v. Hill, C. C. A., 136 Fed. 821; Bell v. Arledge, C. C. A., 192 Fed. 837; even when the borrower agrees that he shall have such right of subrogation, J. P. Browder & Co. v. Hill, C. C. A., 136 Fed. 821. But see note 23 *infra*. It has been held the general rule of Federal jurisprudence that priority in assignments of choses in action is determined by the receipt of notice by the debtor should be followed in bankruptcy although the State law is contrary and the contract between the bankrupt and the first assignee provided that it should be construed in accordance with the laws of the State, *Re* Leterman Decher & Co. Inc., C. C. A., 260 Fed. 543; but that the construction by the State Courts of the recording acts as not applicable to the assignment of choses in action is binding on the Federal Courts. Ward v. Agricultural Chemical Co., C. C. A., 232 Fed. 119. For transactions held not to create valid assignments of book accounts and other choses in action, see Home Bond Co. v. McChesney, 239 U. S. 568; *Re* Handy, 218 Fed. 956; Eastman Kodak Co. v. National Park Bank, 231 Fed. 320; *Re* Howley Down-Draft Furnace Co., 233 Fed. 451; *Re* Barker Piano Co., C. C. A., 233 Fed. 522; *Re* Clark Realty Co., C. C. A., 234 Fed. 576; *Re* Interocean Transp. Co., C. C. A., No. 269, 234 Fed. 863; *Re* Lutz & Schramm Co., 235 Fed. 970; Wuerpel v. Commercial Germania Trust & Savings Bank, C. C. A., 238 Fed. 269; Wolfe v. Bank of Anderson, C. C. A., 238 Fed. 343; Bonvillain v. American Sugar Refining Co., 250 Fed. 641; *Re* Phoenix Planing Mill, 250 Fed. 899; John A. Schmitt's Sons v. Shadrach, C. C. A., 251 Fed. 874; Taylor v. Fram, C. C. A., 252 Fed. 465; Montgomery v. City of Philadelphia, 253 Fed. 473; *Re* Imperial Textile Co., 255 Fed. 199; modifying s. c. 239 Fed. 775. *Re* Klap-

claims entitled to a priority, the court may apportion the priorities as equity requires, with regard to the responsibility of the claimants for the depreciation of the estate.[21] The lienor may for laches lose his priority.[22] The cases where a trustee in bankruptcy may have liens set aside have been previously discussed.[23]

holz, 113 Fed. 1002; *Re* Torchia, 185 Fed. 576. When the debt has been duly proved, delay in claiming a priority will ordinarily be no defense to the application unless other equities have intervened. *Re* Ashland Steel Co., C. C. A., 168 Fed. 169 (one year); *Re* Jamison Bros. Co., C. C. A., 227 Fed. 30, (delay of two years in bringing petition to hearing). The filing of a claim and the receipt of dividends upon its full amount may be treated as a waiver of the creditors security. *Re* Fisk & Robinson, 185 Fed. 974. A lienor does not waive his lien by surrendering possession to a receiver in bankruptcy, *Re* Endlar, C. C. A., 192 Fed. 762 (a chattel mortgage); but a lienor cannot object to the payment of a claimant to a prior lien after notice by the trustee without objection by him, *Re* Torchia, C. C. A., 185 Fed. 576; and creditors may be estopped by laches from objecting to the payment of claims under orders giving them priority, Ibid. See *Re* McAusland, 235 Fed. 173.

21 *Re* Grignard Lithographing Co., 158 Fed. 557. Where a creditor claims priority of payment of notes held by him, which are also a lien on other property not in the custody of the court, an order for the payment of his claim may be conditioned upon his transfer of the notes to the proper officer of the court for the benefit of the whole estate. Mansur v. Dupree, C. C. A., 150 Fed. 329. A petitioner, who united a prayer for the payment of taxes and assessments by a trustee with one for permission to foreclose a mortgage, or, in the alternative, that the trustee sell the property, was allowed to amend his petition by striking out the two latter prayers. *Re* Wellhouse, 113 Fed. 962.

22 *Re* Klapholz, 113 Fed. 1002; *Re* Torchia, 185 Fed. 576.

23 *Supra*, § 644. Upon the bankruptcy of a member of a stock exchange or other exchange, the distribution of the proceeds of his membership is made in accordance with the rules of the exchange. In the case of the New York Stock Exchange, they are applied, first, to the payment of the member's indebtedness thereto; next, to claims arising against him out of transactions on the floor thereof; third, to loans from members; and, lastly, to his general creditors. Sexton v. Kessler, 225 U. S. 90; Gorman v. Littlefield, 229 U. S. 19; Duel v. Hollins, 241 U. S. 523; *Re* Gregory, C. C. A., 27 L.R.A. (N.S.) 613, 174 Fed. 629. For liens held by the customers of bankrupt stock brokers against them, see Richardson v. Shaw, 209 U. S. 365; *Re* Jacob Berry & Co., C. C. A., 174 Fed. 409; *Re* T. A. McIntyre & Co., C. C. A., 181 Fed. 955; s. c., C. C. A., 181 Fed. 960; *Re* James Carothers & Co., 182 Fed. 501; s. c., 192 Fed. 691; *Re* Brown,

§ 649a. Reclamations. A stranger to the proceedings claiming a right to property held by a receiver or trustee in bankruptcy may intervene *pro interesse suo* and reclaim them.[1] A creditor

C. C. A., 175 Fed. 769; s. c., C. C. A., 184 Fed. 454; s. c., 189 Fed. 432; s. c., 189 Fed. 440; s. c., 189 Fed. 442; s. c., C. C. A., 193 Fed. 24; s. c., C. C. A., 193 Fed. 30; *Re* Jamison Bros. & Co., C. C. A., 209 Fed. 541; *Re* H. B. Hollins & Co., 212 Fed. 317; *Re* Leavitt & Grant, C. C. A., 215 Fed. 901; *Re* Hollins, C. C. A., 219 Fed. 544; *Re* T. A. McIntyre & Co., C. C. A., 221 Fed. 232; *Re* H. B. Hollins & Co., 225 Fed. 618; *Re* J. F. Pierson, Jr. & Co., 225 Fed. 889; *Re* Van Schaick & Co., C. C. A., 228 Fed. 465; *Re* Stringer, 230 Fed. 177; *Re* H. B. Hollins & Co., C. C. A., 232 Fed. 124; *Re* Pierson, C. C. A., 233 Fed. 519; *Re* Stringer, 233 Fed. 799; *Re* Pierson, C. C. A., 238 Fed. 142; *Re* Wettengel, 238 Fed. 799; *Re* Gay & Sturgis, 251 Fed. 420; Johnson v. Bixby, C. C. A., 252 Fed. 103; *Re* J. C. Wilson & Co., 252 Fed. 631.

§ 649a. [1] See *supra*, § 258h. In the determination of the title to real estate the law of the situs governs *Supra*, § 477b. In determining the title to chattels, usually the law of the situs, Boden & Haac et al. v. Lovell, C. C. A., 205 Fed. 234; *Re* Ricketts, C. C. A., 234 Fed. 785; but sometimes the law of the State where the contract was made and where it was to be performed. *Re* Liebig, C. C. A., 255 Fed. 458; *Re* Torchia, C. C. A., 185 Fed. 570. In the subject of reclamations, see *Re* Howard, 207 Fed. 402; *Re* Killian Mfg. Co., 209 Fed. 498; *Re* Thorson Bros., 209 Fed. 961; *Re* Watmough, 210 Fed. 539; Roth v. Smith, C. C. A., 215 Fed. 82; *Re* Underwood & Daniel, 215 Fed. 279; *Re* K. Marks & Co., 218 Fed. 453; *Re* McGinley, C. C. A., 219 Fed. 159; *Re* Sycamore Grain & Milling Co., 221 Fed. 468; *Re* N. Y. Commercial Co., C. C. A., 228 Fed. 120; Schroth v. Monarch Fence Co., C. C. A., 229 Fed. 549, denied; *Re* Syracuse Gardens Co., 231 Fed. 284; Walter A. Wood Mowing & Reaping Mach. Co. v. Croll, C. C. A., 231 Fed. 680; *Re* Farmers' Dairy Ass'n, 234 Fed. 118; *Re* Copiag-Lindenhurst Co., 240 Fed. 431; *Re* Hunter-Rand Co., 241 Fed. 175, denied; *Re* Kaplan & Myers, C. C. A., 241 Fed. 459; *Re* Collins, 242 Fed. 975; *Re* Resnek, 243 Fed. 417, denied; *Re* Golub, 245 Fed. 512; Stennick v. Jones, C. C. A., 252 Fed. 345, denied; *Re* Arkin Dress Co., C. C. A., 253 Fed. 926. As to the delivery essential to complete a sale, see Gage Lumber Co. v. M'Eldowney, C. C. A., 207 Fed. 255; *Re* Ricketts, C. C. A., 234 Fed. 785; holding the delivery insufficient; Taney v. Penn National Bank, 232 U. S. 174; Hiller v. Cornille & De Blonde, C. C. A., 228 Fed. 670; holding the delivery sufficient. As to the rescission of a sale for fraud because of a preconceived intent not to pay, see Halsey v. Diamond Distilleries Co., C. C. A., 191 Fed. 498; *Re* Liebig, C. C. A., 255 Fed. 458. See *Re* Weil, 111 Fed. 897; *Re* O'Conner, 114 Fed. 777; *Re* Patterson & Co., 125 Fed. 562.

who does not intervene or prove his claim remains a stranger to the proceedings.[2] The right to reclamation may be waived,[3] or lost by laches.[4]

2 Gratiot County State Bank v. Johnson, 249 U. S. 246.

3 See *supra*, § 185b. The levy of an execution upon property issued under a judgment for the purchase price is a waiver of the right to reclaim the same. *Re* Fitzhugh Hall Amusement Co., 228 Fed. 169. It has been held: that, where the claimant has elected to waive the tort and prove his claim upon an implied contract and has participated in a creditors' meeting after such proof; he cannot be allowed to withdraw his proof and apply for the return of the goods, Standard Varnish Works v. Haydock, C. C. A., 143 Fed. 318. That the act of a creditor of a bankrupt in petitioning the court of bankruptcy for the appointment of a receiver to take charge of and protect the bankrupt's property, which petition set forth that certain of the property in the bankrupt's possession was owned by the petitioner, and that the bankrupt was also largely indebted to it, did not estop it to assert its ownership of such property; *Re* Pierce, C. C. A., 157 Fed. 757; Lynch v. Bronson, 160 Fed. 139; but that proof of a claim is not a waiver of a previous action for the recovery of the specific property. Mould v. Importers & Traders' Nat. Bank, 72 App. Div. (N. Y.) 30, 33. *Cf.* § 649, *supra*. That there is no such waiver by petitioning the court of bankruptcy for the appointment of a receiver when the petition sets forth that certain property in the bankrupt's possession was the property of the petitioner and the bankrupt was also largely indebted to it, *Re* Pierce, C. C. A., 157 Fed. 757; nor by attending a meeting of creditors to discuss a composition and not asserting the right of reclamation until subsequently, *Re* Loll, 162 Fed. 79. *Cf.* § 647, *supra*. Nor by the description of a claimant as a creditor in a petition for relief to which he would have been entitled as the owner of property obtained from him by the bankrupt through fraud. *Re* Midland Motor Co., 224 Fed. 368.

4 *Re* Watmough, 210 Fed. 539. Where a claim for compensation and expenses in taking care of merchandise which had been sold by the trustee was disallowed, the claimant was permitted upon appeal from the order or disallowance to assert his equitable claim to the proceeds of the sale although a stranger to the proceedings had presented to the trustee a demand for the goods which he had sold to the appellant. Bramble v. Brett, C. C. A., 230 Fed. 385. It was said that a petition for reclamation was premature when filed before the maturity of a note extending the time of payment. *Re* Wegman, Paint Co., 221 Fed. 128.

For rulings that goods were held by the bankrupt on *consignment for sale* and not part of his assets, see Berry Bros. v. Snowdon, C. C. A., 209 Fed. 324; *Re* Wright-Dana Hardware Co., C. C. A., 211 Fed. 908; *Re* Caldwell Machinery Co., 215 Fed. 428; Thomas v. Field-Brundage Co., C. C. A., 215 Fed.

§ 650. Exemptions of bankrupt property. "This act shall not affect the allowance to bankrupts of the exemptions which

891; *Re* Handy, 218 Fed. 956; General Electric Co. v. Brower, C. C. A., 221 Fed. 597; Ellet-Kendall Shoe Co. v. Martin, C. C. A., 222 Fed. 851; *Re* Reeves, 22 Fed. 74; *Re* National Home & Hotel Supply Co., 226 Fed. 840; Hauck v. Frey, 228 Fed. 779; *Re* Bondurant Hardware Co., 231 Fed. 247; *Re* Thomas, 231 Fed. 513; McElwain-Barton Shoe Co. v. Bassett, C. C. A. 231 Fed. 889; McKey v. Clark, C. C. A., 233 Fed. 928; *Re* Kruse, 234 Fed. 470; Smith Wallace Shoe Co. v. Ternes, C. C. A., 235 Fed. 282; Brandsford v. Regal Shoe Co., C. C. A., 237 Fed. 67; *Re* Wright & Barron Drug Co., 237 Fed. 411. For rulings that goods were part of the bankrupt's assets and *not* held *on consignment*, see: *Re* Balkind & Joseph, C. C. A., 215 Fed. 697; *Re* Cozatsky, 216 Fed. 920; Flanders Motor Co. v. Reed, C. C. A., 220 Fed. 642; *Re* Nicol, 221 Fed. 82; *Re* M. L. B. Sturkey Co., 224 Fed. 251; Louisville Woolen Mills v. Johnson, C. C. A., 228 Fed. 606; *Re* Graboyes, 233 Fed. 133; Miller Rubber Co. v. Citizens' Trust & Savings Bank, C. C. A., 233 Fed. 488; L. E. Waterman Co. v. Kline, C. C. A., 234 Fed. 891; Taylor v. Fram, 243 Fed. 733. For *conditional sales* where the vendors' titles have been *sustained*, see Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690; York Manufacturing Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, Ohio; Holt v. Henley, Trustee, 232 U. S. 637, Va.; Bailey v. Baker Ice Machine Co., 239 U. S. 268, Kansas; *Re* Butterwick, 131 Fed. 371, Pa.; *Re* Great Western Mfg. Co., C. C. A., 152 Fed. 123, Neb.; see Bryant v. Swofford Bros., 214 U. S. 279, 53 L. ed. 997, Ark.; *Re* Franklin Lumber Co., 147 Fed. 852, N. J.; Mishawaka Woolen Mfg. Co. v. Smith, 158 Fed. 885, Wisc.; *Re* Hager, 166 Fed. 972, Ia.; Crucible Steel Co. of America v. Holt, C. C. A., 174 Fed. 127, Ky.; York Mfg. Co. v. Brewster, C. C. A., 174 Fed. 566, Texas; John Deere Plow Co. v. Anderson, C. C. A., 174 Fed. 815, Ga.; *Re* Miller Pure Rye Distilling Co., 176 Fed. 606, Pa.; Nauman Co. v. Brawshaw, C. C. A., 193 Fed. 350, Ia.; *Re* J. S. Appel Suit & Cloak Co., 198 Fed. 322, Colo.; Southern Hardware & Supply Co. v. Clark, C. C. A., 201 Fed. 1, Fla.; Burnes v. Epstein, 201 Fed. 393, Conn.; *Re* Farmers' Co-Operative Co. of Barlow, N. D., 202 Fed. 1005, N. D.; Hart v. Emmerson-Brantingham Co., 203 Fed. 60, Mo.; *Re* Anson Mercantile Co., 203 Fed. 871, Texas; *Re* Superior Drop Forge & Mfg. Co., 208 Fed. 813, Ohio; Baker Ice Mach. Co. v. Bailey, C. C. A., 209 Fed. 603, Kan.; *Re* Lane Lumber Co., 210 Fed. 82, Idaho; *Re* Rector's, C. C. A., 220 Fed. 645, N. Y.; Potter Mfg. Co. v. Arthur, C. C. A., 220 Fed. 843, Ohio; *Re* Wegman Piano Co., 221 Fed. 128, N. Y.; *Re* Brown Wagon Co., 221 Fed. 266, Ga.; *Re* Cooper's Estate, 226 Fed. 317, Iowa; *Re* Fitzhugh Hall Amusement Co., C. C. A., 230 Fed. 811, N. Y.; *Re* Stoughton Wagon Co., C. C. A., 231 Fed. 676, Mich.; *Re* I. S. Remson Mfg. Co., C. C. A., 232 Fed. 594, N. Y.; *Re* Farmers'

are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."[1] This section is

Dairy Ass'n, 234 Fed. 118, Cal.; Mergenthaler Linotype Co. v. Hull, C. C. A., 239 Fed. 26, Porto Rico; Shook v. Levi, C. C. A., 240 Fed. 121, Cal.; *Re* Seward Dredging Co., C. C. A., 242 Fed. 225, N. Y.; *Re* Atlantic Beach Corp, 244 Fed. 828, Florida; *Re* Terrell, C. C. A., 246 Fed. 743, Okla.; *Re* Bettman-Johnson Co., C. C. A., 250 Fed. 657, Ohio; *Re* Russell Falls Co., 249 Fed. 260; Story & Clark Piano Co. v. Holmer, C. C. A., 251 Fed. 565, Wisc. For cases where the *trustee was allowed to attack the vendor's title under conditional sales,* see *Re* Fish Bros. Wagon Co., C. C. A., 164 Fed. 553, Kan.; *Re* Bement, C. C. A., 172 Fed. 98, Wisc.; Chilberg v. Smith, C. C. A., 174 Fed. 805, Wash.; *Re* Franklin Lumber Co., 187 Fed. 281, Pa.; *Re* Bazemore, 189 Fed. 236, Ala.; *Re* Calhoun Supply Co., 189 Fed. 537, Ga.; *Re* Nelson, 191 Fed. 233, S. D.; *Re* Farmers' Supply Co., 196 Fed. 990, Ala.; *Re* Daney Hardware & Furniture Co., 198 Fed. 336, Ala.; *Re* Kreuger, 199 Fed. 367, Ky.; *Re* Williamsburg Knitting Mill, 190 Fed. 871, Va.; *Re* Burlage Bros., 169 Fed. 1006, Ia.; *Re* Penny & Anderson, 176 Fed. 141, N. Y.; *Re* Williamsburg Knitting Mill, 190 Fed. 871, Va.; Mishawaka Woolen Mfg. Co. v. Westveer, C. C. A., 191 Fed. 465, Mich.; *Re* Senoia Duck Mills, 193 Fed. 711, Ga.; *Re* J. S. Appel Suit & Cloak Co., 198 Fed. 322, Colo.; *Re* A. Gaglione & Son, 200 Fed. 81, Pa.; L. A. Becker Co. v. Gill, C. C. A., 206 Fed. 36, Mo.; Corbett v. Riddle, C. C. A., 209 Fed. 811, Va.; Norris v. Trenholm, C. C. A., 209 Fed. 827, Miss.; Walton v. Tepel, C. C. A., 210 Fed. 161, Pa.; *Re* Johnson, 212 Fed. 311, Okla.; Cincinnati Ry. Supply Co. v. Hartlieb, C. C. A., 214 Fed. 177, Ohio; *Re* O'Brien, 215 Fed. 129, N. J.; *Re* Vandewater & Co., 219 Fed. 627, N. J.; *Re* Automatic Sprinkler Co. of America, C. C. A., 220 Fed. 451, N. Y.; *Re* Roelich, 223 Fed. 687, Oregon; *Re* O'Callaghan, 225 Fed. 133, Mass.; *Re* Leflys, C. C. A., 229 Fed. 695, Wisc.; Bell v. Shaw, C. C. A., 230 Fed. 976, Iowa; Walter A. Wood Mowing & Reaping Mach. Co. v. Croll, C. C. A., 231 Fed. 679, Mich.; *Re* Thompson, 242 Fed. 602; Citizens' Coal & Supply Co. v. Custard, C. C. A., 244 Fed. 425, W. Va.; *Re* Aronson, 245 Fed. 207, Mass.; *Re* Russell Falls Co., 249 Fed. 260, Mass.; *Re* Capital City Cap Co., 251 Fed. 664, N. J.; Gooch v. Stone, C. C. A., 256 Fed. 631, Tenn. See Lehman v. Gumbel, 236 U. S. 448, La.

§ 650. [1] 30 St. at L. 544, 548, § 6. The subsequent removal of the bankrupt from the State does not forfeit his claim to exemptions given by the State statute to residents thereof. *Re* Donahey, 176 Fed. 548. A bankrupt is not entitled to exemptions out of property which, before the bankruptcy proceedings, he conveyed to a creditor as a preference or in fraud of creditors, although it was subsequently recovered by the trustee or surrendered to the lat-

constitutional;[2] but it does not exempt property from liens existing before the State statute created the exemption.[3] In determining the bankrupt's rights of exemption, the construction placed by the highest court of the State upon its statutes will be followed by the Court of Bankruptcy.[4] The provisions of the Bank-

ter. *Re* Wishnefsky, 181 Fed. 896. *Contra, Re* Soper, 173 Fed. 116. A claim to an exemption in a life insurance policy was not lost because, after the adjudication of bankruptcy, the bankrupt's wife, whom he had made the payee, obtained a divorce. *Re* Orear, C. C. A., 189 Fed. 888; nor is the exemption lost because he bought the property which he claims as exempt in view of bankruptcy without intending to pay therefor; *Re* Hammonds, 198 Fed. 574. For the disallowance of an exemption of a homestead fraudulently bought in view of bankruptcy, see *Re* Gerber, C. C. A., 186 Fed. 693. It has been held that pension money, after it has been received by the bankrupt, is exempt. *Re* Bean, 100 Fed. 262. *Contra, Re* Jones, 166 Fed. 337; Friend v. Garcelon, 77 Me. 25, 52 Am. Rep. 739; Crane v. Linneus, 77 Me. 59. The provisions of the acts of Congress exempting the rights of entrymen to certain public lands, are followed in bankruptcy, U. S. R. S., § 2296; *Re* Parmeter's Estate, 211 Fed. 757; *Re* Evans, 235 Fed. 957; *Re* Auge, 238 Fed. 621.

[2] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113; Hurley v. Devlin, 151 Fed. 919.

[3] Kener v. La Grange Mills, 231 U. S. 215.

[4] See *supra* § 477. *Alabama:* Sellers v. Bell, C. C. A., 94 Fed. 801; *California: Re* Petersen, 95 Fed. 417; *Re* Schumm, 232 Fed. 414; *Florida: Re* Rippa, 180 Fed. 603; *Re* Rivas' Estate, C. C. A., 241 Fed. 673; *Re* Libby, 253 Fed. 278; *Re* Castleberry, 143 Fed. 1018; *Georgia: Re* Dobbs, 175 Fed. 319; *Re* Dicks, 198 Fed. 293; *Re* Anderson, 224 Fed. 790; *Re* Hardy, 229 Fed. 825; *Re* Powell, 230 Fed. 316; *Re* Hadden, 242 Fed. 285; *Re* Johnson, 247 Fed. 135; *Illinois: Re* Buelow, 98 Fed. 86; *Re* Bitner, C. C. A., 255 Fed. 48; *Iowa: Re* Tilden, 91 Fed. 500; *Re* Steele, 98 Fed. 78; *Re* Pope, 98 Fed. 722; *Re* Sullivan, C. C. A., 148 Fed. 815; *Re* Eash, 157 Fed. 996; Seig v. Greene, C. C. A., 225 Fed. 955; *Idaho:* Bank of Nez Perce v. Pindel, C. C. A., 193 Fed. 917; *Kentucky: Re* Baker, C. C. A., 182 Fed. 392; *Re* Cheatham, 210 Fed. 379; *Massachusetts:* Eaton v. Boston Safe Dep. & Tr. Co., 240 U. S. 427; Downing, 148 Fed. 120; *Michigan: Re* Andrews & Simonds, 193 Fed. 776; *Re* Solomon & Johnson, 254 Fed. 503; *Minnesota: Re* Johnson, 176 Fed. 951; *Re* Hassler, 204 Fed. 139; *Mississippi: Re* Rainwater, 191 Fed. 738; *Re* H. W. Bundy & Co., 218 Fed. 711; *Montana: Re* Lehfeldt, 225 Fed. 681; *Nebraska:* Smith v. Thompson, C. C. A., 213 Fed. 335; *New York: Re* Murphy, 221 Fed. 449; *Re* Hoag, 227 Fed. 478; *Re* Hoag, 227 Fed. 480; *Re* French, 231 Fed. 255; *North Carolina: Re* Woodward, 95 Fed. 260; *Ohio: Re* Stern, 208 Fed. 488; *Re* Strauch, 208 Fed. 842; *Re* Radcliffe, 243 Fed. 716; *Re* Stitt, C. C. A., 252 Fed. 1; *Oregon: Re* Majors, 241 Fed. 538; *Pennsylvania: Re*

ruptcy Act control as to the time and manner of the claim, award,

Wunder, 133 Fed. 821; *Re* Sloan, 135 Fed. 873; *Re* Renda, 149 Fed. 614; see *Re* Rice, 164 Fed. 589; *Re* Dittmar, C. C. A., 249 Fed. 606; *South Carolina: Re* McCutchen, 100 Fed. 779; Norwood v. Watson, C. C. A., 242 Fed. 886; *South Dakota: Re* Novak, 150 Fed. 602; *Re* Carlon, 189 Fed. 815; *Re* I. S. Vickerman & Co., 199 Fed. 589; *Tennessee: Re* Coffman, 93 Fed. 422; *Re* Smith, 96 Fed. 832; Duncan v. Ferguson-McKinney Dry Goods Co., C. C. A., 150 Fed. 269; *Texas:* Langever v. Stitt, C. C. A., 237 Fed. 83; Woodward v. Sanger Bros, C. C. A., 246 Fed. 777; Dunn v. Eckhardt, C. C. A., 256 Fed. 315; *Washington:* Jennings v. William A. Stannus & Son, C. C. A., 191 Fed. 347; *Wisconsin: Re* Jones, 97 Fed. 773; *Re* Hoag, 97 Fed. 543.

The Federal court is not bound by a statement in the opinion of a State court, which is not essential to the decision, *Re* Sullivan, C. C. A., 148 Fed. 815. An order of the Court of Bankruptcy upon the report of a trustee setting aside property as exempt is *res adjudicata* in the State and Federal courts, as to all creditors who had proper notice of the bankruptcy proceedings. *Re* Turnbull, 106 Fed. 667. It has been held that a judgment of the State court as to the right of exemption upon the same property is binding upon the Court of Bankruptcy, Smalley v. Laugenour, 196 U. S. 93, 49 L. ed. 400; unless it has no jurisdiction of the case, *Re* Rhodes, 109 Fed. 117; *Re* Eash, 57 Fed. 996. A provision in a State statute, "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt, is followed. Holden v. Stratton, 98 U. S. 202, 49 L. ed. 1018, reversing *Re* Holden, C. C. A., 114 Fed. 650. It has been held that the State statutes authorizing exemptions of life insurance are not invalidated by the provisions of the Bankruptcy Law (§ 70*a*, subd. 5) upon that subject. *Re* Johnson, 176 Fed. 591; *Re* Carlon, 189 Fed. 815. See authorities cited *supra*, § 643. Where the state statute provided that no property "while in the hands of the vendee" should be exempt from execution for debts contracted for the purchase thereof, the bankrupt, who held the property at the time of the institution of the bankruptcy proceedings, was not allowed an exemption, although the goods were subsequently sold by the trustee. Mullinix v. Simon, C. C. A., 96 Fed. 775. The distinction between individual and partnership property is determined by the general principles of the law upon the subject enforced in the Federal courts irrespective of the decisions of the State courts upon the subject. *Re* Turnock & Sons, C. C. A., 230 Fed. 985. In the absence of fraud or the insolvency of a firm at the time of its dissolution, the partner to whom its assets were transferred does not lose his right to an exemption in bankruptcy proceedings shortly thereafter instituted; *Re* Kolber, 193 Fed. 281; but a pretended dissolution with the intention of allowing him to claim an exemption in bankruptcy from the firm assets, *Re* Abrams, 193 Fed. 271; or an abandonment of the firm by the other partner without any actual dissolution, *Re* Abrams, 193 Fed. 271, is ineffectual as against partnership creditors. As to the exemptions of

selection, and setting apart of the exemptions.[5] The Court of Bankruptcy has jurisdiction to determine the amount of the exemptions to which the bankrupt is entitled[6] but not to administer them.[7] Exempt property is no part of the estate in bankruptcy and its title does not pass to the trustee,[8] but where process is necessary to segregate the parts which are exempt from those which are not, the Court of Bankruptcy has jurisdiction to regulate the time and manner thereof.[9]

It is the duty of the trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."[10]

partners, see *Re* Rutland Grocery Co., 189 Fed. 765; *Re* I. S. Vickerman & Co., 199 Fed. 589. An omission by a bankrupt to keep a full account of the sales made by him in a business which the creditors permitted him to continue after the petition had been filed and before the trustee was elected, was held not to be such misconduct as to deprive him of his right to an exemption. *Re* McUlta, 189 Fed. 250. But see *Re* Denson 195 Fed. 857. A partner who has been discharged from the proceedings because of his infancy cannot claim exemptions therein, *Re* W. J. Floyd & Co., 154 Fed. 757.

5 *Re* Culwell, 165 Fed. 828; *Re* Andrews & Simonds, 193 Fed. 766; *Re* Crum, 121 Fed. 729; *Re* Lenters, 225 Fed. 878.

6 McGahan v. Anderson, C. C. A., 113 Fed. 115. It has been held that where a bankrupt dies pending the bankruptcy proceedings seized of land in different States, the Court of Bankruptcy, in which the proceedings are pending, has exclusive jurisdiction to determine the right of the widow to dower in all such land. Hurley v. Devlin, 151 Fed. 919. See *supra*, §§ 608, 613.

7 Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061.

8 Ibid.

9 Bank of Nez Perce v. Pindel, C. C. A., 193 Fed. 917.

10 30 St. at L. 544, 557, § 47; *Re* Friedrich, C. C. A., 100 Fed. 284; *Re* Diller, 100 Fed. 931; *Re* Camp, 91 Fed. 745; *Re* Woodward, 95 Fed. 955; *Re* Grimes, 96 Fed. 529; *Re* McBryde, 99 Fed. 686; *Re* McCutchen, 100 Fed. 779; *Re* Smith, 93 Fed. 791. "The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party." General

The exemptions should be claimed in the schedules, which

Order XVII; *Re* Cheatham, 110 Fed. 371. It has been said that, when no trustee is appointed, the court sets apart the exemptions. Smalley v. Laugenour, 196 U. S. 93, 97, 49 L. ed. 400; *Re* W. C. Allen & Co., 134 Fed. 620. "Any agreement on the part of the bankrupt or the creditors that the exemptions shall be allotted in any other manner than that prescribed by the bankruptcy law, or through other agencies than that of the trustee of the bankrupt, is a nullity." *Re* Grimes, 96 Fed. 529, 531, 532, per Ewart, J. "When the exemptions are formally set apart by the trustee, and affirmed by the court, the title of the bankrupts then becomes superior to that of the trustee, and absolute. After the exempt property has been designated and set apart to the bankrupts by the trustee, it has been administered, and has passed out of the possession and control of the Bankruptcy Court. The trustee has no further concern with it, nor has the court any jurisdiction to defend such property from adverse claims or liens that may or may not be extinguished by the bankruptcy proceedings." *Re* Grimes, 96 Fed. 529, 534, per Ewart, J. And, in such case, it has been held that the claims of creditors, as regards whom the bankrupt has waived his exemption, *Re* Sloan, 135 Fed. 873; *Re* Renda, 149 Fed. 614; and claims which, by the State statute, take priority to the exemptions, must first be paid out of the fund. *Re* Renda, 149 Fed. 614. In the distribution of the proceeds of the lien of a landlord or other person, it will be given priority over the claim of exemption, if this is authorized by the State law. *Re* Highfield, 163 Fed. 924. It has been held that the trustee may except, on behalf of the creditors, to an allowance for an exemption on the ground of fraud, which, under the State statute, is a ground for forfeiture, *Re* Rice, 164 Fed. 589; *Re* Culwell, 165 Fed. 828; *Re* Rice, 164 Fed. 589. A bankrupt, as well as the creditors, has the right to except to the trustee's report. *Re* Finklestein, 192 Fed. 738. After the expiration of the twenty days of limitation prescribed by the general order, objections cannot be filed, and it has been held that objections previously filed cannot be amended by adding additional grounds to the same. *Re* Cotton & Preston, 183 Fed. 190. It seems that the exceptions to the report of the trustee setting aside the exceptions need not be verified. The burden of proof to establish that an article is exempt ordinarily rests upon the bankrupt. *Re* Campbell, 124 Fed. 417; *Re* Rainwater, 191 Fed. 738. See *Re* Denson, 195 Fed. 857. It was held that the acceptance, by the bankrupt, of so much of a referee's order as allowed him exemptions of personal property did not preclude him from appealing from another by the same order, which affected his right to the exemption of a homestead. *Re* Letson, C. C. A., 157 Fed. 78. A referee was allowed to deduct from the exemption the value of the goods which the bankrupt had failed to surrender to the trustee, although they were in the possession of the latter on the eve of the bankruptcy proceeding. *Re* Aronson, 233 Fed. 1022. Where the bankrupts failed to make a full disclosure of their

the act requires to be filed within ten days after a petition in

personal property, but the amount of the concealment could not be ascertained, they were not allowed their personal property exemptions until all of the personal property had been accounted for, *Re* Ansley Bros., 153 Fed. 983. It has been held that the trustee may dispute the bankrupt's claim to an exemption, *Re* Bonvillain, 32 Fed. 370. *Contra*, *Re* Humphreys, 221 Fed. 997. The court refused to consider exceptions filed after the expiration of the twenty days, *Re* Kreenn, C. C. A., 229 Fed. 711. It has been held that a bankrupt may claim his exemption out of property recovered by the trustee or returned to him as a preference, *Re* Osborn, 104 Fed. 780; *Re* Tollett, C. C. A., 106 Fed. 866; *Re* Falconer, C. C. A., 110 Fed. 111; Bashinski v. Talbott, C. C. A., 119 Fed. 337; Remington on Bankruptcy, § 1095. *Contra*, *Re* White, 109 Fed. 635; *Re* Long, 116 Fed. 113; *Re* Evans, 116 Fed. 909; or because of its fraudulent conveyance by the bankrupt. *Re* Tollett, C. C. A., 54 L.R.A. 222, 106 Fed. 866; *Re* Thompson, 115 Fed. 924. Where the bankrupt sells goods between the time when the petition is filed and that when the property is taken into custody by an officer of the Court of Bankruptcy, the sum that he receives from such sale should be deducted from his statutory exemption. *Re* Ansley Bros., 153 Fed. 983; *Re* McUlta, 189 Fed. 250, holding that the burden of proof that he sold more than he admitted was upon the creditors. But see *Re* Denson, 195 Fed. 857. Where personal property which the bankrupts were entitled to claim as exempt was sold at the bankrupt's request that cash be allowed them, instead of the property, the bankrupts should be charged with their percentage of the difference between the proceeds of the property and its appraised value as against the amount of their exemptions, *Re* Ansley Bros., 153 Fed. 983. It has been held that exempt property may be charged with the actual expenses for the storage thereof. Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061; *Re* Edwards, 156 Fed. 794; and also for the statutory fees, *Re* Grimes, 96 Fed. 529. But see *Re* Le Vay, 125 Fed. 990; pending the proceedings necessary for its separation from the assets of the estate. *Re* Bean, 100 Fed. 262; *Re* Castleberry, 143 Fed. 1021. But see *Re* Le Vay, 125 Fed. 990.

Where the bankrupt's land is encumbered by mortgages, it has been held that the Court of Bankruptcy may sell it and allot the bankrupt his homestead exemption out of the proceeds. *Re* Paramore & Ricks, 156 Fed. 208. But in *Re* Brown, 228 Fed. 533; which must be paid to him and cannot be paid to the mortgagee, although the mortgage covers the homestead besides other property, *Re* Paramore & Ricks, 156 Fed. 211. But see *Re* Sloan, 135 Fed. 873; *Re* Renda, 149 Fed. 614. Where the property is sold by a receiver or trustees in bankruptcy after the bankrupt has seasonably claimed his exemptions, *Re* Sloan, 135 Fed. 873; *Re* Renda, 149 Fed. 614; Dunlap Hardware Co. v. Huddleston, C. C. A., 167 Fed. 433; *Re* Finklestein, 192 Fed. 738, before he has had due opportunity to claim or select the surety, *Re* Andrews & Simonds, 193 Fed. 776; or where the

voluntary bankruptcy or an adjudication in involuntary bankruptcy.[11] Otherwise they are usually waived.[12] An amendment of the schedules may be allowed so as to cure a defect in the claim for exemptions,[13] and even, it has been held, to insert an exemption not previously claimed;[14] but not after the discharge.[15] The withdrawal of a claim to an exemption is a waiver thereof, which cannot subsequently be revoked,[16] except under the most extraordinary circumstances.

Liens upon exempt property, which would be invalidated by the bankruptcy if the property were not exempt, are abrogated by the proceedings.[17] Where creditors hold a waiver of the bank-

trustee has wrongfully refused to set the exemptions apart and to report thereupon, *Re* Finklestein, 192 Fed. 738; the bankrupt will be allowed them out of the proceeds, even when he has consented to the sale, *Re* Renda, 149 Fed. 614. An agreement to that effect between the bankrupt and trustee was approved. *Re* Hutchinson, 197 Fed. 1021. After the property had been set off as an exempted homestead, it was held that the court had no power to sell the same subject to the estate of the bankrupt. Sullivan v. Mussey, C. C. A., 184 Fed. 60, affirming *Re* Mussey, 179 Fed. 1007.

11 *Re* Woodward, 95 Fed. 955; *Re* Haskin, 109 Fed. 789; *Re* Wunder, 133 Fed. 821; *Re* Donahey, 176 Fed. 458. 30 St. at L. 544, § 7. A claim of "three hundred dollars cash from the proceeds, as provided by the exemption law of Pennsylvania, or stock to the value of three hundred dollars, to be set aside by the appraisers, as provided by law, was held to be sufficient in form where the assets consisted of merchandise. *Re* Kelly, 199 Fed. 984.

12 *Re* W. S. Jennings & Co., 166 Fed. 639; *Re* Harrington, 200 Fed. 1010; *Re* Gerber, C. C. A., 186 Fed. 693. Where the bankrupt failed to file his claim for exemptions within that time and before the sale of his assets, the State law requiring exemptions to be claimed before such a sale; it was held that he waived them, although he appeared and objected to the order for the sale upon the ground that his exemptions had not been allowed to him. *Re* Wunder, 133 Fed. 821; *Re* Exum, 209 Fed. 716; *Re* Webb, 219 Fed. 349.

13 *Re* Maxson, 170 Fed. 356, a homestead exemption; *Re* Irwin, 177 Fed. 284; *Re* Crum, 221 Fed. 729.

14 *Re* Bean, 100 Fed. 262; *Re* Maxson, 170 Fed. 356.

15 *Re* Irwin, 174 Fed. 642, reversing 177 Fed. 284, where after the allowance of exemptions which did not equal the full statutory amount, assets were subsequently discovered. A waiver by the bankrupt as regards certain creditors, of his right to exemptions, does not put the property originally exempt within the jurisdiction of the Court of Bankruptcy. *Re* Anderson, 110 Fed. 141.

16 *Re* Baughman, 183 Fed. 668.

17 Chi., B. & Q. R. R. v. Hall, 229 U. S. 511; *Re* Arnold, 94 Fed. 1001; *Re* Boffinger, 108 Fed. 374; *Re* McCartney, 109 Fed. 621; *Re* Tune, 115

rupt's exemption they must enforce it in the State court;[18] but, there should be a reasonable postponement of the discharge of the bankrupt, in order that the creditors may have an opportunity to take such proceedings in the State courts as are necessary to make their rights effective,[19] and they may be allowed to withdraw their claims for that purpose.[20]

§ 651. Exemption of bankrupt from arrest. "A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim for which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a Court of Bankruptcy or engaged in the performance of a duty imposed by this act."[1] "If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may

Fed. 906; *Re* Beals, 116 Fed. 530; *Re* Downing, 139 Fed. 590. But see *Re* Weaver, 144 Fed. 229; Remington on Bankruptcy, § 1100.

18 It has been held that a Court of Bankruptcy has no authority to hold in custody the exempt property of a bankrupt to await the determination of an action in tort against him in a State court, *Re* Hartsell & Son, 140 Fed. 30; *Re* Remmerde, 206 Fed. 822; *Re* Cheatham, 210 Fed. 370; *Re* Brown, 228 Fed. 533; *Re* Dittmar, C. C. A., 249 Fed. 606. But see *Re* Goldberg, 254 Fed. 441.

19 Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061; *Re* W. C. Allen & Co., 134 Fed. 620; *Re* Castleberry, 143 Fed. 1018. The proof, as an unsecured claim, of a bankrupt's note containing a waiver of homestead exemption, was held not to be a waiver of the creditor's right to subject the homestead to the payment of the balance of his debt after crediting his dividends in bankruptcy. *Re* Loden, 184 Fed. 965.

20 *Re* Strickland, 167 Fed. 867. Where the bankrupts converted $100, which was derived from the sale of goods between the time of the filing of the petition for adjudication and the time when property was taken into custody by the deputy marshal, such sum was deducted from the bankrupt's exemptions, *Re* Ansley Bros., 153 Fed. 983.

§ 651. 1 30 St. at L. 544, 549, § 9. General Order XII. "The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the

order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.''[2]

court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court.''

[2] General Order XXX. It has been held that the bankrupt cannot be arrested, even upon a debt which is not affected by the bankruptcy, during the entire period from the adjudication until his discharge, or, if he is not discharged, until the time limited for his discharge has expired, *Re* Lewensohn, 99 Fed. 73. But see *Re* Baker, 96 Fed. 954. *Cf.* Barrett v. Prince, C. C. A., 143 Fed. 302. He may be discharged when he was arrested before his bankruptcy. People ex rel. Taranto v. Erlanger, 132 Fed. 883; Turgeon v. Emery, 182 Fed. 1016; *Re* Komar, 234 Fed. 378; Ex parte Margiasso, 242 Fed. 990; *Re* Madigan, 254 Fed. 221. *Contra, Re* Claiborne, 109 Fed. 74; People ex rel. Taranto v. Erlanger, 132 Fed. 883; Turgeon v. Emery, 182 Fed. 1016; *Re* Hall, S. D. N. Y. May 4, 1916; People ex rel. Wiloy v. Smith, N. Y. Sup. Ct. Sp. Tm. per Hotchkiss, J., N. Y. L. J. May 31, 1916. It has been held that the Court of Bankruptcy may protect from arrest under a judgment entered after his discharge pending an applietaion for relief to the court which entered such judgment. *Re* Lockwood, 240 Fed. 161. Protection from arrest applies to process from any Court of the United States, as well as to process from a State court. *Re* Wenham, 153 Fed. 910. It has been held that the Court of Bankruptcy will not discharge a bankrupt from arrest for a contempt of court, even when he has been committed for disobedience to an order in proceedings supplementary to execution, until the payment of a fine, of the amount of the judgment, upon which

§ 652. Declaration and payment of dividends. "(*a*) Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.[1] (*b*) The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed, equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided,* that the first dividend shall not include more than 50 per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: and provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared. (*c*) The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors

those proceedings are founded. *Re* Fritz, 152 Fed. 562. But see *Re* Houston, 94 Fed. 119. An injunction was granted against an application during the pendency of the bankruptcy proceedings to punish the bankrupt for contempt of a judgment of a State court. *Re* Adler, C. C. A., 144 Fed. 659. The Bankruptcy Act does not prevent the arrest and imprisonment of a judgment debtor upon proof of the fraudulent removal or concealment of his property, under the Pennsylvania Act of July 12, 1842, p. 339, in either the State courts or the circuit court of the United States. *Ex parte* Crawford, C. C. A., 154 Fed. 769. Motion for leave to file petition for writ of *habeas corpus* denied, 206 U. S. 561, 51 L. ed. 1189. The discharge from arrest may be conditioned upon the filing of a bond not to depart from the jurisdiction. *Re Lewensohn,* 99 Fed. 73; *Re* Dresser, 124 Fed. 915. An injunction against the prosecution of a suit against a surety upon the bankrupt's bail bond was denied when the latter's personal liability was not threatened. *Re* Franklin, 106 Fed. 666.

§ 652. [1] Dividends cannot be attached in the hands of the trustee in bankruptcy before their payment, although the State law permits this in the case of a trustee appointed by a State court. *Re* Hollander, 181 Fed. 1019; *Re* Argonaut Shoe Co., C. C. A., 187 Fed. 784. See *supra,* §§ 56, 470.

proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.[2] (*d*) Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a Court of Bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts. (*e*) A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act."[3]

"(*a*) Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. (*b*) Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends."[4] "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."[5]

2 Where a creditor fails to prove his claim until after a dividend has been paid, he can only claim to share *pro rata* in those subsequently paid. *Re* Stein, 94 Fed. 124; *Re* Scott, 96 Fed. 607, for claims to interest on dividends. It seems that an order declaring a dividend may be revoked before any payment thereunder, upon the proof of a large claim not previously presented. *Re* Henry Siegel Co., 216 Fed. 943.

3 30 St. at L. 544, 563, § 65. "A dividend 'in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion.'" *Re* Barber, 97 Fed. 547, 550, per Lochren, J.

4 30 St. at L. 544, 563, § 66.

5 30 St. at L. 544, § 57, subd. *h*, as amended 32 St. at L. 797. But

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or

see Washington-Alaska Bank v. Dexter Horton Nat. Bank, C. C. A., 263 Fed. 304. The value can be fixed, after a hearing, by the referee. *Re* Davison, 179 Fed. 750, where the bank was not required to surrender the security to the trustee after the value thereof had been deducted from the amount claimed, upon which the dividend was declared. A creditor holding an endorsement or guarantee by another is not considered as secured, Young v. Gordon, C. C. 219 Fed. 168; *Re* Bash, 245 Fed. 808; *supra*, §§ 608, 645. The holder of a claim against several parties, one or more of whom become bankrupt, may prove his claim for the full amount against the estate of each bankrupt and pursue other obligors in actions at law. He may collect dividends upon the full amount of his claim, with such interest as he may be entitled to, up to the time of the filing of the petition, against each estate in bankruptcy, until he has collected the full payment thereof from any or all sources, but no longer. Board of County Com'rs of Shawnee County, Kan. v. Hurley, C. C. A., 169 Fed. 92, *Re* Simon, 197 Fed. 105. Where a creditor has security for a claim that can be proved in the bankruptcy proceedings, and another that cannot, he may marshal his security against the unprovable claim, and, if that exhausts the same, prove all of the other against the estate. Hiscock v. Varick Bank, 206 U. S. 28, 37, 51 L. ed. 945, 951. When the security is insufficient, the creditor may charge against the principal thereof interest that has accrued upon the debt prior to the filing of the petition; Sexton v. Dreyfus, 219 U. S. 339, 55 L. ed. 244; *Re* Fabacher, 193 Fed. 556; but not interest subsequently accruing, Sexton v. Dreyfus, 219 U. S. 339, 55 L. ed. 244; reversing *Re* Kessler, C. C. A., 180 Fed. 979, 171 Fed. 751. See Harv. Law Rev., XXIII, 219; although he may charge such subsequently accruing interest against dividends and interest that accrue upon the security subsequent to the institution of the bankruptcy proceedings. *Re* Graves, 182 Fed. 443. See Sexton v. Dreyfus, 219 U. S. 339, 55 L. ed. 274. Where mortgaged land, subject to mechanics' and judgment liens, was sold by the trustee free from liens, which were transferred to the proceeds, it was held that interest was payable upon the mortgage debt until the date of the payment of the principal thereof, but that this was not the case as regards the liens of mechanics and judgment creditors. *Re* Torchia, 185 Fed. 576. Where the creditor bought his security at a foreclosure sale for less than the amount of his claim, his dividend was estimated upon the difference between the amount of his debt and the value of the property so obtained. *Re* Progressive Wall Paper Co., 224 Fed. 143, reversed on another point, 229 Fed. 489; *Re* J. G. Reichard & Bro., 230 Fed. 525; *Re* McAusland, 235 Fed. 173; *Re* Clark Realty Co., C. C. A., 253 Fed. 938.

the proportional part thereof if rejected, only in part."[6] A Court of Bankruptcy has jurisdiction to determine the question whether, because of inequitable conduct, the claim of one creditor to a dividend should be postponed to that of another.[7] It has been held: that exceptions to the proposed distribution of a bankrupt's estate must be filed before the final decree of con-

6 30 St. at L., 544, § 57, subd. 1, as amended 32 St. at L. 797. No objection to the payment of a dividend to anyone can be made by a person whose claim has been disallowed, *Re* Blanton, 219 Fed. 679; *Re* Stringer, 244 Fed. 629; *Re* Schloss, 257 Fed. 876.

7 Western Tie & Timber Co. v. Brown, 196 U. S. 502, explained *supra*, § 644; *Re* Headley, 97 Fed. 765; *Re* Knox, 98 Fed. 585; *Re* Cannon, 121 Fed. 582; *Re* Royce Dry Goods Co., 133 Fed. 100; *Re* Ewald & Brainard, 135 Fed. 168. An estoppel may be enforced in favor of all, *Re* Cloverdale Creamery Co., C. C. A., 249 Fed. 194; or a part of the creditors, Courtney v. Croxton, C. C. A., 239 Fed. 247. Where a debt barred by the statute of limitations is included in the bankrupt's schedules, a creditor is entitled to a dividend after the payment of expenses of administration and the full amount of all other claims that are proved and allowed. *Re* Currier, 192 Fed. 695; *Re* W. A. Silvernail Co., 218 Fed. 977; *supra*, § 647. It has been held that a partner who has loaned money to the firm may prove a claim therefor, but that he cannot share in the distribution of the partnership assets until all the firm creditors are paid. Re Effinger, 184 Fed. 728. *Contra*, *Re* Walker, 176 Fed. 455. See § 647, *supra*. A surety of part of a debt of the bankrupt cannot receive a dividend upon his payments thereupon until the creditor whose debt was partly secured by him has been paid in full. *Re* Am. Product Co., 221 Fed. 126. The creditor may compel payments by the surety before the termination of the proceedings in bankruptcy; but he must thereupon assign to the latter his rights to dividends, U. S. Fidelity & Guaranty Co. v. Eichel, C. C. A., 241 Fed. 357. A trustee may in a proper case be subrogated to the rights of certain creditors to dividends. Searle v. Mechanics' Loan & Trust Co., C. C. A., 249 Fed. 942. Dividends due an assignee whose assignor was indebted to the estate and had become a bankrupt were first applied to the payment of the sum owed by the assignor and no payment was made to the assignee until the other's debt had been paid in full. Boatman's Bank v. Laws, C. C. A., 257 Fed. 299. Creditors who had participated in a fraudulent transfer of assets were not allowed to share in the proceeds thereof after such assets had been recovered. Wells v. Lincoln, C. C. A., 214 Fed. 227, reversing *Re* Wenatchee Heights Orchard Co., 209 Fed. 84. Payment of the dividends due solvent stockholders, who were liable only to creditors thereby defrauded for the difference between the par value of their stock and the amount they had paid therefor, was not postponed until after the payment of other creditors. Courtney v. Croxton, C. C. A., 239 Fed. 247.

firmation is entered; that if not filed until thereafter and after the distribution of the final dividend, they will not be considered, although accompanied by a petition for review,[8] and that, where a bankrupt's estate is ready for final dividend, it may be closed at any time after four months from the adjudication, upon notice to all persons scheduled as creditors or appearing as such in any way in the proceedings.[9] Any surplus left after payment of the expenses of the administration and the number of the claims that are proved, should be applied to the payment of interest upon the latter.[10]

§ 653. Compositions. "(*a*) A bankrupt may offer,[1] either before or after adjudication, terms of composition to his creditors [2] after,[3] but not before,[4] he has been examined in open court [5] or at a meeting of his creditors [6] and filed in court the schedule of his property and list of his creditors, required to be filed by bankruptcy.[7] In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims,

8 *Re* Heebner, 132 Fed. 1003. In the Eastern District of New York it was held to be too late to object to a dividend when ten days had elapsed after the order of the Referee, *Re* Stringer, 244 Fed. 629.

9 *Re* Eldred, 155 Fed. 686.

10 *Re* John Osborn's Sons & Co., C. C. A., 29 L. R. A. (N. S.) 887, 177 Fed. 184; Johnson v. Norris, C. C. A., 190 Fed. 459.

§ 653 1 The offer should not contain arguments in favor of its acceptance or approval. *Re* Graham & Sons, C. C. A., 251 Fed. 93. The bankrupt may be allowed to amend his offer, *Re* Kinnane Co., 217 Fed. 488; *Re* Cockshaw, 220 Fed. 239; but permission to do this may be denied after his first offer has been rejected. Ibid. *Re* Griffith Stillings Press, 244 Fed. 315. The amended offer should be submitted to the creditors in the same manner as an original offer, *Re* Kinnane Co., 217 Fed. 488. It has been held that the offer cannot be withdrawn, *Re* Agree, 247 Fed. 590, where it had been accepted by the requisite number of the creditors.

2 Creditors who have not proved their claims should be notified. *Re* Rider, 96 Fed. 808; *Re* Kinnane Co., 217 Fed. 488. See *Re* Atlantic Const. Co., 228 Fed. 571.

3 It has been held that the composition may be offered after the discharge of the bankrupt and the payment of the first dividend. *Re* Spiller, 250 Fed. 490.

4 *Re* Berler Shoe Co., 246 Fed. 1018.

5 The term "in open court" includes proceedings before the referee. *Re* Bloodworth-Stembridge Co., 178 Fed. 372.

6 *Re* Fox, 222 Fed. 135; *Supra*, § 637a.

7 *Supra*, § 627a.

examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed. (*b*) An application for the confirmation of a composition may be filed in the Court of Bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims,[8] and the consideration to be paid by the bankrupt to his creditors,[9] and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.[10]

[8] The courts have refused to confirm compositions where the votes of relatives of the bankrupt and of an assignee of a claim who had bought this for its face value were essential to the majority. *Re* McClellan, 204 Fed. 482; *Re* Goldstein, 213 Fed. 115; *Re* Weintrob, 240 Fed. 532; and where a majority of the creditors of individual members of a bankrupt firm failed to give their consent, although consent was given by a majority of the creditors of the firm, who were a majority in number and amount of all the creditors of the firm and the individuals. *Re* Ullman, 180 Fed. 944. It is the safer practice to present the composition to a special meeting of the creditors, called for that express purpose. *Re* Rider, 96 Fed. 808; *Re* Frear, 120 Fed. 978; Remington on Bankruptcy, § 2358. A creditor whose claim has been withdrawn is not counted in determining the number essential to such a majority. *Re* M. & H. Gordon, 245 Fed. 905.

[9] The consideration must be cash or notes and not a mortgage. *Re* Kinnane Co., 221 Fed. 762; nor stock in a new corporation formed to re-organize the bankrupt's affairs. *Re* Prudential Outfitting Co., 250 Fed. 504. The proper manner of providing for a settlement through a re-organization is a sale at an upset price fixed by the court. Ibid. See *supra*, §§ 310a, 394e, 641a. When the consideration was part cash and the balance in notes endorsed by a corporation which bought the assets, it was held that these were not subject to a trust in favor of the holders of the notes giving them a priority over other creditors of the endorser. *Re* Fleig Mercantile Co., C. C. A., 237 Fed. 178. Confirmation was denied when the consideration consisted of promissory notes or promises by the bankrupt to deliver merchandise at a future day. *Re* Frear, 120 Fed. 978; or stock, *Re* Woodend, 133 Fed. 593; or obligations, *Re* Rosenblatt, 153 Fed. 335; *Re* J. B. & J. M. Cornell Co., 186 Fed. 859; when no provision was made for the costs of the bankruptcy proceedings, *Re* Harris, 117 Fed. 575.

[10] It is the safer practice to pro-

(*c*) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections [11] as may be made to its confirmation. (*d*) The judge [12]

cure an order from the judge designating the amount of the deposit and the place thereof. *Re* Frear, 120 Fed. 978; *Re* Bloodworth-Stembridge Co., 178 Fed. 372; although it is the more usual custom for the referee to certify the requisite amount and the bankrupt to deposit the money in the regular depository. Remington on Bankruptcy, § 2364. A deposit must be sufficient to pay all costs, priority claims and expenses. *Re* Rider, 96 Fed. 808; *Re* Harris, 117 Fed. 575; *Re* Harvey, 144 Fed. 901. The expense of conducting the bankruptcy proceedings for the purposes of the composition must be included in the deposit, *Re* Miller, 243 Fed. 242. It has been held that the fees of an attorney employed by a creditors' committee to investigate the condition of the bankrupt's estate should not be paid therefrom. *Re* Siegel, 252 Fed. 197. The preference collected by the bankrupt cannot be given priority. *Re* Alpert, 237 Fed. 295. The deposit in case the composition fails may be used for the expenses occasioned by the stay which the bankrupt thereby secured; but not, it has been held, for delay caused by the opposition of creditors. *Re* Wiener, 217 Fed. 169. See *Re* Miller, 243 Fed. 242. The deposit should not be distributed until after the liquidation of the claims of secured creditors who are entitled to share therein. *Re* H. B. Hollins & Co., 230 Fed. 920. See *Re* Spiller, 230 Fed. 490. Interest which accrued upon the deposit pending litigation in opposition to the confirmation was allowed to the bankrupt. *Re* Kelley, 223 Fed. 383. It has been held that the creditors may waive the actual deposit of money or securities. Kinkead v. Bacon & Son, C. C. A., 230 Fed. 362.

11 Creditors whose claims have been barred by failure to present the same within the statutory time have no standing to oppose the composition. *Re* French, 181 Fed. 83, holding that it is immaterial that the claims have been omitted from the schedules and denying an adjournment of the proceedings because no provisions had been made for them. The acceptance by the creditor of a former offer which the court had not approved did not prevent him from objecting to a subsequent offer in substantially the same terms. *Re* Kinnane Co., 221 Fed. 762. Objections cannot be withdrawn in consideration of a promise to pay the objector more than any other creditor. *Re* Levenson, 228 Fed. 875. It has been held that the objectors cannot at this hearing question the right of a claimant to share in the distribution. *Re* Griffith Stillings Press, 244 Fed. 315.

12 The composition must be approved by the judge; *Re* Harvey, 144 Fed. 808; criticised in Remington on Bankruptcy, § 2367; *Re* Bloodworth-Stembridge Co., 178 Fed. 372; *Re* Graham & Sons, C. C. A., 252 Fed. 93; but he may refer the questions that arise there-

shall confirm a composition if satisfied that (1) it is for the best interests of the creditors;[13] (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge;[14] and (3) the offer and

upon to a referee as special master to report his findings for final disposition. *Re* Frear, 120 Fed. 978; *Re* Levy, 172 Fed. 372. The judge may refuse confirmation even when there are no objections. *Re* Kinnane Co., 221 Fed. 762.

[13] *Re* Doyle, C. C. A., 220 Fed. 434; *Re* Dozier Wholesale Grocery Co., 234 Fed. 169. It is not a fatal objection that the offer is in the same terms as an assignment for the benefit of creditors which was an act of bankruptcy. *Re* Graham & Sons, C. C. A., 252 Fed. 93. The approval of the majority of creditors creates a presumption that the composition is for the best interests of all, and the burden of proof is upon those who oppose the confirmation. *Re* Hoxie, 180 Fed. 508; *Re* McLellan, 204 Fed. 482; *Re* Silberstein, 225 Fed. 665; *Re* Spiller, 230 Fed. 490; *Re* Soloway & Katz, C. C. A., 234 Fed. 67. Confirmation of a composition may be refused, although it has been accepted by a majority in interest of the creditors, when the consideration appears to be insufficient. Adler v. Jones, C. C. A., 109 Fed. 967; Riley v. Pope, 186 Fed. 857. As when made in consideration of a promise by the creditors, that they will not prosecute the bankrupts criminally, nor furnish evidence against them in any criminal prosecution; *Re* Rosenblatt, 153 Fed. 335. A clause providing for a provisional order of adjudication was not approved when an order of adjudication that could not be attacked by the bankrupt had been previously made. *Re* Linderman, 166 Fed. 593. The court declined to review so much of the agreement as concerned the raising of funds to make payments to others than creditors in connection with the estate. Ibid. Confirmation may be refused when the consideration seems to be considerably less than the creditors would receive from the administration of the assets. Adler v. Jones, C. C. A., 109 Fed. 967; *Re* Morris, 246 Fed. 1021. But see *Re* Weber Furniture Co., Fed. Cas. No. 17,330, 13 N. B. R. 529; *Re* Arrington Co., 113 Fed. 498. The burden of showing this, is upon the objectors. *Re* Waynesboro Drug Co., 157 Fed. 101.

[14] *Re* Rivkin, 206 Fed. 218; *Re* Burman, 210 Fed. 512; Bolles v. Kelley, C. C. A., 222 Fed. 63; *Re* Silberstein, 225 Fed. 665; *Re* Levenson, 223 Fed. 875; *Re* Weintrob, 240 Fed. 532, where a large amount of assets described in the bankrupt's statement to sellers of merchandise had disappeared without any explanation by him; International Trust Co. v. Myers, C. C. A., 245 Fed. 110; *Re* Kerner, 245 Fed. 807. A false statement in the schedules by the bankrupt, if unknown to the petitioning creditor until after the confirmation, is a ground for setting this aside, although the order confirming it has recited that it appears that the bankrupt has not been guilty of any acts that would be a bar to his discharge. *Re* Roukous, 128 Fed. 645. The confirmation of a composition may be

its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. (*e*) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."[15] "(*a*) The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed,[16] set the same aside and reinstate

denied because the bankrupt has committed an act, which would be a bar to his discharge, although the creditors would have thereby received more than they could obtain from the regular administration of the estate. *Re* Godwin, 122 Fed. 111; *Re* Olman, 134 Fed. 681; *Re* Comstock, 154 Fed. 747; *Re* Griffin, 180 Fed. 792; *Re* B. Jacobson & Son Co., C. C. A., 196 Fed. 949. The fact that the objector had bought the claim against the bankrupt for the purpose of compelling, by threats of opposition to the confirmation, the settlement of a suit brought by the trustee did not influence the decision of the court. *Re* Comstock, 154 Fed. 747. Preferential payments to actual creditors who received them in good faith are no grounds for refusing to confirm the composition. *Re* McLellan, 204 Fed. 482; *Re* Rivkin, 206 Fed. 218.

15 30 St. at L. 544, 549, § 12, as am'd 36 St. at L. 838, 839. See Ross v. Saunders, C. C. A., 105 Fed. 915; *Re* Hilborn, 104 Fed. 866. No composition can be made without unanimous consent of the creditors, except in the manner directed by the statute, *Re* Malkan, C. C. A., 261 Fed. 894. The composition and the proceedings thereupon are a continuation of the original proceedings in bankruptcy, voluntary or involuntary as the case may be. *Re* Radley, 252 Fed. 205.

16 A composition cannot be set aside when an application is made more than six months after the date of its confirmation. *Re* Eisenberg, 148 Fed. 325; *Re* Jersey Island Packing Co., 152 Fed. 839; *Re* Ennis, 183 Fed. 859. It has been held: that the fact that a bankrupt has failed to perform the covenants in an agreement of composition is no ground for setting the composition aside, whatever may be its effect upon the operation of the composition as a discharge, *Re* Eisenberg, 148 Fed. 325; that, in the absence of fraud, a creditor who assents to a proposition releases his claim for damages caused by a breach of a contract, of which breach he then was ignorant, Fowle v. Park, 48 Fed. 789; and that an erroneous statement of the address of a creditor made in the schedules in good faith is no reason for setting aside the confirmation of the composition, although the creditor had no notice of the proceedings and his claim was not included in the composition, *Re* Rudnick, 93 Fed. 787.

the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition,[17] and that the knowledge thereof has come to the petitioners since the confirmation of such composition."[18] "The confirmation of a composi-

[17] *Re* Siegel, 256 Fed. 220.

[18] 30 St. at L. 544, 550, § 13. *Re* Ballance, 205 Fed. 505; *Re* Siegel, 256 Fed. 220; *Re* Kass, 263 Fed. 138. An order setting aside a composition should not be granted without notice to all the creditors who have consented thereto. *Re* Dunn, 53 Fed. 341. As to the rights of secured creditors under a composition, see Flower v. Greenebaum, 50 Fed. 190. It was held to be error to deny the application upon the payment by the bankrupt of part of the objector's claim. *Re* Ballance, C. C. A., 219 Fed. 537. It has been held: that a creditor, who has sold his claim for a consideration, cannot maintain a petition to set aside the confirmation of a composition subsequently made, although the sale was obtained through the fraudulent misrepresentations of the bankrupt and his trustee, *Re* Allen B. Wrisley Co., C. C. A., 133 Fed. 388; but that the institution of an action at law against the bankrupt does not justify the dismissal of a petition, previously filed by a creditor, to set aside the confirmation of a composition, *Re* Ronkous, 128 Fed. 648. It has been held that a verification of the petition to set aside a composition may be made in the usual form of the verification to a bill in equity. *Re* Ronkous, 128 Fed. 645; but that, where the principal allegations were made on information and belief, a verification by a joint petitioner, who had shown no personal knowledge of the facts, was insufficient. *Re* Ronkous, 128 Fed. 648. That the petition is not demurrable for the omission of an allegation that the petitioner has restored, or offers to restore, the consideration. *Re* Ronkous, 128 Fed. 645. Nor for a failure to allege the time and manner in which the petitioner acquired knowledge of the fraud charged, when there is an allegation that it was unknown to him until after the confirmation. *Re* Ronkous, 128 Fed. 645. And that leave to file a petition to set aside the confirmation of a composition should not be refused unless the petition, on its face, shows that, upon the facts stated, the petitioner cannot, under any circumstances, be entitled to relief. *Re* Allen B. Wrisley Co., C. C. A., 133 Fed. 388. The burden of proof rests upon the party who seeks to have the order of confirmation set aside. City Nat. Bank v. Doolittle, C. C. A., 107 Fed. 236. The composition will be set aside when it was obtained through false representations, made by the trustee concerning the assets, *Re* Allen B. Wrisley Co., C. C. A., 133 Fed. 388. A secret agreement made before the composition, that one creditor shall receive more than the other, is a fraud, which cannot be enforced. Brownsville Mfg. Co. v. Lockwood, 11 Fed. 705; *Re* Starr, 56 Fed. 142; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; Cavanna v. Bassett, 3 Fed. 215; but see Zavelo v. Reeves, 227 U. S. 625, even though the additional payment is for

tion shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." [19]

expenses incurred in investigation, *Re* M. & H. Gordon, 245 Fed. 905. Such an agreement is no ground for relieving the promisee from the legal consequences of his failure to prove his claim. *Re* Starr, 56 Fed. 142; and because of it the composition may be set aside. Brownsville Mfg. Co. v. Lockwood, 11 Fed. 705. But see *Re* Jacobson & Son Co., C. C. A., 196 Fed. 949. But after such creditor's claim had been withdrawn, the bankrupt was allowed to renew his application for confirmation. *Re* M. & H. Gordon, 245 Fed. 905. It has been held: that the trustee may recover any property that has been in pursuance of such an agreement conveyed to the creditor, even if part of the consideration was his assistance in procuring the consent of others by the purchase of claims and other wise, Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; but that the creditors cannot. Crowder v. Allen-West Commission Co., C. C. A., 213 Fed. 1. That the debtor may recover any excess he has paid the preferred creditor before the composition was made. Ibid. Batchelder & Lincoln Co. v. Whitmore, C. C. A., 122 Fed. 355, 359, 360, 362. But not what he has voluntarily paid after the composition was made, although paid pursuant to a previous agreement. Ibid. A mortgage or other security given before the composition for such a payment cannot be enforced. Copeland v. Hornik, 216 Fed. 117. Where a note with security, to pay the balance of a debt discharged by the composition, was given thereafter, it was held that it could be attacked for insufficient consideration when the payee had received the dividend, Spann v. Read Phosphate Co., C. C. A., 238 Fed. 338; but an agreement to pay in full, a creditor who advanced the funds to carry out a composition, did not prevent him from proving his claim in full upon the subsequent bankruptcy proceedings, *Re* Hawks, 204 Fed. 309. See Zavelo v. Reeves, 227 U. S. 625; Crowder v. Allen-West Commission Co., C. C. A., 213 Fed. 1, *supra*, § 652; and proof may then be made by anyone who has advanced funds for such a purpose. McKey v. Bruns, C. C. A., 243 Fed. 370.

[19] Bankruptcy Law, § 14c. The confirmation of a composition is, in effect, a discharge of the bankrupt. U. S. ex rel. Adler v. Hammond, C. C. A., 104 Fed. 862; Ross v. Saunders, C. C. A., 105 Fed. 915; *Re* Friend, C. C. A., 134 Fed. 778; *Re* Cooper Bros., 166 Fed. 932; *Re* Wilkens, 191 Fed. 94, *infra*, § 657. Notes which share in a composition cannot subsequently be used as a set-off. *Re* Am. Paper Co., 243 Fed. 753. See *supra*, § 652. A composition by a firm does not discharge the liability of the individual members for their individual indebtedness. *Re* Coe, C. C. A., 183 Fed. 745. Neither does the composition discharge a claim against the stockholders of the bankrupt corporation. *Re* Berler Shoe Co., 246 Fed. 1018. The confirmation of a composition dissolves liens by

§ 654. Reopening estates in bankruptcy. The bankruptcy courts have jurisdiction to "close estates, whenever it appears

attachment or otherwise which arose within four months prior to the proceeding and which would have been dissolved by an adjudication of bankruptcy, *Re* Lilienthal, C. C. A., 256 Fed. 819; but not other liens, the holders of which did not share in the composition. Oilfields Syndicate v. Am. Improvement Co., 256 Fed. 979; Cobb v. First Nat. Bank, 263 Fed. 1000. It discharges debts which were not filed and proved within the statutory time. *Re* Maytag-Mason Motor Co., 223 Fed. 684; Cobb v. First Nat. Bank, 263 Fed. 1000; *supra*, § 646. It has been held that a creditor whose claim is not dischargeable is entitled to share in the benefits of the composition without prejudice to subsequent proceedings by him to collect his claim. *Re* Alpert, 237 Fed. 295. Unscheduled creditors, who had no notice of the bankruptcy proceedings, are not barred by the composition, *Re* Lockwood, 104 Fed. 794. But they have no right to share therein, unless they present their claims before it has been confirmed, *Re* Abrams & Rubins, 173 Fed. 430; nor even, it has been held, unless they present these before the referee has made a rule nisi why the order of confirmation should not be entered, *Re* Ennis, 183 Fed. 859. It has been said that the only remedy in such a case is to set aside the confirmation for fraud. *Re* Abrams & Rubins, 173 Fed. 430. It does not operate to extend the time for filing claims beyond one year after adjudication, nor has the court authority to allow claims filed after expiration of that time. *Re* Bickmore Shoe Co., 263 Fed. 926. The composition does not prevent a liquidating trustee to whom the assets are thus transferred from maintaining a suit under a State statute to set aside a preferential transfer by the bankrupt, Kobre Assets Corp. v. Baker, 178 App. Div. (N. Y.) 62. It does not deprive the referee of jurisdiction to pass on the accounts of the trustee and to direct that he be discharged and the estate closed, U. S. v. Sondheim, 188 Fed. 378. Otherwise the approval of the composition ordinarily terminates the jurisdiction of the Court of Bankruptcy over the property, *Re* Frischknecht, C. C. A., 223 Fed. 417; *Re* Hollins, C. C. A., 229 Fed. 349; *Re* Hollins, C. C. A., 238 Fed. 787; see *Re* Kligerman, 253 Fed. 778; and also, it has been held, over any trustee thereby appointed to collect and distribute the assets, Guaranty Trust Co. v. McCabe, C. C. A., 250 Fed. 699. Unless otherwise therein provided, it vests the title to the assets in the bankrupt free of all claims of creditors except those which would not be barred by a regular discharge in bankruptcy. Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447; *Re* Rider, 96 Fed. 808, 809, *per* Coxe, J.; *Re* McNeil Corp. 249 Fed. 765, 767. It has been held that where notes given by a trustee in bankruptcy pursuant to an order confirming a composition with creditors are not paid, the original debt revives. Am. Woolen Co. v. Friedman, 97 Misc. (N. Y.) 593.

that they have been fully administered, by approving the final accounts and discharging the trustees,[1] and reopen them whenever it appears they were closed before being fully administered."[2] There is no statutory limitation of the time within which a bankrupt's estate that has been closed may be reopened,[3] but such an application may be denied for laches.[4] An estate may be reopened after a trustee has been discharged, in order

§ 654. [1] The estate is not closed by the discharge of the bankrupt, *Re* Margolies, C. C. A., 266 Fed. 203; although the time for revoking the discharge and for indicting him for the concealment of assets has not expired, *Re* Levy, 261 Fed. 432; and he may be subsequently compelled to deliver to the trustee property which he has fraudulently concealed. Ibid. It has been held that when there has been no final meeting of creditors, the estate is not closed although the referee has declared its closing. *Re* Levy, 261 Fed. 432. The closing of the estate does not transfer to the bankrupt the title to unadministered assets which have not been duly rejected by the trustee. *Re* Lighthall, 221 Fed. 791; *Supra*, § 643.

[2] 30 St. at L. 544, § 2, subd. 8. The motion to re-open is addressed to the sound discretion of the court. *Re* Graff, C. C. A., 250 Fed. 997. It has been said that creditors alone can make such an application, Ibid; and not creditors who have not proved their claims, *Re* Paine, 127 Fed. 246; *Re* Meyer, 181 Fed. 904. See *supra*, § 646; nor, the trustee who has been discharged. Ibid. It has been held that no creditors who have failed to prove their debts can share in the newly discovered assets. Ibid. An estate was re-opened upon the petition of a purchaser of land from the trustee when the sale had not been legally perfected. *Re* Minners, 253 Fed. 360. There must be a reasonable prospect of realizing assets which are unadministered and evidence that the creditors or other parties in interest would be thereby benefited. *Re* Graff, C. C. A., 250 Fed. 997. A case may be re-opened because of the discovery of assets which the bankrupt had fraudulently concealed. *Re* Paine, 127 Fed. 246. The court cannot open the estate for the sole purpose of permitting the bankrupt to amend his schedules by adding the names of other creditors, when the administration of the estate has been completed. *Re* Sayer, 210 Fed. 397.

[3] *Re* Paine, 127 Fed. 246; Traub v. Marshall Field & Co., C. C. A., 182 Fed. 622.

[4] Vary v. Jackson, C. C. A., 164 Fed. 840, seven years. For a case where a delay of two years was held to be no laches, see Traub v. Marshall Field & Co., C. C. A., 182 Fed. 622. After the expiration of the two years statutory limitation, the court may refuse to re-open the estate in order to enable the trustee to attack a sale by the bankrupt for fraud which he might have discovered during such time. Kinder v. Scharff, 231 U. S. 517. See *supra*, §§ 181, 643.

that a new trustee may be appointed to receive a preference.[5] The effect of the reopening is not to reinstate the trustee; but a new trustee must be appointed.[6]

§ 655. Discharge of bankrupts. "(*a*) Any person [1] may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt,[2] file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.[3] "There shall be thirty days' notice of all

[5] *Re* B. Feinberg & Sons, 187 Fed. 283.

[6] *Re* Rochester Sanitarium & Baths Co., C. C. A., 222 Fed. 22; *Re* Graff, C. C. A., 250 Fed. 997; *Re* Minners, 253 Fed. 360.

§ 655. [1] A corporation may receive a discharge in bankruptcy. *Re* Hargadine-McKittrick Dry Goods Co., 239 Fed. 155. It has been held, that where a partnership has been adjudicated a bankrupt, the partners may obtain a discharge from their individual indebtedness although there has been no adjudication against them individually. Armstrong v. Norris, C. C. A., 247 Fed. 253. See *supra* § 618.

[2] It has been held that the bankrupt may file the application any time within thirteen months after the adjudication. *Re* Walters, 209 Fed. 133; *Re* Daly, 224 Fed. 263; *Re* Jacobs, C. C. A., 241 Fed. 620. *Contra*, *Re* Holmes, 165 Fed. 225. As to the mode of computation, see *Re* De Lewandowski, 243 Fed. 787, *supra*, § 608. The court has no power to set aside an adjudication, entered upon a default in involuntary proceedings, and to make another order to the same effect in order to extend the bankrupt's time to apply for a discharge. *Re* Morse, 168 Fed. 157. After eighteen months from the adjudication in bankruptcy have expired, no extension can be granted. *Re* Snell, 244 Fed. 613. Nor can any order be made *nunc pro tunc* granting the extension, unless an application for the same was made and orally granted within that period. *Re* Wolff, 100 Fed. 430; *Re* Taunton, 216 Fed. 987. *Contra*, Daly, 224 Fed. 263. See *Re* Anderson, 134 Fed. 319; International Harvester Co. of America v. Carlson, C. C. A.,

[3] 30 St. at L. 544, § 14, as amended 36 St. at L. 838, 841; *Re* Wheeler, 5 Fed. 299; *Re* Wolff, 100 Fed. 430; *Re* Levenstein, 180 Fed. 957; Lindeke v. Converse, C. C. A., 198 Fed. 618; *Re* Agnew, 225 Fed. 650. The filing of the petition without the leave of the court, after the expiration of a year and within the succeeding six months, is insufficient. *Re* Knauer, 133 Fed. 805. See *Re* Daly, 244 Fed. 263. The lack of sufficient means by a bankrupt to pay an attorney, when accompanied by sickness of himself and his family was held to be an unavoidable prevention. *Re* Casey, 195 Fed. 322. So was the illness of his at-

applications for the discharge of the bankrupts given to creditors

torney. *Re* Waller, C. C. A., 249 Fed. 187. But not the fact that his business was in such a condition that he did not have the time to file the application; *Re* Daly, 205 Fed. 1002; nor that he was in contempt of court for disobedience to an order with which he afterwards complied after its modification, *Re* Geasberg, C. C. A., 197 Fed. 896; nor because if the application had been filed within the year, it would necessarily have been denied because of his previous discharge in voluntary proceedings within six years, *Re* Vaine, 186 Fed. 535; *Re* Chase, 186 Fed. 408; nor that no trustee was appointed within a year after the adjudication. Hinman v. Barrett, 244 Fed. 621. It is not the duty of the referee to notify the bankrupt when the time expires for filing the petition for discharge, *Re* Knauer, 133 Fed. 805, and the statutory period of limitations cannot be enlarged because the referee misled the bankrupt's attorney by incorrect information in that respect. Ibid. The extension, if granted within the eighteen months, cannot be attacked collaterally but only by a motion to set the order aside. *Re* Agnew, 225 Fed. 650. Where the petition for the discharge was filed more than a year, but less than eighteen months, after the adjudication; it was held that it could not be impeached collaterally, since it must be presumed that an extension of time had been granted by the court. *Re* Haynes & Sons, 122 Fed. 560. But where the petition was filed after the expiration of eighteen months; it was held that a discharge granted thereupon was void and could be attacked collaterally. *Re* Fahy, 116 Fed. 239. *Cf.* *Re* Wagner, 139 Fed. 87. The creditor may be estopped by laches from moving to set aside an order of extension, *Re* Casey, 195 Fed. 322; or by filing objections to the discharge. *Re* Churchill, 197 Fed. 111. It has been held that the question whether a bankrupt was unavoidably prevented from applying for a discharge within the year should be raised within the next six months. *Re* Chase, 186 Fed. 408. *Re* Maier, 256 Fed. 60. The order extending the time cannot be reviewed upon the hearing of objections to the discharge. *Re* Casey, 195 Fed. 322. A petition was treated as filed on the day when it was offered to the clerk, although it was subsequently taken away by the attorney because of an erroneous statement by the former in accordance with instructions by the judge as to the practice. *Re* Swain, 243 Fed. 781. So where the application was filed with the referee, instead of the clerk, but was with the other proceedings before the former filed with the latter within a year after the adjudication, no objection having previously been made. *Re* Taylor, 188 Fed. 479. It seems that creditors are not entitled to notice of the application for an extension of time. *Re* Churchill, 197 Fed. 111; *Re* Fritz, 173 Fed. 560. The petition for an extension because the bankrupt was unavoidably prevented from applying within the year is not evidence of the facts therein alleged and must be sustained by proof, although not formally traversed. *Re* Glickman & Pisnoff, 164 Fed. 209. The insufficiency of the evidence to establish

by mail to their respective addresses as they appear in the schedule or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing."[4] "(*b*) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person for the purpose of obtaining credit from such purpose; or (4) at any time subsequent to the first day of the four months

the unavoidable prevention does not deprive the court of jurisdiction to grant the application for an extension. Ibid.

4 30 St. at L. 544, 561, § 58, as amended 36 St. at L. 838, 841. *Re* Blaesser, 230 Fed. 528; *Re* Lengfeldt, 253 Fed. 458. This notice should be a copy of an order of the court in fixing the date in accordance with Form 57. *Re* Hockman, 205 Fed. 330. But see S. D. N. Y. Rule 7. The order cannot be made by the referee. Ibid. Where one of the petitioners in an involuntary proceeding fails to give such notice to the creditors, it is incumbent upon the bankrupt so to do. *Re* Wollowitz, C. C. A., 192 Fed. 105. It seems that notice of the application should be given by publication, as well as sent by mail, to the creditors. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 191, 192, 46 L. ed. 1113, 1120, 1121; Remington on Bankruptcy, § 2432. See *Re* Sykes, 106 Fed. 669. As to what is proper proof of service of notice to the creditors, see *Re* Downing, 199 Fed. 329. When a creditor has died, notice should be given to his executor or administrator or if there is none such his widow and next of kin if the record shows who they are; but need not be served upon his own creditors who might possibly take out letters of administration. *Re* Blaesser, 230 Fed. 328. Failure to serve written notice upon the receiver of the property of the creditor when the former's name and address were disclosed by the proofs, and that of the latter was not in the schedules, was held to be no ground for setting aside the order for a discharge, where the notice was duly served by publication and there was no proof of fraud. *Re* Fritz, 173 Fed. 560. A discharge was not denied because, in a voluntary proceeding by Max Elkind and Boris Schwartz, the advertisement of notice of the first meeting of creditors described them as "Max Elkurd and Boris Schwartz." *Re* Elkind, C. C. A., 175 Fed. 64.

immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy, within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of the creditors called for that purpose.[5] (*c*) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."[6]

[5] *Re* Reiff, 205 Fed. 399; *Re* Höckman, 205 Fed. 330. Neither the judge nor the referee has the power to prescribe conditions of the interposition of objection by a trustee duly authorized, such as that the objections shall not delay settlement of the estate beyond a stated time or cause expense to the estate. *Re* Churchill, 197 Fed. 111; *infra*, § 656. The referee cannot order the trustee to file an objection unless the creditors' meeting has directed that this be done. *Re* White, 238 Fed. 874; but he may direct that a creditors' meeting be called to consider the question. *Re* Whitney, 250 Fed. 1005. The court cannot deny the discharge of its own motion. Ibid; *Re* Walsh, C. C. A., 256 Fed. 653; *Re* Armstrong, 248 Fed. 292. But see *Re* Main, 205 Fed. 421. A creditor may oppose the discharge, although he has not proved his claim; *Re* Frice, 96 Fed. 611; *Re* Barrager, 191 Fed. 247; even it seems, if his time to prove the same has expired, *Re* Bimberg, 121 Fed. 942; *Re* Conroy, 134 Fed. 764, 766; and although his claim is contested. *Re* Conroy, 134 Fed. 764. So, it has been held, may a creditor whose claim has been barred by the statute of limitations. *Re* Westbrook, 186 Fed. 414. It has been held that a creditor whose debt would not be discharged may oppose the application; *Re* Main, 205 Fed. 421; *Re* Menzin, C. C. A., 238 Fed. 773; *Re* Armstrong, 248 Fed. 292. *Contra*, *Re* Meikleham, 236 Fed. 401; the pendency of a suit in a State court upon the claim will not prevent its holder from such opposition. *Re* Menzin, C. C. A., 238 Fed. 773. As to matters which do not estop a creditor, see *Re* Hagy, C. C. A., 220 Fed. 665. After one creditor has declared his intention to abandon objections, another creditor may adopt and prosecute them. *Re* Guilbert, 154 Fed. 676.

[6] 30 Stat. at L. 544, 440. § 14b, as amended 36 St. at L. 838. See *Re* Levey, 133 Fed. 572. The court has no discretionary power to refuse a discharge when none of the statutory grounds for refusal has been duly alleged and proved. *Re* Jacobs, C. C. A., 241 Fed. 620; *Re* Whitney, 250 Fed. 1005.

"The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt."[7]

"A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."[8]

[7] General Order XXXI. The separate petition by a member of a bankrupt firm for his discharge should recite the former proceedings by and against the partnership and pray for his separate discharge. *Re* Meyers, 97 Fed. 757. It has been held: that the petition may be amended so as to include this prayer and to state the adjudication of the bankruptcy of the copartnership; but that new notice to the creditors in the proper form must subsequently be given. *Re* Meyers, 97 Fed. 757, 759. It has been said that a petition for a discharge need not be verified. *Re* Jemison Mercantile Co., C. C. A., 112 Fed. 966; Remington on Bankruptcy, § 2430. But see *Re* Glass, 119 Fed. 509; but see *Re* Taylor, 188 Fed. 479, holding that the objection had there been waived because not made until after evidence had been taken. The petition should be filed with the clerk and not with the referee. *Re* Taylor, 188 Fed. 479.

[8] General Order XXXII as amended June 4, 1917. In case of an enlargement or shortening of the time, the notice to the creditors should advise them thereof. See *Re* Horowitz, C. C. A., 250 Fed. 106; *Re* Meyers, 97 Fed. 757. A creditor is entitled to the whole of the tenth day within which to enter his appearance in opposition. *Re* Barager, 191 Fed. 247. It has been held that a creditor may prosecute his objections in *forma pauperis*. *Re* Gilbert, 154 Fed. 676; *supra*, § 413. Specifications, which are not filed within the time limited by the general order, will be dismissed. *Re* Abrecht, 104 Fed. 974; *Re* Clothier, 108 Fed. 199. The judge may extend the time for a creditor's entry of appearance in opposition after the same has expired. *Re* Levin, C. C. A., 176 Fed. 177. Where an appearance was duly entered by an objecting creditor it was held that the judge might enlarge his time to file specifications or allow them to be filed *nunc pro tunc*. *Re* Price, 96 Fed. 611. *Cf. Re* Nathanson, 152 Fed. 585. It has been said that objections to a discharge constitute a new suit or action, the hearing of which is in effect a trial in equity. *Re* Malschick, 217 Fed. 492. The objections should be filed with the clerk and not with the referee. *Re* Hockman, 205 Fed. 330; *Re* C. H. Kendrick & Co., 226 Fed. 890. The application of a creditor in opposition to a discharge may be made

These must be clear, specific, circumstantial, and distinctly allege one of the statutory grounds for refusing the discharge.[9]

by a member of the bar of the court without a written power of attorney. *Re* Gasser, C. C. A., 104 Fed. 537. The specifications of objections to the discharge should be verified; *Re* Glass, 119 Fed. 509; *Re* Gift, 130 Fed. 230; *Re* Abramovitz, 253 Fed. 299. Remington on Bankruptcy, § 2584. *Contra, Re* Jamieson, 120 Fed. 697. It has been held to be sufficient, if the oath is taken "to the best of affiant's knowledge, information and belief." *Re* Milgraum & Ost, 129 Fed. 827. *Cf. Re* Jamieson, 120 Fed. 697. But see *Re* Brown, C. C. A., 112 Fed. 49; *Re* Glass, 119 Fed. 509; Re Nathanson, 155 Fed. 645; *Re* White, 222 Fed. 688; *Re* Abramovitz, 253 Fed. 299. Such omissions or irregularities may be cured by amendment. *Re* Glass, 119 Fed. 509; *Re* Gift, 130 Fed. 230; *Re* Meuer, 144 Fed. 445; *Re* Hanna, C. C. A., 158 Fed. 238; *Re* Miller, 192 Fed. 730; and are waived if the bankrupt proceeds without objecting thereto. *Re* Baernecopf, 117 Fed. 975; *Re* Robinson, 123 Fed. 844; Godshalk v. Sterling, C. C. A., 129 Fed. 580. That where several creditors join in the same specifications, each of them, or someone in his behalf must sign and verify the same. *Re* Glass, 19 Fed. 509. Where a partnership, which had proved a claim against a partner's estate, was dissolved pending the proceedings without a transfer of the claim to any one of the partners; it was held that objections to the discharge in which they did not all unite, could not be sustained. *Re* Hendrick, 143 Fed. 647. The specifications should also be signed by or on behalf of the objecting creditors. *Re* Baernecopf, 117 Fed. 975. But see *Re* Kretz, 212 Fed. 784. Where the creditor is absent, verification by his attorney may be permitted. *Re* Baernecopf, 117 Fed. 975; Remington on Bankruptcy, § 2596; but the reason why the creditor does not himself swear to the same should be stated. *Re* Baernecopf, 117 Fed. 975; *Re* Glass, 119 Fed. 509; Remington on Bankruptcy, § 2590, *Re* Randall, 159 Fed. 298. The specifications should show the facts which make the objector a party in interest. *Re* Servis, 140 Fed. 222; *Re* Main, 205 Fed. 421; an averment that the petitioners are "creditors of the bankrupt" is insufficient. It was held that the bankrupt by proceeding to trial upon the objection did not waive the defense that neither the specifications nor the proceedings showed that the trustee had received authority to object. *Re* White, C. C. A., 248 Fed. 115; *Re* Chandler, C. C. A., 138 Fed. 637; *Re* Fackler, 246 Fed. 864. *Contra, Re* Nathanson, 155 Fed. 645.

[9] *Re* Price, 96 Fed. 611; *Re* McCarthy, 170 Fed. 859, holding that such a defect is not waived by the bankrupt's failure to except thereto. It has been said that the specifications of the objecting creditors must be as specific as a criminal indictment or information. *Re* Hirsch, 96 Fed. 468. But see *Re* Kaiser, 99 Fed. 689; *Re* White, 222 Fed. 688. When the objection is the commission of an act, which is a crime under the bankruptcy law; 30 St. at L. 544, 554, § 29; quoted *infra*, § 654, the specifications must state its commission "knowingly and

They must set forth the particular facts on which the opposition is based,[10] must not be vague, nor general, nor contain mere conclusions of law.[11] They must allege the essential facts which constitute the bar to the discharge.[12] Allegations in the language of the statute are insufficient,[13] except when the objection is that the bankrupt has failed to keep any books of account or

fraudulently.'' *Re* Beebe, 116 Fed. 48 (false oath); *Re* Patterson, 121 Fed. 921 (fraudulent concealment); Kentucky Nat. Bank v. Carley, C. C. A., 127 Fed. 686 (false oath); *Re* Levey, 133 Fed. 572 (fraudulent concealment); *Re* Taplin, 135 Fed. 861 (false oath); *Re* Cohen, 149 Fed. 908 (false oath); *Re* Agnew, 225 Fed. 650 (false oath); *Re* Opava, 235 Fed. 779 (fraudulent concealment). It has been held: that in a charge of the transfer, removal, destruction or concealment of property, or permission that the same be done within four months before the filing of the petition, with intent to hinder, delay or defraud creditors, the word ''knowingly'' may be omitted; *Re* Gift, 130 Fed. 230. Objections to such omissions are waived by going to trial upon the merits without raising them. *Re* Osborne, C. C. A., 115 Fed. 1; but see *Re* Taplin, 135 Fed. 861, and may be cured by amendment. *Re* Kanszak, 151 Fed. 503.

[10] *Re* Hixon, 93 Fed. 440.

[11] *Re* Holman, 92 Fed. 512. An objection that the bankrupt has fraudulently concealed or transferred property should specify the property and the date of the transfer with some reasonable degree of certainty. *Re* Carrier, 47 Fed. 438; *Re* Hixon, 93 Fed. 440; *Re* Hirsch, 96 Fed. 468; *Re* Taplin, 135 Fed. 861; *Re* White, 222 Fed. 688; *Re* Agnew, 225 Fed. 650. The same rule applies to an objection that the bankrupt obtained property on credit by a false statement in writing; *Re* Epstein, 248 Fed. 191; *Re* Troutman & Jesse, 251 Fed. 930. Such an objection must also set forth the false statement and show wherein it was false. *Re* Levy, 133 Fed. 572; *Re* Main, 205 Fed. 421; *Re* Epstein, 248 Fed. 191. And also the name of the person alleged to have been defrauded. *Re* Levy, 133 Fed. 572. A charge of a false oath must show its materiality, *Re* White, 222 Fed. 688; set forth the false statement and negative its truth, *Re* Nathanson, 155 Fed. 645; *Re* Greer, 248 Fed. 131, 133; *supra*, § 506*r*. In these cases, the proper remedy is a motion to make the specifications more definite and certain, *Re* Mintzer, 197 Fed. 647; and if that is delayed until after evidence has been taken, a motion to amend them to conform to the proof will usually be granted. Ibid. It was held that such an objection for insufficient precision of the specifications when not made until after the witnesses were called, was properly denied with leave to renew after the testimony had been taken. Ibid. *Cf. Re* Wakefield, 207 Fed. 180.

[12] *Re* Kaiser, 99 Fed. 689.

[13] McNeil v. U. S., C. C. A., 150 Fed. 82, 18 Am. B. R. 21; Remington on Bankruptcy, § 2608. *Re* Mintzer, 197 Fed. 647.

records.[14] Several grounds of opposition may be included in the same specifications, but they must be separately stated.[15] Where the statute provides that the offenses must have been committed within a specified time before the bankruptcy, the specifications must show their commission within the period of limitation.[16] It has been said that a bankrupt may avail himself upon the hearing of the insufficiency of allegations in the specifications,[17] and that objections to the form of specifications cannot be raised for the first time upon appeal.[18] The specifications may be once amended by permission of the judge;[19]

[14] *Re* Patterson, 121 Fed. 921; Godshalk v. Sterling, C. C. A., 129 Fed. 580; *Re* Ginsburg, 130 Fed. 627; *Re* Randall, 159 Fed. 298. The objection should state that the failure was with intent to conceal the financial condition of the bankrupt. *Re* Epstein, 248 Fed. 191. See *Re* Lewis, 163 Fed. 137. But where the allegation was that he failed to keep such books of account or records as would enable his financial condition to be ascertained, it was held that the particulars in which the failure consisted should be pleaded. *Re* Peck, 120 Fed. 972. Evidence should not be pleaded, *Re* Troeder, C. C. A., 150 Fed. 710.

Allegations that he did not keep some necessary books, and that the books kept were insufficient to show the course or condition of his business, did not justify the objection that some particular transactions were not entered. *Re* Smith, 16 Fed. 465. It was held under the Act of 1867, that a specification of a failure to keep proper books of account could not sustain a finding that the books were kept upon an incorrect theory. *Re* Graves, 24 Fed. 550.

[15] *Re* Wetmore, 102 Fed. 290. In such a case, the discharge will be denied if any one of them is sustained. Hudson v. Mercantile Nat. Bank, C. C. A., 119 Fed. 346.

[16] *Re* Steed & Curtis, 107 Fed. 682.

[17] *Re* Crist, 116 Fed. 1007. *Contra*, *Re* Osborne, C. C. A., 115 Fed. 1; *Re* Baldwin, 119 Fed. 796. But see *Re* Servis, 140 Fed. 222; Troeder v. Lorsch, C. C. A., 150 Fed. 710. But see cases cited *supra*.

[18] *Re* Osborne, C. C. A., 115 Fed. 1. *Re* Singer, C. C. A., 251 Fed. 51.

[19] *Re* Holman, 92 Fed. 512; *Re* Carley, C. C. A., 117 Fed. 130; *Re* Gift, 139 Fed. 230; *Re* Hendrick, 138 Fed. 473. See *Re* Mudd, 105 Fed. 348. Amendments have been allowed after the expiration of the time for filing specifications. *Re* Morgan, 101 Fed. 982; *Re* Osborne, C. C. A., 115 Fed. 1; *Re* Nathanson, 152 Fed. 585. An amendment may be allowed after a reference; *Re* Hendrick, 138 Fed. 473, but not, it has been held, after the proofs are closed. *Re* Smith, 16 Fed. 465. But see *Re* Pierce, 103 Fed. 64.

An amendment was refused where the specifications merely alleged the words of the statute. *Re* Peck, 120 Fed. 972. *Cf. Re* Gift, 130 Fed. 230. But see *Re* Glass, 119 Fed. 509. New objections to the discharge cannot be added by

but not, it has been held, by permission of the referee alone.[20] A motion for the discharge should not be granted until disposition has been made on the specifications to the objections.[21]

The right of the bankrupt to discharge must be decided by the judge, not by a referee;[22] but the judge may refer the hearing upon the objections to a referee, either in his official capacity or as a special United States commissioner, to take the evidence

amendment after the original time to file specifications has expired. *Re* Gift, 130 Fed. 230; *Re* Johnson, 192 Fed. 356.

20 *Re* Kaiser, 99 Fed. 689.

21 *Re* Randall, 159 Fed. 298. In the Eastern District of New York, it has been held to be the duty of the creditors to bring the discharge to a hearing. *Re* Fritz, 173 Fed. 560. See *Re* Lockwood, 240 Fed. 159. That a petition may be dismissed for want of prosecution, when no specifications of objections have been filed and the bankrupt takes no proceedings for a year; *Re* Lederer, 125 Fed. 96; *Re* Shrimer, 228 Fed. 794. Where, upon an appeal from an order denying a discharge, there was no opposition by the creditors, the abandonment of the opposition was held to be entitled to weight and to be considered, but not conclusive. *Re* Hammerstein, C. C. A., 189 Fed. 37. A local rule (S. D. N. Y.) was held to be valid which provided that "if the first meeting of creditors is not called and the examination of bankrupt at such meeting begun, carried on and completed before the petition for discharge is filed, the referee is directed to certify such facts to the court, and thereupon, upon notice to the bankrupt, an application to dismiss the petition for discharge may be made." *Re* Wolliwitz, C. C. A., 192 Fed. 105; but that, when specifications of objections have been filed, the only remedy of the creditors is to set the matter down for a hearing upon the petition and objections. *Re* Wolff, 132 Fed. 396, and that objections may be disregarded when the objector does not appear upon the hearing of the application for a discharge. *Re* Chase, 186 Fed. 408.

22 *Re* Elby, 157 Fed. 935. Where the objection is that the bankrupt has made a false oath with reference to an exemption, the hearing thereupon should be postponed until his right to an exemption has been decided. *Re* Meikleham, 236 Fed. 401. Where the recovery of a judgment is essential to the enforcement of a creditors' claim against a surety, *Re* J. L. Philips & Co., 224 Fed. 628; or to enforce the bankrupt's waiver of an exemption, *Re* Mitchell, 175 Fed. 877; H. S. Meinhard & Bro. v. Pincus, C. C. A., 200 Fed. 736; the discharge may be postponed until such judgment has been obtained, provided of course that the creditor acts with due diligence. But it has been held that a sub-contractor who has intervened in the bankruptcy proceedings against a contractor is not entitled to a stay of the discharge until he can prosecute his claim to judgment, so as to enable him to enforce a mechanic's lien under the State statute. *Re* Goodrich, 192 Fed. 746.

and report his findings and recommendations.[23] The burden of proof is upon the objecting creditors to support their specifications.[24] The evidence in the decision must be confined to the

[23] General Order XII, *Re* Kaiser, 99 Fed. 689; *Re* Meyers, 100 Fed. 775; *Re* Gillardon, 187 Fed. 289. In the Western District of Kentucky, it seems to be the custom to refer the objections and specifications to the referee, no matter how frivolous they may be. *Re* Daugherty, 189 Fed. 239. But this extraordinary practice is not the rule in most districts. The referee has no jurisdiction to hear such an application unless there has been a special reference to him. *Re* Taylor, 188 Fed. 479; *Re* Randall, 159 Fed. 298; *Re* C. H. Kendrick & Co., 226 Fed. 980. The previous taking of testimony by the referee upon the subject is an irregularity; *Re* Goodhile, 130 Fed. 782, but such testimony may be allowed to stand as if subsequently taken, provided that both parties were then represented. Ibid.

Where an application for a bankrupt's discharge was referred to the referee, as special master, to hear the facts and report his conclusions, and specifications of objection filed by creditors were not sufficiently specific, it was held to be the master's duty merely to report back to the court that nothing had been filed with him in the way of objections requiring the taking of testimony. *Re* Hendrick, 138 Fed. 473. The bankrupt's attendance before the referee on hearing of objections to his application for discharge demanded by creditors was held to be indispensable. *Re* Shanker, 138; *Re* Curle, 217 Fed. 688; even when he had removed from the district. It has been held that the referee has power to rule upon the sufficiency of the specifications, and that he should exclude evidence offered in support of specifications that are clearly defective. *Re* Kaiser, 99 Fed. 689. *Contra*, *Re* Knasxzak, 151 Fed. 503. See *supra*, § 639. Objections to the admission of evidence which were not taken before the commissioner or referee may be disregarded. *Re* Magen, 218 Fed. 692. No exceptions to the report are required, International Harvester Co. v. Carlson, 217 Fed. 736; *Re* Hughes, C. C. A., 262 Fed. 500. See *Re* Pierce, 210 Fed. 389. The referee's finding of fact upon conflicting evidence will usually be confirmed. *Re* Harr, 143 Fed. 421; *Re* Wheeler, C. C. A., 165 Fed. 188; Baker v. Bishop-Babcock-Becker Co., C. C. A., 220 Fed. 657; *Re* Rowe, 240 Fed. 165; *Re* Leally, 255 Fed. 358; *Cf. Re* Cohen, 201 Fed. 188. But see *Re* Lenweaver, 226 Fed. 987. When confirmed by the district judge, they will very rarely be disturbed upon appeal. Boyd v. Arnold, Loucheim & Co., C. C. A., 149 Fed. 187. See McDonald v. Campbell, C. C. A., 151 Fed. 743. As to the form of the report, see *Re* Rivkin, 206 Fed. 218; *Re* Mogen, 218 Fed. 692; *Re* Lenweaver, 226 Fed. 987; *Re* Rowe, 240 Fed. 165; *Re* Troutman & Jesse, 251 Fed. 930. *Supra* § 392.

[24] *Re* Wetmore, 99 Fed. 703; *Re* De Leeuw, 98 Fed. 408; *Re* Idzall, 96 Fed. 314; *Re* Hirsch, 96 Fed. 468; *Re* Dews, 96 Fed. 181; *Re* Freund, 98 Fed. 81; *Re* Cornell, 97 Fed. 29; *Re* Corn, 106 Fed. 143;

specifications of the objection;[25] but all the allegations set forth in a specification need not be proved when there is sufficient evidence to establish a ground for refusing the discharge.[26] When objections are dismissed, the bankrupt may be allowed costs against the objector;[27] but it has been said that this will not be done when the opposition was not frivolous or vexatious.[28]

Upon the death of the bankrupt pending his application for a discharge the proceedings should be continued after notice to his personal representative, or if none has been appointed to his widow and next of kin.[29] The insanity of a bankrupt, which arises pending the proceedings and prevents his examination by his creditors, is not a bar to his discharge.[30] After a discharge had been refused upon the merits, a second application at a subsequent term was denied, although in the meanwhile a grand

Re Gaylor, 106 Fed. 833; *Re* Hamilton, 133 Fed. 823; *Re* Walder, 152 Fed. 489; Troeder v. Lorsch, C. C. A., 150 Fed. 710; *Re* Griffin Bros., 154 Fed. 537; *Re* Main, 205 Fed. 421; *Re* Cohen, C. C. A., 206 Fed. 457; *Re* Johnson, 215 Fed. 747; *Re* Braun, C. C. A., 239 Fed. 113; *Re* Garrity, C. C. A., 247 Fed. 310; Horner v. Hamner, C. C. A., 249 Fed. 134. But when they have made out a prima facie case, such as the existence of assets and their disappearance a short time before the institution of the proceedings in bankruptcy, the burden is shifted to the bankrupt, who must then explain the facts which are peculiarly within his knowledge, or else his discharge will be refused. *Re* Meyers, 96 Fed. 408; *Re* Wood, 98 Fed. 972; *Re* O'Gara, 97 Fed. 932; *Re* Ablowich, 99 Fed. 81. But see *Re* Idzall, 96 Fed. 314. They are not obliged to prove the truth of the allegations in their specifications beyond a reasonable doubt. *Re* Greenberg, 114 Fed. 773; Troeder v. Lorsch, C. C. A., 150 Fed. 710; *Re* Delmour, 161 Fed. 589; *Re* Atlas, 219 Fed. 783; *Re* Garrity, C. C. A., 247 Fed. 310; *Re* Lally, 255 Fed. 358. It has been held that a ruling of the referee denying an exemption because of a concealment of property in violation of the Code of Georgia A. D. 1910, §§ 3377, 3380 was not res adjudicata against the right of a discharge. *Re* Frosteg, 252 Fed. 199. For circumstantial evidence held to be sufficient, See *Re* Reed, 191 Fed. 920.

25 *Re* Bouck, 199 Fed. 453; *Re* Felts, 205 Fed. 983; *Re* Newmark, C. C. A., 249 Fed. 341. A creditor who had filed specifications only in his capacity as a creditor of an individual partner was not permitted to offer evidence as to defects in the books of the firm, although he was also a firm creditor. *Re* Smith, 16 Fed. 465.

26 *Re* Magen, 218 Fed. 692.

27 *Re* Miers, 193 Fed. 288; *Re* Amer, 228 Fed. 576; *Re* Whitney, 250 Fed. 1005.

28 Ibid.

29 *Re* Blaesser, 230 Fed. 528.

30 *Re* Miller, 133 Fed. 1017

jury had refused to indict the bankrupt upon a charge of the same offense that had been held to be a bar to his discharge.[31]

§ 656. Grounds for refusing discharge. A discharge in bankruptcy will be refused if the applicant has "(1) committed an offense punishable by imprisonment as herein provided;[1] or (2)

[31] *Re* Royal, 113 Fed. 140.

[1] § 656. "(*a*) A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. (*b*) A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; (4) or received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money, or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. (*c*) A person shall be punished by fine not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. (*b*) A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense." 30 St. at L. 544-554, § 29. See *supra* § 506*t*. There can be no indictment for a concealment of the assets when they were not concealed after the appointment of the trustee. U. S. v. Young & Holland Co., 170 Fed. 110. Larceny against the objector, not accompanied by any act made a crime by the bankruptcy law, is no ground for a denial. *Re* Wolf, 159 Fed. 299. A discharge cannot be denied because the bankrupt has violated a State statute, civil or criminal, unless his act is one forbidden by the bankruptcy law. *Re* McClellan, 204 Fed. 482. A discharge may be denied because of a false statement in the verified schedules of the bankrupt, *Re Becker*, 106 Fed. 54; 140 Fed. 728; *Re* Garrity, C. C. A.,

with intent to conceal his financial condition destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained;[2] or (3) obtained money or

247 Fed. 310, and of a false statement in an affidavit upon a motion to dismiss the proceedings, *Re* Young, 140 Fed. 728; but not for a false statement in a verified answer, which was filed too late for its consideration by the court, *Re* Young, 140 Fed. 728; nor for false statements in the testimony of the bankrupt in insolvency proceedings, which were by stipulation read in evidence in the proceedings in bankruptcy, *Re* Goldsmith, 101 Fed. 570; nor for a false oath in other bankruptcy proceedings, in which the petitioner for the discharge was not the respondent, *Re* Blalock, 118 Fed. 679; criticised in Remington on Bankruptcy, § 2531. The fact that the false testimony related to the existence of property, which could not have been recovered by the creditors, does not relieve the bankrupt, *Re* Becker, 106 Fed. 54; *Re* Royal, 112 Fed. 135; *Re* Conroy, 134 Fed. 764. But see *Re* Chamberlain, 180 Fed. 304. A subsequent correction or retraction of the false testimony does not obviate the objection, *Re* Wolf, 156 Fed. 543; *Re* Marcus, 192 Fed. 743; *Re* Doyle, 199 Fed. 247; except in so far as it tends to show that the untruth was inadvertent. *Re* Marcus, 192 Fed. 743; *Re* Doyle, 199 Fed. 247. Nor is it obviated when, after the creditors had discovered the fraudulent omission from the schedules, he amended the same, *Re* Eaton, 110 Fed. 731; *Re* Breiner, 129 Fed. 155; although this may be considered as a circumstance tending to prove good faith, *Re* Wolf, 156 Fed. 453. Evasive, *Re* Cohen, 149 Fed. 908; *Re* Fanning, 155 Fed. 701; and disrespectful, *Re* Fanning, 155 Fed. 701; answers upon the bankrupt's examination were held to be no reasons for refusing a discharge. The fact, that a grand jury has refused to indict the bankrupt for perjury, *Re* Royal, 113 Fed. 140; or that he could not be convicted criminally, *Re* Gaylord, C. C. A. 112 Fed. 668; for a false statement under oath in the bankruptcy proceedings will not prevent the denial of discharge because of the same.

[2] *Re* Helfgoth, 245 Fed. 358; the mere failure to keep books is insufficient, unless it appears that this was done with the intent to conceal his financial condition. *Re* McCrea, C. C. A., 161 Fed. 246; *Re* Tanner, 192 Fed. 572; *Re* Brown, 199 Fed. 356. It has been said that the burden of proof is upon the creditor to show that the failure of the bankrupt to keep books was done with the intent to conceal his financial condition, *Re* Garrison, C. C. A., 149 Fed. 178; but where a bankrupt, who has had considerable business experience fails to keep any books whatever from which his financial condition can be ascertained; it may be presumed that he did so in order to conceal the same. *Re* Bragasa, 103 Fed. 936; *Re* Alford, 135 Fed. 236; *Re* Amsten, 249 Fed. 256. The keeping of misleading books, *Re* Feldstein, C. C. A., 115 Fed. 259; or books without any entries concerning alleged debts, upon which

property on credit upon a materially false statement in writing

the bankrupt claimed to have made payments, is a ground for refusing a discharge, *Re* Greenberg, 114 Fed. 773; but omission, Van Ingen v. Schophofen, C. C. S., 129 Fed. 352; or false entries, *Re* Hamilton, 133 Fed. 823; when made solely for the purpose of concealing financial assistance or a preference, were held not to be. A discharge was granted when the bankrupt kept a cash book without any day book, blotter or register. *Re* Allendorf, 129 Fed. 981; and when the nature of the bankrupt's business did not require the keeping of ordinary books, his failure so to do did not prevent his discharge, Sellers v. Bell, C. C. A., 94 Fed. 801; *Re* Corn, 106 Fed. 143; *Re* Prager, 134 Fed. 1006; *Re* Keefer, 135 Fed. 885. The destruction of a check book and pass book at a time when the bankrupt's debts were small, *Re* Studebaker, C. C. A., 127 Fed. 591; the destruction of a salesman's slips of memoranda after the amount of the same had been written in the cash book, *Re* Allendorf, 129 Fed. 981; and the alteration and mutilation of immaterial parts of the old records of a corporation, of which the bankrupt was a bookeeper, Bauman v. Feist, C. C. A., 107 Fed. 83; were held no grounds for refusing a discharge. For cases of omissions from books, which were held to justify a denial of the application, see *Re* Brod, 166 Fed. 1011; *Re* Pomerantz & Hopkins, 168 Fed. 444; *Re* Schachter, 170 Fed. 683; *Re* Koelle, 171 Fed. 257; *Re* Kyte, 174 Fed. 867; *Re* Berger, 200 Fed. 325, where the bankrupt transacted business through a corporation which he owned; *Re* Josephson, 229 Fed. 272; *Re* Sternberg, 249 Fed. 980; *Re* Bloomberg, 253 Fed. 94.

For cases where they did not, see *Re* Barthier, 188 Fed. 394; *Re* Sabsevitz, 197 Fed. 109; *Re* Marcus, C. C. A., 203 Fed. 29. It has been held that if the intent to conceal the financial condition exists, the discharge should be denied, whether such intent was fraudulent or not, *Re* Hanna, C. C. A., 168 Fed. 238; *Re* Linker, 222 Fed. 173; but an intent to conceal must exist, *Re* Marcus, 192 Fed. 743; although it may be proved by circumstantial evidence, *Re* Schachter, 170 Fed. 683; *Re* Linker, 222 Fed. 173. For a disappearance of the books which caused a denial, see *Re* Wiedmann, 188 Fed. 684; Baylor v. Rawlings, C. C. A., 200 Fed. 131. But see Garry v. Jefferson Bank, C. C. A., 186 Fed. 461; *Re* Mintzer, 197 Fed. 647. The destruction of the books of a partnership of which the bankrupt was formerly a member, was held to be a bar to his discharge. *Re* Conley, 120 Fed. 42. In the case of a partnership, the burden is upon each partner to show that he was innocent of participation in such concealment. *Re* Schachter, 170 Fed. 683. Where the bankrupt lived in New York, he was not refused a discharge because a firm in Michigan, of which he was a member, did not keep proper books for a short period of time, there being no proof of his knowledge thereof. *Re* Garrison, C. C. A., 149 Fed. 178. *Cf. Re* Warne, 110 Fed. 377; *Re* Kamsler, 97 Fed. 194; *Re* Ablowich, 99 Fed. 81; *Re* Spear, 103 Fed. 779; *Re* Bemis, 104 Fed. 672; Ablowich v. Stursberg, C. C. A., 105 Fed. 751; *Re* Corn, 106 Fed. 143; Bragassa v.

made by him to any person or his representative for the purpose of obtaining credit from such person,[3] or (4) at any time subse-

St. Louis Cycle Co., C. C. A., 107 Fed. 77. The actual effect upon the creditors of the bookkeeping is immaterial, *Re* Schachter, 170 Fed. 683; *Re* Nadel, 211 Fed. 767; *Re* Josephson, 229 Fed. 279.

[3] *Re* Josephson, 229 Fed. 272; *Re* Shea, 245 Fed. 363; *Re* Faekler, 246 Fed. 864; *Re* Kerner, 250 Fed. 993; *Re* Neuman, 251 Fed. 667; *Re* Troutman & Jesse, 251 Fed. 930; *Re* Baldwin, 253 Fed. 836; *Re* Goldberg, 256 Fed. 541; *Re* Perlmutter, 256 Fed. 862, aff'd C. C. A., 264 Shea, 245 Fed. 363; *Re* Faekler, 246 Fed. 957; *Re* Rammage, 260 Fed. 893. The fraudulent omission of a debt in a financial statement is not cured because through inadvertence an asset of the same amount was also omitted, *Re* Maaget, 245 Fed. 804; *Re* Reed, 256 Fed. 412. The right to object to a discharge because the bankrupt has obtained property or credit upon a materially false statement in writing is not confined to the person defrauded, but may be interposed by any creditor, *Re* Harr, 143 Fed. 421; *Re* A. B. Carlton & Co., 148 Fed. 63. But see *Re* Allendorf, 129 Fed. 981; *Re* Dresser & Co., 144 Fed. 318. The property need not have been thus obtained for the benefit upon his credit as principal or surety, *Re* Aldridge, 168 Fed. 93. The obtaining of a loan, *Re* Louisville Banking Co., C. C. A., 158 Fed. 403; *Re* Gilpin, 160 Fed. 171; *contra, Re* Pfaffinger, 154 Fed. 528; Bank of Commerce & Savings v. Mathews, C. C. A., 257 Fed. 292; or a renewal of a loan, Samet v. Farmers' & Merchants' Bank, C. C. A., 247 Fed. 669, affirming *Re* Samet, 243 Fed. 203, by means of a materially false statement in writing is sufficient. So is the obtaining of credit by a corporation, in which the bankrupt owned a majority of the stock, *Re* Dresser & Co., 144 Fed. 318. It has been held that the obtaining of a bond of indemnity or a surety bond is not, *Re* Tanner, 192 Fed. 572. But see *infra*, § 657. Services have been held not to be property within the meaning of this section of the statute. Gleason v. Thaw, C. C. A., 185 Fed. 345; s. c., C. C. A., 196 Fed. 359, aff'd 336 U. S. 558. It has been held that checks or drafts drawn upon an account where there are no funds, are not false statements in writing. Firestone v. Harvey, C. C. A., 174 Fed. 574, *Re* Rea Bros., 251 Fed. 431. *Contra Re* Robinson, 256 Fed. 55.

According to the preponderance of authority before the amendment of 1910 false statements to a commercial agency were not, *Re* Russell, C. C. A., 176 Fed. 253; *Re* Foster, 186 Fed. 254; ser, C. C. A., 146 Fed. 383, 76 C. C. A., 655; *Re* Pineus, 147 Fed. 621; *Re* Carton & Co., 148 Fed. 63; *Re* Kyte, 174 Fed. 867. It has since been held that they may be, Haimowich v. Mandel, C. C. A., 243 Fed. 338, affirming 232 Fed. 378, but see J. W. Ould Co. v. Davis, C. C. A., 246 Fed. 228. It does not avail the bankrupt that he paid in full for the first property that he received upon the faith of the false statement. Ragan, Malone & Co. v. Cotton & Preston, C. C. A., 200 Fed. 546. *Cf. Re* Terens, 172 Fed. 938. But see *Re* Cotton & Preston, 183

quent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed or concealed, or permitted to be removed, destroyed or concealed any of his property, with intent to hinder, delay or defraud his creditors,[4] or (5) in voluntary proceedings been granted a discharge

Fed. 181; *Re* Sabsevitz, 197 Fed. 109; *Re* O'Callaghan, 199 Fed. 662; *Re* Braverman, 199 Fed. 863. The fact that credit was extended to a firm and not to the bankrupt member thereof, is immaterial. *Re* Terens, 172 Fed. 938. A false statement made by an agent of the bankrupt within the scope of his authority, will justify a refusal of the discharge, *Re* Goodhile, 130 Fed. 782; *Re* Dresser, C. C. A., 146 Fed. 383. See *Re* Hardie & Co., 143 Fed. 607; *Re* Reed, 191 Fed. 920. In the case of a partnership, such a statement by one of the firm is a ground for refusing a discharge to him and to the firm. *Re* Neyland & McKeithern, 184 Fed. 144; Ragan, Malone & Co. v. Cotton & Preston, C. C. A., 200 Fed. 546; but not the discharge of a partner who did not participate in or authorize the same. Ragan, Malone & Co. v. Cotton & Preston, C. C. A., 200 Fed. 546, affirming 183 Fed. 181; Hardie v. Swafford Bros. Dry Goods Co., C. C. A., 20 L.R.A.(N.S.) 785, 165 Fed. 588. The false statement must have been made either with knowledge of its falsity, or so recklessly as to justify a finding of fraud. *Re* Collins, 157 Fed. 120. Where the statement was false in fact, but made in good faith through a mistake on the part of the bankrupt, his discharge denied. *Re* Shaffer, 169 Fed. 724. See *Re* Terens, 172 Fed. 938. *Contra*, W. S. Peck Co. v. Lowenbein, C. C. A., 178 Fed. 178; *Re* Mintzer, 197 Fed. 647; *Re* O'Callaghan, 199 Fed. 662; *Re* Goldberg, 256 Fed. 541.

For evidence held to be sufficient to show that the statement was intentionally false, see *Re* Taff & Conyers, 182 Fed. 899; Shaffer v. Kohlegard Co., C. C. A., 183 Fed. 71; *Re* Puschkin, 183 Fed. 882; *Re* Miller 192 Fed. 730; *Re* Ellerbee, 198 Fed. 952. The denial of the discharge operates as to all claims and is not limited to that of the objector. *Re* Miller, 192 Fed. 730. A creditor can make the objection, although the discharge would not release the bankrupt from the debt thus incurred. *Re* Reed, 191 Fed. 920. An agreement by a creditor for a valuable consideration, by which he canceled and agreed to surrender certain written statements, upon which the bankrupt obtained credit, and conceded that any inaccuracies therein were inadvertent, was held to estop him from using the same as a ground of objection to the discharge. *Re* Russell, C. C. A., 176 Fed. 253.

[4] It has been held that concealment at a time when no trustee was appointed is no ground of objection. *Re* Adams, 171 Fed. 599. But see U. S. v. Comstock, 161 Fed. 644; Radin v. U. S., C. C. A., 189 Fed. 568. The advice of counsel may be considered when determining whether the concealment was fraudulent. *Re* Alleman, 162 Fed. 693; Klein v. Powell, C. C. A., 174 Fed. 640. It has been held that the word "conceal" means a continuous concealment, and the fact that the first

concealment was prior to the four months' period is no excuse if continued. *Re* Quackenbush, 102 Fed. 282; *Re* Toothaker Bros., 128 Fed. 187 U. S. v. Cohn, 142 Fed. 983; *Re* Jacob & Verstandig, 147 Fed. 797. A discharge will not be denied because of an omission of assets from the bankrupt's schedules, caused by inadvertence or a mistake of fact or law, *Re* Scott, 11 Fed. 133; *Re* Crenshaw, 95 Fed. 632; *Re* Hirsch, 96 Fed. 468; *Re* Morrow, 97 Fed. 574; *Re* McAdam, 98 Fed. 409; *Re* McBryde, 99 Fed. 686; *Re* Wetmore, 99 Fed. 703; *Re* Neely, 134 Fed. 667; nor, it has been held, because of the omission of a leasehold, where there is no evidence that it has any value, *Re* Hirsch, 97 Fed. 571. Nor for the omission of an asset of nominal value. Devorkin v. Security Bank & Tr. Co., C. C. A., 243 Fed. 171; Anderson v. Forest City Nat. Bank, C. C. A., 254 Fed. 793. Nor because of the omission of an interest in property, which has been pledged, when there is no evidence that it is worth more than the debt due the pledgee, *Re* Hirsch, 96 Fed. 468; nor, an omission of an asset which the bankrupt supposed he owned, but in fact did not. *Re* Hughes, C. C. A., 262 Fed. 500. It has been held that a preference, which does not amount to a fraudulent concealment, is not a bar to discharge. *Re* Pierce, 103 Fed. 64; *Re* Brown, 140 Fed. 383; *Re* Maher, 144 Fed. 503; *Re* Friedrich, 199 Fed. 193; *Re* Doyle, 199 Fed. 247; *Re* Bouck, 199 Fed. 453; Gill v. White, C. C. A., 249 Fed. 50. But see Grafton v. Meikleham, C. C. A., 246 Fed. 737, reversing *Re* Meikleham. It has been held that the transfer must have been effective. W. A. Liller B.'g. Co. v. Reynolds, C. C. A., 247 Fed. 90; 239 Fed. 401, certiorari denied, 246 U. S. 665, 83 Sup. Ct. 334, 62 L. ed. 929; Sternburg v. M. Cohen & Co., C. C. A., 254 Fed. 1, affirming *Re* Sternburg, 249 Fed. 980. It has been intimated that the use and loss of money belonging to the estate in gambling after the filing of the petition and before the appointment of the trustee might be held to be a cause for refusing the discharge. *Re* Sternberg, 249 Fed. 980. The pledge by a stockholder of securities owned by his customers to secure a loan to himself is not such a transfer of property with intent to defraud his creditors as will prevent his discharge, although it is property on which he has a lien, *Re* Jacob Berry & Co., 146 Fed. 623, in which the author was counsel. It seems that a transfer of property in fraud of creditors when made by a bankrupt's general agent with complete control of the same will bar a discharge, although the bankrupt did not know it was made. Ibid.; *Re* James, C. C. A., 181 Fed. 476, affirming 175 Fed. 894. See § 621, *supra*. *Cf.* Johnson v. U. S., C. C. A., 18 L.R.A.(N.S.) 1194, 163 Fed. 30. *Contra*, Warren v. U. S., C. C. A, 199 Fed. 753. Where prior to the six months, the bankrupt parted with the title and all control to the property, there is no such concealment as is described in the statute. *Re* Hammerstein, C. C. A., 189 Fed. 37. *Cf. Re* Boner, 169 Fed. 727. For cases where it was held that there was such a fraudulent concealment, see *Re* Roy, 96 Fed. 400; *Re* Skinner, 97 Fed. 190; *Re* Kamsler, 97 Fed. 194; *Re* Lewin, 103 Fed. 852; *Re* Lowenstein, 106 Fed. 51; *Re* Becker, 106 Fed. 54; *Re* Bemis, 104 Fed. 672; U. S. v.

in bankruptcy, within six years;[5] or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of

Young & Holland Co., 170 Fed. 110; *Re* Wright, 177 Fed. 578; *Re* McCann, 179 Fed. 575; *Re* Margolis, 181 Fed. 591; *Re* Taylor, 182 Fed. 187; *Re* Sussman, 183 Fed. 331; U. S. v. Stern, 186 Fed. 854; *Re* Graves, 189 Fed. 847; *Re* Sussman, 190 Fed. 111; *Re* Doyle, 199 Fed. 247; *Re* Berger, 200 Fed. 325; *Re* Singer, C. C. A., 251 Fed. 51. For cases holding that there was not, see *Re* Alleman, 162 Fed. 693; Johnson v. U. S., C. C. A., 18 L.R.A.(N.S.) 1194, 163 Fed. 30; *Re* Boner, 169 Fed. 727; *Re* Reed, 191 Fed. 920; *Re* Mintzer, 197 Fed. 647; *Re* Doyle, 199 Fed. 247. It seems that money borrowed to pay the expenses of the bankruptcy proceedings need not be put in the schedules. Sellers v. Bell, C. C. A., 94 Fed. 801. The advice of counsel is no excuse for the omission of assets from the schedule, unless the bankrupt gave him a full disclosure of the facts; but, in such a case, it may have weight with the court. *Re* Alleman, 162 Fed. 693; *Re* Kyte, 174 Fed. 867; *Re* Nelson, 179 Fed. 320.

[5] See *Re* Wheeler, 5 Fed. 299; *Re* Wolff, 100 Fed. 430; *Re* Chase, 186 Fed. 408; *Re* De Lewandowski, 243 Fed. 787. A discharge by composition has the same effect. *Re* Radley, 252 Fed. 205. It makes no difference whether the former proceedings were voluntary or involuntary or whether the second proceeding is of the same character as the former. *Re* Neely, 134 Fed. 667; *Re* Seaholm, C. C. A., 136 Fed. 144. The discharge of a firm in former bankruptcy proceedings is no bar to the subsequent discharge of another co-partnership within the six years, although one of the partners of the former was a member of the latter. *Re* Neyland & McKeithen, 184 Fed. 144, where the former order of discharge, although purporting to discharge the individual partners also, was construed as a discharge of the partnership only, since there had been no adjudication against the individuals. A creditor, who held a provable claim under the former proceeding, is not estopped from raising his objection to the bankrupt's discharge in a subsequent proceeding, although he proved his claim therein, when the bankrupt scheduled no assets not exempt. *Re* Bacon, C. C. A., 193 Fed. 34; *Re* Neely, 134 Fed. 667; *Re* Seaholm, C. C. A., 136 Fed. 144. The discharge of a firm in former bankruptcy proceedings is no bar to the subsequent discharge of another co-partnership within the six years, although one of the partners of the former was a member of the latter. *Re* Neyland & McKeithen, 184 Fed. 144, where the former order of discharge, although purporting to discharge the individual partners also, was construed as a discharge of the partnership only, since there had been no adjudication against the individuals.

In computing the time which has intervened since the bankrupt was discharged in voluntary proceedings, the six years are counted back from the time of the hearing on the application for the second discharge, and not from the time of the filing of the second voluntary petition in bankruptcy. *Re* Jordan, 142 Fed. 292; *Re* Haase, 155 Fed. 553.

or to answer any material question approved by the court."[6] A discharge was denied where there were no dischargeable debts.[7] It has been held that a bankrupt, who failed to apply for his discharge within the time limited by the present bankruptcy law, cannot thereafter file a second petition and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy;[8] an order refusing to confirm composition is not a bar to a subsequent discharge.[9]

§ 657. Obligations released by discharge. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;[1] (2) are liabilities for obtaining property by false pre-

[6] 30 St. at L. 544, 550, § 14, as amended, June 25, 1910, ch. 412, § 6, 36 St. at L. 839, Comp. St. § 9598.

[7] *Re* Gullick, 190 Fed. 52.

[8] *Re* Silverman, C. C. A., 157 Fed. 675; *Re* Elby, 157 Fed. 935; *Re* Bramlett, 161 Fed. 588; *Re* Von Borries, 168 Fed. 718; *Re* Stone, 172 Fed. 947; *Re* Westbrook, 186 Fed. 414; *Re* Bacon, C. C. A., 193 Fed. 34; *Re* Springer, 199 Fed. 294; *Re* Loughran, 215 Fed. 271; Siebert v. Dahlberg, C. C. A., 218 Fed. 293; *Re* Skaats, 233 Fed. 817; *Re* Schwartz, 248 Fed. 841; Horner v. Hamner, C. C. A., 249 Fed. 134; *Re* Spangler, 256 Fed. 62. In the latter proceeding the court should limit the discharge so as to exclude claims prior to the former petition. *Re* Westbrook, 186 Fed. 414; Pollet v. Cosel, C. C. A., 30 L.R.A. (N.S.) 1164, 179 Fed. 488; *Re* Pullian, 171 Fed. 595. The dismissal of a bankrupt's petition for want of prosecution has the same effect. *Re* Kuffler, 144 Fed. 445. The failure of a partnership to apply for a discharge does not affect the rights of an individual partner who has not then been so adjudicated to obtain his discharge in a subsequent proceeding. Horner v. Hamner, C. C. A., 249 Fed. 134.

[9] *Re* McVoy Hardware Co., C. C. A., 200 Fed. 949.

§ 657. [1] A claim that is disallowed is not a non-provable debt, when the disallowance is because it is without foundation, and the discharge in bankruptcy is a bar to a suit thereupon. Lesser v. Gray, 236 U. S. 70. A claim that is capable of liquidation is provable and dischargeable. Williams v. U. S. Fidelity & Gy. Co., 236 U. S. 549. A claim of a surety upon a contract broken prior to the bankruptcy is dischargeable although the damage was not paid until subsequently. Ibid. A claim which arises between the adjudication and the discharge is not dischargeable in the proceeding. Zavelo v. Reeves, 227 U. S. 625, 631. Such are a promise to repay money loaned for use in a composition and a promise to pay a debt in full in case the composition is confirmed, although based upon no consideration provided that it is not obtained by extortion or constitutes a secret and fraudulent agree-

tenses or false representations,[2] or for wilful and malicious injuries to the person or property of another,[3] or for alimony due

ment at the expense of other creditors. Ibid. See *supra*, § 653. It has been held that a claim for personal tort, which has not been reduced to judgment before the bankruptcy, is not dischargeable. *Re* N. Y. Tunnel Co., 159 Fed. 688; Pearlman v. Booth, 160 App. Div. (N. Y.) 219. See *supra*, § 619, 647.

2 A discharge in bankruptcy does not release a debt caused by fraudulent and material misrepresentations, Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. ed. 723; Packer v. Whittier, C. C. A., 91 Fed. 511; *Re* Wollock, 120 Fed. 516; or contracted when the debtor knew that he was insolvent and intended not to pay it, Ames v. Moir, 138 U. S. 306, 34 L. ed. 951. The fraud must be actual, not constructive. *Re* Nuttall, 201 Fed. 557, 56; *Re* Shepardson, 220 Fed. 186. It has been held that the word "property" does not include the services of an attorney. *Re* Thaw, 180 Fed. 419, aff'd Gleason v. Thaw, C. C. A., 185 Fed. 361; Gleason v. Thaw, 236 U. S. 558 affirming C. C. A., 196 Fed. 359; see Gleason v. O'Mara, C. C. A., 180 Fed. 417; but that a judgment for false representation in obtaining a bond is not dischargeable, *Re* Dunfee, 219 N. Y. 188. The word "false" means fraudulent. Gilpin v. Merchants' Nat. Bank, C. C. A., 20 L.R.A.(N.S.) 1023, 165 Fed. 607. But an indebtedness thus incurred through the false representation of one partner will not be barred by the discharge of the other. Frank v. Michigan Paper Co., C. C. A., 30 L.R.A.(N.S) 623, 179 Fed. 776. It has been said: that, in order to except the debt from the discharge, the false representations need not have been made in writing. Katzenstein v. Reid (Texas Ct. App.), 16 Am. B. R. 740; nor need the bankrupt have known their falsity, if he made them recklessly. Ibid; and that they may have been made to a mercantile agency in order to obtain credit, and not to any particular creditor. Ibid. See *supra* § 656. See also Bullis v. O'Beirne, 195 U. S. 606, 49 L. ed. It has been held that the cause of action for the fraudulent representations is waived by an action for conversion. *Re* Ennis & Stoppani, 171 Fed. 755; Maxwell v. Martin, 130 App. Div. (N. Y.) 80; *contra*, Kavanaugh v. McIntyre, 128 App. Div. (N. Y.) 722; s. c., 74 Misc. (N. Y.) 222; or by filing a claim for the goods sold, Standard Sewing Mach. Co. v. Kattell, 132 App. Div. (N. Y.) 539; see Standard Varnish Works v. Haydock, C. C. A., 143 Fed. 318; Harv. Law Rev., Dec. 1909; and in such cases it is barred. But see Friend v. Talcott, 228 U. S. 27, cited *infra*.

3 It has been said: that the words "wilful and malicious injuries" do not imply express malice; but that the word "malicious" is used in its ordinary legal sense. McChristal v. Clisbee, 190 Mass. 120; *Re* Halper, 82 Misc. (N. Y.) 205. Liabilities for assault and battery, *Re* Colaluca, 133 Fed. 255; *Re* Conroy, C. C. A., 237 Fed. 817; McChristal v. Clisbee, 190 Mass. 120; false imprisonment, McChristal v. Clisbee, 190 Mass. 120, 3 L.R.A.(N.S) 702; malicious prosecution, McChristal v.

or to become due,[4] or for maintenance or support of wife or child,[5] or for seduction of an unmarried female,[6] or for breach of promise of marriage accompanied by seduction,[7] or for criminal conversation;[8] (3) have not been duly scheduled in time

Clisbee, 190 Mass. 120, 3 L.R.A. (N.S.) 702; libel, McDonald v. Brown, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659; intentional, and wilful conversion, McIntyre v. Kavanaugh, 242 U. S. 138; *Re* Arnao, 210 Fed. 395; *Re* Keeler, 243 Fed. 770; are not released by a discharge. Nor it has been held are claims for forcible dispossession although unaccompanied by expressed malice, *Re* Munro, 197 Fed. 450; and alienation of affection not accompanied by seduction; Leicester v. Hoadley, 66 Kansas, 172, 65 L.R.A. 523. The discharge bars claims for conversion, which is not wilful. *Re* Ennis & Stoppani, 171 Fed. 755; *Re* Toklas Bros., 201 Fed. 377; Wild v. Schelhorn, N. Y. City Court *per* Allen, J., N.Y.L.J. April 25, 1916. See Kreitlein v Ferger, 238 U. S. 21. *Contra,* Kavanaugh v. McIntyre, 128 App. Div. (N. Y.) 722; s. c., 74 Misc. (N. Y.) 222; Maxwell v. Martin, 130 App. Div. (N. Y.) 80.

[4] *Re* Pyatt, 257 Fed. 362; *Re* Vadner, 259 Fed. 614. This includes a judgment for alimony entered in one State upon a decree of divorce entered in another. Matter of Williams, 152 App. Div. (N. Y.) 385. A debt for medical attendance furnished to the wife or child of the bankrupt at his request, while they were living together, is discharged. *Re* Ostrander, 139 Fed. 592.

[5] Including a judgment in a bastardy proceeding. *Re* Baker, 96 Fed. 954.

[6] *Re* Maples, 105 Fed. 919.

[7] See *Re* Warth, C. C. A., 200 Fed. 408, reversing 196 Fed. 571; *Re* Komar, 234 Fed. 378; *In re* Grounds, 215 Fed. 280.

[8] The enumeration of debts in the exceptions does not enlarge the class of debts which are provable under the subsequent section of the statute. Brown & Adams v. United Button Co., C. C. A., 8 L.R.A. (N.S.) 961, 149 Fed. 48; *Re* N. Y. Tunnel Co., C. C. A., 159 Fed. 688; *supra,* § 647; nor authorize the proof of liabilities for tort disconnected with any contract. Ibid. Debts, which are not provable, are not released by a discharge. Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. ed. 1084; *Re* Moore, 111 Fed. 145. Such are: a fine imposed by a State court for a criminal contempt, *Re* Hall, 170 Fed. 721; a suit to compel a corporation to issue a certificate of stock, *Re* Clipper Mfg. Co., C. C. A., 179 Fed. 843. So it has been held are a "put" or agreement to take a certain number of shares of stock at a specified price, at the option of the plaintiff, at any time prior to a specified date, Phœnix Nat. Bank v. Waterbury, 197 N. Y. 161; and a judgment in favor of the People of the State upon an appeal bond. People of the State of New York v. Smith, N. Y. Sup. Ct., Sp. Tm., Erlanger, J., N. Y. L. J. April 25, 1912, and cases cited. It has been held that an unliquidated debt may be discharged, *Re* Hilton, 104 Fed. 981. Since judgments are provable, a judgment for a tort not of the class specified in this section of the

for proof and allowance, with the name of the creditor if known to the bankrupt [9] unless such creditor had notice or actual knowl-

bankruptcy law is released by the discharge in bankruptcy, *Re* Conroy, C. C. A., 237 Fed. 817; Burnham v. Pideock, 58 App. Div. (N. Y.) 273, 5 Am. B. R. 590, affirming 5 Am. B. R. 42; even if the claim before judgment was not provable. Such is a judgment for personal injuries by negligence, *Re* Wakefield, 207 Fed. 180; McClellan v. Schmidt, 235 Fed. 986; *Re* Madigan, 254 Fed. 221; but see article by Frank O. Loveland, Esq., 20 Case & Comment 591; or for injury to property by negligence, *Re* Cunningham, 253 Fed. 663. A judgment for a debt belonging to one of the classes described in the statute is not. Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009. It has been held that the burden of proof is on the judgment creditor to show that it is not dischargeable. *Re* Levitan, 224 Fed. 241. The recital, in a judgment, of the nature of the cause of action does not control the Court of Bankruptcy. But see *Re* Shepardson, 220 Fed. 186.

[9] Miller v. Guasti, 226 U. S. 170, 57 L. ed. —; Bergmann v. Manes, 141 App. Div. (N. Y.) 102; Horbach v. Arkell, 172 App. Div. (N. Y.) 566; The Merchants Bank of Brooklyn v. Miller, 176 App. Div. (N. Y.) 413. The use in the schedule of an initial instead of the creditor's full given name did not prevent the discharge from releasing the judgment, Kreitlein v. Ferger, 238 U. S. 21. Where it is known that the debt has been assigned, its description in the schedule simply by the name of the assignor is insufficient. Columbia Bank v. Birkett, 174 N. Y. 112, 102 Am. St. Rep. 478; s. c., Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231. The rule is otherwise when the bankrupt had no notice of the assignment. Lent v. Farnsworth, 180 N. Y. 503. It is sufficient to procure the discharge of a stockholder's liability, when the schedules name the receiver appointed in the suit to enforce the same. Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231. In such a case it was held that the debt was not discharged when notice of the assignment was obtained by the bankrupt in ample time to amend his schedules before the first meeting of the creditors. Pendleton, J., N. Y. L. J. Nov. 25, 1914. It is insufficient to describe the creditor's residence as unknown when it might have been ascertained by the exercise of due diligence. Hyde Park Flint Bottle Co. v. Miller, 179 App. Div. (N. Y.) 73. It is insufficient to give the office or business address instead of the residence. McKee v. Preble, 138 N. Y. Supp. 9150. Where a debt was scheduled in the name of a creditor who is dead, but of whose death the bankrupt was not aware, this was held to be sufficient. Wheeler v. Emmeluth, 58 Hun 369, aff'd 125 N. Y. 750; Lent v. Farnsworth, 94 App. Div. 99, aff'd 180 N. Y. 503. Where partnership debts of a firm, to which the bankrupt belonged, were not properly described in the schedules attached to a petition for individual bankruptcy; it was held that they were not discharged. *Re* Monroe, 114 Fed. 398; *Re* Faun, 96 Fed. 592. But see Kreitlein v. Ferger, 238 U. S. 21.

edge of the proceedings in bankruptcy;[10] or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer[11] or in any fiduciary capacity."[12]

[10] "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends." Birkett v. Columbia Bank, 195 U. S. 345, 350, 49 L. ed. 231, per McKenna, J. Information from a person not therewith connected that bankruptcy proceedings were pending is insufficient. Wheeler v. Newton, 168 App. Div. (N. Y.) 783.

It has been held that the burden of proof is on the bankrupt to prove that a creditor whose debt was not scheduled had notice of the proceeding. Grabe v. Gault, 103 App. Div. (N. Y) 511. But see Kreitlein v. Ferger, 238 U. S. 21.

[11] The word "officer" in the phrase "while acting as an officer" has been held to include officer of a private corporation, such as a national bank. *Re* Harper, 133 Fed. 970, affirmed as Harper v. Rankin, C. C. A., 141 Fed. 626; *Re* Gulick, 186 Fed. 350, a private corporation. But see *Re* Floyd, Crawford & Co., 15 Am. B. R. 277.

[12] 30 St. at L. 544, 550, § 17, amended Feb. 5, 1903, ch. 487, 55, 32, St. at L. 798, amended March 2, 1917, ch. 153, 39 St. at L. 999, Comp. St. § 9601. It has been said that the words "fiduciary capacity" imply one that exists independently of the particular transaction, out of which the debt arises. Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931; *Re* Harper, 133 Fed. 970, affirmed as Harper v. Rankin, C. C. A., 141 Fed. 626. "The words, in the fourth division of section 17, 'while acting as an officer, or in any fiduciary capacity,' extended to 'fraud, embezzlement, misappropriation,' as well as 'defalcation.'" Tindle v. Birkett, 205 U. S. 183, 186, 51 L. ed. 762, 764, per Fuller, C. J. "The word 'fraud' means moral turpitude or intentional wrong." *Re* Blumberg, 94 Fed. 476, 479. It has been held: that the fraud itself must be "the foundation of the right and of the recovery." *Re* Blumberg, 94 Fed. 476, 479, and that, within the meaning of this section of this statute, it does not consist simply in fraudulent conveyances to defeat the collection of the debt. *Re* Blumberg, 94 Fed. 476. The discharge releases a debt due by a stock broker, Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; Barrett v. Prince, C. C. A., 143 Fed. 302; Wood v. Fisk, 215 N. Y. 233; Knott v. Putnam, 107 Fed. 907; Chapman v. Forsyth, 2 Howard, 202, 11 L. ed. 236; Bills v. Schliep, C. C. A., 127 Fed. 103; *Re* Adler, C. C. A., 152 Fed. 422; Mathieu v. Goldberg, 156 Fed. 541; *Re* Gulick, 186 Fed. 350; *Re* Toklas Bros., 201 Fed. 377, or attorney, Upshur v. Briscoe, 138 U. S. 34 L. ed. 931; for the conversion of money or other property of his principal, and the obligation of a

It has been held that the discharge in bankruptcy of a firm from firm debts does not relieve the individual members of the firm from liability for firm debts, where no individual adjudication was had.[13] The discharge of a corporation will not release its directors or stockholders from any liability that they may have incurred.[14] A limited judgment for that purpose was allowed against the corporation; but otherwise a corporation is entitled to as complete a discharge as an individual.[15]

§ 658. Revocation of discharge. "The judge may, upon the application of parties in interest[1] who have not been guilty of

trustee of an implied trust, Chapman v. Forsyth, 2 Howard, 202, 11 L. ed. 236; Noblet v. Hammond, 129 U. S. 65, 32 L. ed. 621; Fleitas v. Richardson, 147 U. S. 550, 37 L. ed. 276 (the liability of a husband for his wife's paraphernal property under the law of Louisiana); *Re* Harper, 133 Fed. 970, affirmed as Harper v. Rankin, C. C. A., 141 Fed. 626; Mulock v. Byrnes, 129 N. Y. 23; Reeves v. McCracken, 69 N. J. L. 203, 13 Am. B. R. 680; or of a pledgee who has converted the proceeds of collateral, given him as security for his debt, Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362; *Re* Adler, C. C. A., 144 Fed. 659; but not, it has been held, the mutual obligations of partners; *Re* Walker, 176 Fed. 455; Haggerty v. Badkin, (N. J. Ch.) 66 Atl. Rep. 420; *Re* Toklas Bros., 201 Fed. 377; unless the conversion was wilful, McIntyre v. Kavanaugh, 242 U. S. 138. As to its effect upon community debts, see Gibbons v. Horton Tr. & Sav. Bank, 229 Fed. 424.

13 *Re* Neyland & McKeithen, 184 Fed. 144.

14 Re Marshall Paper Co., C. C. A., 102 Fed. 872.

15 Ibid.

§ 658. 1 It has been held that a creditor who has not proved his claim, and whose time to prove this has expired, may apply for the revocation of a discharge; *Re* Bimberg, 121 Fed. 942; *Re* Chandler, C. C. A., 138 Fed. 637; but, that the assignee of a claim assigned after the discharge of a subsequent creditor, cannot. *Re* Chandler, C. C. A., 138 Fed. 637. See *supra*, § 653, 655. It seems that, in a proper case, the bankrupt himself may move for the vacation of the decree discharging him. *Re* Hawk, C. C. A., 114 Fed. 916; *Re* Shaffer, 4 Am. B. R. 728; Remington on Bankruptcy, § 2812; but leave was denied him when he applied for the purpose of amending his schedules, so as to include an omitted creditor without notice after the expiration of the time for proving the latter's claim. *Re* Hawk, C. C. A., 114 Fed. 916. It has been said that the court may, of its own motion, vacate the discharge within the statutory time. *Re* Bimberg, 121 Fed. 942. It has been held that the trustee of the bankrupt cannot make a motion to reopen the estate. *Re* Paine, 127 Fed. 246. That a creditor whose claim was not barred by the discharge cannot obtain the revocation. *Re* Chandler, C. C. A., 138 Fed. 637.

undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt,[2] and that the knowledge of the fraud has come to the petitioners since the granting of the discharge,[3] and that the actual facts did not warrant the discharge."[4] Where creditors because of a mistake failed to file within the statutory time speci-

2 The fraud must be connected with the procurement of the discharge and not previous conduct which if duly interposed by objection would have prevented the discharge. *Re* Weintrob, 263 Fed. 904. It must be actual fraud involving moral turpitude or intentional wrongs and not merely acts from which fraud is inferred by the law. *Re* Cuthbertson, 202 Fed. 266. A misstatement through a mistake in law made under the advice of counsel is not such a fraud. Ibid. A discharge may be revoked because of the subsequent discovery of articles fraudulently concealed by the bankrupt. *Re* Hoover, 105 Fed. 354; because of the withdrawal without notice, for a consideration, of objections filed by certain creditors, upon whose opposition the others relied. *Re* Meyers, 100 Fed. 775; and because he intentionally gave an erroneous address of a creditor in order to obtain the discharge without the latter's knowledge. *Re* Dietz, 97 Fed. 563. But see *Re* Adams, 242 Fed. 335. An order of discharge may be amended at any time before the proceedings are closed, so as to discharge the bankrupt from his debts as a member of a firm, as well as from his individual liabilities. *Re* Diamond, C. C. A., 149 Fed. 407. The petition for the revocation of a discharge must state specifically that the discharge was obtained through the fraud of the bankrupt. *Re* Hoover, 105 Fed. 354. It must set forth grounds which, if sustained, would result in the denial of the discharge. *Re* Wright, 177 Fed. 578; *Re* Downing, 199 Fed. 329. See Gage v. Penfield, C. C. A., 249 Fed. 961.

3 It should show that knowledge of the fraud was first obtained by the applicant since the discharge was granted. *Re* Roosa, 119 Fed. 542; Gage v. Penfield, C. C. A., 249 Fed. 961; but where such an allegation appeared in an affidavit annexed to the creditor's petition, an amendment was allowed. *Re* Hoover, 105 Fed. 354; *Re* Oleson, 110 Fed. 796; *Re* Upson, 124 Fed. 980. The petition should also make a substantial showing of facts to prove the absence of undue laches. *Re* Oliver, 133 Fed. 832. Leave was refused to amend the petition by adding a new objection after the expiration of a year from the discharge. *Re* Wright, 177 Fed. 578. See *Re* Weintrob, 263 Fed. 904. A delay of ten months, *Re* Mauzy, 163 Fed. 900; and of eight months, *Re* Downing, 199 Fed. 329, were held to constitute such laches. It has been held that notice of the fraud to the trustee, previous to the discharge is notice to all the creditors. *Re* Oleson, 110 Fed. 796. But see *supra*, § 653.

4 30 St. at L. 544, 550, § 15. *Re* Hansen, 107 Fed. 252.

fications against the discharge, the discharge was vacated although it did not appear that the bankrupt was guilty of any fraud.[5] Where, through mistake, certain debts had been omitted from the schedules, a motion was granted when made by the bankrupts to set aside the discharge and to permit them to amend their schedules by including both the creditors' claim and their counterclaim.[6] The hearing upon an application for the revocation of a discharge must be before the judge; but he may refer it to the referee as special master, to report the evidence and facts with his opinion.[7]

§ 659. Costs and fees. The Courts of Bankruptcy have power "to tax costs wherever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates in proceedings in bankruptcy."[1] When a petition in involuntary bankruptcy is "dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."[2] "In cases of

5 *Re* Appelgate, 235 Fed. 271. But see *Re* Groves, 244 Fed. 197.

6 *Re* McKee, 165 Fed. 269.

7 *Re* Oliver, 133 Fed. 832. Where no proceedings were taken before the referee after his request for a deposit to cover the costs of the hearing, the petition was dismissed at the cost of the petitioners for want of prosecution. *Re* Meyers, 100 Fed. 775.

§ 659. 1 30 St. at L. 544, 546, § 2; *Re* Carolina Cooperage Co., 96 Fed. 604. See *supra*, § 409. The power thus granted is not restricted by General Order XXXIV, quoted *infra*. Petition of Kurtz Brass Bed Co., 250 Fed. 116. In a proper case the costs may be divided. *Re* Liberty Doll Co., 242 Fed. 695. *Re* Ward, 203 Fed. 769; King Hardware Co. v. J. G. Christopher Co., C. C. A., 222 Fed. 225. See *Re* H. B. Hollins & Co, 225 Fed 619. Where the bankrupt is penniless, the court will not tax against him the costs of a successful opposition to his discharge. *Re* Kyte, 189 Fed. 531. No costs were awarded to the alleged bankrupts when petitions in an involuntary bankruptcy were dismissed for want of jurisdiction, in the case of an individual because he had not resided a sufficient length of time in the district. *Re* Williams, 120 Fed. 34, and in the case of a corporation because it was not a member of the class subject to bankruptcy. *Re* Philadelphia & Lewes Transp. Co., 127 Fed. 896.

2 30 St. at L. 544, 547, § 3; *Re* Ward, 203 Fed. 769. Where after dismissal the bankrupt was obliged to sue to recover the expenses caused

involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."[3] The expense of determin-

by the seizure, he was allowed to include therein his counsel fees in such proceedings, *Re* Weissbord, 241 Fed. 516; but not the expenses incurred in procuring the dismissal; nor any damages in excess of the amount named in the bond. Ibid. When there is no seizure, taking or detention of property there is no liability upon the bond except for the usual costs, unless the petitioners acted without probable cause and maliciously, and in such a case the remedy is a suit in the nature of a suit for malicious prosecution. *Re* Moehs & Rechnitzer, 174 Fed. 165; *Re* National Carbon Co., C. A. A., 241 Fed. 330. Where no seizure has been made and no bond given no costs, counsel fees or damages will be awarded upon the dissolution for want of jurisdiction of an injunction against the payment of money. *Re* Williams, 120 Fed. 34, *supra*, §§ 297, 298. Where the petition is dismissed the costs and expenses of the receivership may be charged againt the petitioners, Beach v. Macon Grocery Co., C. C. A., 125 Fed. 513; *Re* Lacov, C. C. A., 142 Fed. 960; *Re* Weissbord, 241 Fed. 516; *supra*, § 634. But see *Re* Veler, C. C. A., 249 Fed. 633; *Re* Independent Machine & Tool Corp., C. C. A., 251 Fed. 484. Where the receiver had by his services largely increased the estate, the expenses of the administration, including a reasonable allowance to the receiver and his counsel, were charged to the fund. *Re* Wentworth Lunch Co., 25 Am. B. R. 612; decided by Stanley W. Dexter, Special Master. The courts have refused to include in the costs taxed against the petitioner's compensation for the trustee and the latter's counsel. *Re* National Carbon Co., C. C. A., 241 Fed. 330. A judgment of dismissal with specified costs to the bankrupt does not prevent him from subsequently proceeding upon the bond to recover other expenses. *Re* McKenzie, 219 Fed. 630. By D. N. J. Bankruptcy Rule 16 upon the dismissal the compensation of a special master may be taxed against the petitioning creditors. *Re* Ward, 203 Fed. 769. When the respondent has not been deprived of the possession of his property, no counsel fees are allowed. *Re* Morris, 115 Fed. 591; not even it was held when the appointment of the receiver prevented the alleged bankrupt from redeeming property held by a sheriff. *Re* J. Ito Terusaki, 238 Fed. 934. It has been held that the bankrupt must file his bill of costs with the clerk and give to the petitioning creditors, notice of taxation, together with the amount of his bill. *Re* Haeseler-Kohlhoff Carbon Co., 135 Fed. 867.

[3] General Order XXXIV, held that the costs of contesting claims before the election of a trustee, which were incurred in an attempt to control the election, are not chargeable to the estate. *Re* Mer-

ing the title to, and of protecting the property subject to a lien may, in a proper case, be charged against the proceeds thereof.[4] The cases in which costs can be charged against property, which is exempt, have been previously considered.[5] "The actual and necessary expenses incurred by officers in the administration

cantile Co., 95 Fed. 123; *Re* Worth, 130 Fed. 927; *Re* Fletcher, 10 Am. B. R. 398, by Referee Miller. A creditor cannot be allowed his counsel fees upon the re-examination of a claim, which is again allowed; but when he resided at a distance, his reasonable traveling and hotel expenses were allowed him. *Re* George Watkinson & Co., 130 Fed. 218. Claimants to property in the possession of the trustee, when successful, are not allowed their costs and expenses, unless it appears that the defense made by the trustee was captious or unwarranted. *Re* Stewart, 178 Fed. 463. A stranger to the proceeding who successfully defeats a summary application against him cannot have his expenses and counsel fees paid out of the estate. *Re* Reiswig, 255 Fed. 390. Costs of summary applications cannot be taxed personally against parties who do not appear. Havens & Geddes Co. v. Pierek, C. C. A., 120 Fed. 244. Where a reclamation proceeding was dismissed, the trustee was allowed to tax, as part of the costs, the charges and expenses of the preservation of the property during its pendency. *Re* Schocket, 177 Fed. 583.

[4] *Re* Goldville Mfg. Co., 123 Fed. 579. See *Re* Gaskill, 130 Fed. 235; *Re* Erie Lumber Co., 150 Fed. 817, 825. Ordinarily the expense of determining the title to a fund or other property impressed with different equities, some of which are superior to others, in the hands of the trustee including the compensation of accountants should be charged against the general estate. In case this is insufficient against the least favored claimants. If the amount due the latter is insufficient, against those holding the superior equities. But no item of expense should be charged against any person whose rights were determined without any need of resorting thereto. *Re* J. C. Wilson & Co., 252 Fed. 631. But see *Re* J. F. Pierson, Jr., Co., 225 Fed. 889; *Re* Tietje, 263 Fed. 917. The general expenses of the proceedings should not be charged against lienors who establish their claims. The Bethulia, 200 Fed. 877; *Re* Cutler & John, 228 Fed. 771; *Re* Russell Falls Co., 249 Fed. 260, aff'd Keefe v. Worchester Tr. Co., C. C. A., 253 Fed. 536; certiorari denied, 249 U. S. 602, 39 Sup. Ct. 259, 63 L. ed. 797. A deposit for the purposes of a composition may, even if the composition is not consummated, in a proper case be used for the expenses of the bankruptcy proceeding, *Re* Miller, 243 Fed. 242; or such parts thereof as resulted from the unsuccessful attempt to make the composition. *Re* Wiener, 215 Fed. 278; *supra*, § 653. Where the bankrupt transacted business in a district where he did not reside in the name of another who also became bankrupt the expense of the administration of both estates was charged against the property therein. *Re* Offrich, 260 Fed. 682.

[5] *Supra*, § 650.

of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed of the estates in which they were incurred."[6] The costs include "the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery."[7] The referee may, "upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates for a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings."[8]

[6] 30 St. at L. 544, 562, § 62. It has been held that the costs and expenses of the administration are entitled to priority of payment over taxes due the State. State of New Jersey v. Lovell, C. C. A., Third Ct., 179 Fed. 321. *Contra*, as to taxes due the United States, *Re* Weiss, S. D. N. Y., 159 Fed. 295. See § 649, *supra*. Such costs of administration include the fees and mileage of witnesses. 30 St. at L. 544, 563, § 64; *Re* Carolina Cooperage Co., 96 Fed. 604; *supra*, § 419, but not additional compensation to expert witnesses. *Re* Carolina Cooperage Co., 96 Fed. 604.

[7] 32 St. at L., 797. See *supra*, § 643. The filing fees are not repaid the bankrupt. *Re* Matthews, 97 Fed. 772. The affidavit by the petitioner of his inability to pay the filing fees is not conclusive. *Re* Collier, 93 Fed. 191. See *supra*, § 413. It has been held that a trustee, who has no funds in his hands, cannot be obliged to advance money to pay the disbursements of the bankrupt in opposing an application to compel him to turn over property, although the bankrupt testifies that he himself is without means. *Re* Goldstein, 155 Fed. 695. The bankrupt may be obliged to pay them as a condition to the filing of a petition of voluntary bankruptcy, although all of his property is exempt from execution. *Re* Collier, 93 Fed. 191; *Re* Bean, 100 Fed. 262; *Re* Hines, 117 Fed. 790; *Re* Mason, 181 Fed. 899.

[8] *Re* Todd, 109 Fed. 265; *Re* Mammoth Pine Lumber Co., 116 Fed. 731; *Re* Pearce, 235 Fed. 917; *Re* Weissman, 267 Fed. 588, *supra*, § 418e. Where the stenographer furnished three copies, his compensation was reduced to forty cents a page, his charge of one dollar a page being held to be unreasonable. *Re* Elliott El. Co., 196 Fed. 400. In the absence of such an order, stenographers' fees cannot be taxed, except upon a written stipulation between the attorneys. 30 St. at L. 544, § 38*a*, subd. 5; *supra*, § 420. The bankrupt is entitled to a copy of the testimony upon payment of

"In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed."[9] "Before incurring any expense in publishing or mailing of notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same."[10]

§ 660. Clerk's fees. "Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of record which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees,[1] (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers

the legal fees therefor. Petition of Moulthrop, C. C. A., 249 Fed. 468.

9 General Order XXXV.

10 General Order X. *Re* Crisp, 239 Fed. 419. The referee is not authorized to require a petitioner for the re-examination of claims to indemnify the claimants for hotel bills and travelling expenses in order to attend the hearing. *Re* Elk Valley Coal Mining Co., 210 Fed. 386. See *supra*, § 645.

§ 660. 1 *Cf. supra*, § 413. This provision does not relieve a voluntary petitioner from his obligation to furnish indemnity when required in order to enable the requisite notice to creditors to be published, *Re* Crisp, 239 Fed. 419; *supra*, § 659; nor authorize the bankrupt after paying a fee to his attorney to avoid payment of the filing fees. *Re* Darr, 232 Fed. 415. See *infra*, § 665.

by mail, and in like manner return papers which were received from such referees after they had been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition."[2] "Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except where a fee is not required from a voluntary bankrupt."[3] "The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers."[4]

§ 661. Marshal's fees. "Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals."[1] Where the rules require that a paper be served by the marshal, he may charge a reasonable fee for such services, although no fee therefor is specified in the Revised Statutes.[2] A fee of two

[2] 30 St. at L. 544, 558, 559, § 51. See § 586, *supra*. Where the members of a partnership seek a discharge of themselves and of the partnership, the clerk is entitled to separate fees for each partner and for the partnership, as if they were distinct proceedings. *Re* Farley, 115 Fed. 359; *supra*, § 618.

[3] 30 St. at L. 544, 559, § 52.

[4] General Order XXXV. It has been held: that a clerk can charge his expenses for postage, stationery and clerical work, in sending out notices to creditors of a petition for a discharge; but that a fee of twenty-five cents, *Re* Dunn Hardware & Furniture Co., 134 Fed. 997; or ten cents, *Re* Loughney, 218 Fed. 980; for each notice is improper. But see U. S. v. U. S. Fidelity & Guaranty Co., 263 Fed. 442.

§ 661. [1] 30 St. at L. 544, 559, § 52; *supra*, § 418; *Re* Woodard, 95 Fed. 955; *Re* Scott, 99 Fed. 404; *Re* Adams Sartorial Art Co., 101 Fed. 215; *Re* Damon, 104 Fed. 775.

[2] *Re* Damon, 104 Fed. 775.

dollars for the service by him of a petition and two dollars for the service by him of an order to show cause, with the accompanying affidavits, was held to be proper, although all the papers were pinned together under one cover.[3] The marshal is also entitled to reasonable compensation, in addition to his disbursements, when he seized property of the bankrupt under the order of the Court of Bankruptcy.[4] When marshals are appointed to take charge of the property of bankrupts after the filing of the petition until the dismissal thereof or the qualification of the trustee, they are entitled to the same fees as receivers in like cases.[5] When the business of bankrupts is conducted by a marshal in accordance with the orders of the court under the bankruptcy law he may be allowed the same compensation that may be allowed to trustees and receivers in like cases.[6]

§ 662. Referee's fees. "(*a*) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. (*b*) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees. (*c*) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commission shall be

3 *Re* Damon, 104 Fed. 775, 777.

4 *Re* Adams Sartorial Art Co., 101 Fed. 215. See *Re* Scott, 99 Fed. 404. In one case, twenty dollars for seventeen days was held to be reasonable compensation. *Re* Adams Sartorial Art Co., 101 Fed. 215. In another, deputy marshals were allowed two dollars and a half a day, besides their mileage and other necessary disbursements, exclusive of the cost of their board and lodging, and including one dollar a day for a watchman, who was also employed. *Re* Scott, 99 Fed. 404.

5 30 St. at L. 544, 558, § 48*d*, *infra*, § 664.

6 Ibid., § 48*e*.

paid to the referee."[1] "Neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."[2] "The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the

§ 662. [1] 30 St. at L. 544, 556, § 40; 32 St. at L. 797. See *Re* Ft. Wayne, etc., Corp., 94 Fed. 109; *Re* Carolina Cooperage Co., 96 Fed. 950; *Re* Barber, 97 Fed. 547; *Re* Tebo, 101 Fed. 419; *Re* Troth, 104 Fed. 201; *infra*, § 663. It has been held that the referee is allowed his commissions upon the payments to creditors with a priority. *Re* Alison Lumber Co., 137 Fed. 643; *Re* Cramond, 145 Fed. 966, 17 Am. B. R. 22, 30; *Re* Coffin, 2 Am. B. R. 344, by Referee Dillard; *Re* Gerson, 2 Am. B. R. 352, by Referee Mason; including secured creditors; *Re* Cramond, 145 Fed. 966, 17 Am. B. R. 22; *Re* Erie Lumber Co., 150 Fed. 817; but, that he is not entitled to a commission upon that part of the proceeds of property sold by him, which is applied to satisfy a lien. *Re* Mammoth Pine Lumber Co., 116 Fed. 731, 743; *Re* Goldville Mfg. Co., 123 Fed. 579, 587; *Re* Anders Push Button Telephone Co., 136 Fed. 995; *Re* Elk Valley Coal Mining Co., 213 Fed. 383. *Contra*, *Re* Sanford Furniture Mfg. Co., 126 Fed. 888; *Re* Barber, 97 Fed. 547; *Re* Columbia Cotton Oil & Prov. Corp., C. C. A., 210 Fed. 824. Where a lien is foreclosed in a State court, the commissions of the referee are to be computed only on the amount received by the trustee and disbursed to creditors, not upon the whole proceeds of the sale. *Re* Iowa Falls Mfg. Co., 140 Fed. 527. He is entitled to no commission upon money paid for the expenses of the administration of the estate. *Re* Motridge, 258 Fed. 229. Nor upon the amount of stock given creditors under a plan of re-organization, his commission in such case being based upon the actual cash price paid by the re-organized corporation. Am. Surety Co. v. Freed, C. C. A., 224 Fed. 333. In the case of a composition he is entitled to a commission on the amount paid to creditors although this is not received nor distributed by him. *Re* J. B. White & Co., 225 Fed. 796.

[2] 30 St. at L. 544, § 72; 32 St. at L. 797; *Re* Mammoth Pine Lumber Co., 116 Fed. 731. A practice prevails in the Second Circuit, of referring to the referee special issues in a bankruptcy proceeding as a special master and allowing him compensation therefor. This has also been done in the Seventh Circuit; Fellows v. Freudenthal, C. C. A., 102 Fed. 731; in the Northern District of Michigan. *Re* Grossman, 111 Fed. 507; and in the District of South Carolina, *Re* Goldville Mfg. Co., 123 Fed. 579, 587. See *Re*

act and allowed by special order of the judge."[3] It has been held that a referee cannot receive an extra allowance, even by the consent of all the parties in interest.[4] It is usual to allow the referee compensation for office rent, clerk hire and incidental expenses, and in order to provide for this, to authorize a charge by him of ten cents for each notice served.[5] By special order, the referee may be allowed his traveling and hotel expenses when necessary for the discharge of his duties,[6] but not to a *per diem* compensation for his services in such a case.[7] The court may review an allowance by the referee of fees to himself.[8]

§ 663. Trustee's fees. "(*a*) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first $500 or less; four per centum on moneys in excess of $500 and less than $1,500, two per centum on moneys in excess of $1,500 and less than $10,000, and one per centum on moneys in excess of $10,000, and in case of the confirmation of a composition after the trustee has qualified the court may allow him as compensation, not to exceed one-half

Tracy, C. C. A., 2nd Ct., 179 Fed. 366; § 638, *supra*. In the Sixth Circuit it has been held that this cannot be done. *Re* Sweeney, C. C. A., 168 Fed. 612. So in the Southern District of Ohio, *Re* Troth, 104 Fed. 291; and in the Western District of Michigan, *Re* Wilcox, 156 Fed. 685.

3 General Order XXXV. The court has no power to allow a referee any additional compensation for extraordinary services. *Re* Meadows, 199 Fed. 304. Where the referee continued the bankrupt's business in order to complete Government contracts, it was held that he was not entitled to any additional compensation by a percentage calculated upon the amount which was raised and expended for that purpose or otherwise. Bray v. Johnson, C. C. A., 166 Fed. 67. See, also, *Re* Meadows, 199 Fed. 304.

4 Dressel v. North State Lumber Co., 119 Fed. 531.

5 Remington on Bankruptcy, § 3032. Citing *Re* Dunn Hardware & Furniture Co., 134 Fed. 997. But see *Re* Elk Valley Coal Mining Co., 213 Fed. 383. For an allowance for stationery, see *Re* Dixon, 114 Fed. 675. As regards the salary of his clerk, see *Re* Tebo, 101 Fed. 419.

6 *Re* Daniels, 180 Fed. 597.

7 *Re* Elk Valley Coal Mining Co., 213 Fed. 383.

8 *Re* Allert, 173 Fed. 691.

of one per centum of the amount to be paid the creditors on such composition. (*b*) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. (*c*) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause."[1] "(*e*) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders by them, and, in cases of receivers or marshals, also upon the moneys turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided,* That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further,* That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act."[2] Courts of Bankruptcy are allowed to "authorize the business of bankrupts to be conducted for limited periods by receivers, and the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services."[3] "Neither

§ 663. 1 30 St. at L. 544, 557, 558, § 48; 32 St. at L. 797, 36 St. at L. 838, *supra,* § 662. A trustee who was removed was denied compensation and reimbursement. *Re* Leverton, 155 Fed. 931.

2 30 St. at L. 544, § 48*c*, as amended by 36 St. at L. 838.

3 30 St. at L. 544, § 2, subdivision 5; 32 St. at L. 797. It has been held that a trustee cannot be allowed, in addition to his usual

the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act."[4] "The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts."[5] It has been held that a trustee is not entitled to commissions nor attorneys' fees out of the proceeds of property sold by him which are owned by and returned to an adverse claimant.[6] Before the amendment of 1910, previously quoted, which allows the trustee commissions on moneys turned over to lien holders, the preponderance of authority held that, where the trustee sold property subject to a lien, his commissions should be estimated upon the balance after the lienor had been paid principal and interest and not upon the whole purchase price.[7] Where a creditor buys in the property and

commissions, duplicate commissions upon the amounts disbursed by him in conducting the business of the bankrupt, pursuant to the order of the court. *Re* Cambridge Lumber Co., 136 Fed. 983; *Re* Kirkpatrick, C. C. A., 148 Fed. 811. *Contra, Re* Pequod Brewing Co., N. Y. L. J. April 19, 1907, per Dexter, referee. *Cf.* Remington on Bankruptcy, § 2116.

4 30 St. at L. 544, § 72; 32 St. at L. 797; *Re* Screws, 147 Fed. 989; *Re* Meadows, 199 Fed. 304.

5 General Order XXXV. A trustee, who is an attorney at law, cannot be allowed compensation for legal services rendered by him to the estate. *Re* George Halbert Co., C. C. A., 134 Fed. 236. A trustee was allowed his counsel fees out of the fund involved in litigation, which he instituted to reduce the number of claimants to a special fund belonging primarily to mortgage creditors. *Re* Waterloo Organ Co., C. C. A., 154 Fed 657. It has been said that a trustee should not be allowed reimbursement for a premium paid to a surety company for furnishing his official bond, *Re* Hoyt, 119 Fed. 987; Remington on Bankruptcy, § 2038; but such disbursements are frequently allowed and seem not to be improper. The trustee is allowed the fees of an auctioneer employed by him for a sale.

6 Gillespie v. J. C. Piles & Co., C. C. A., 178 Fed. 886.

7 *Re* Meadows, 199 Fed. 304; *supra*, § 642. *Contra, Re* Utt, C. C. A., 105 Fed. 754; *Re* Mammoth Pine Lumber Co., 116 Fed. 731; *Re* Sanford Furniture Mfg. Co., 126 Fed. 888. See *Re* Anders Push Button Telephone Co., 136 Fed. 995; *Re* Zehner, 193 Fed. 787.

The expense of taking care of property subject to a lien, when not incurred with the consent of the lienor, was not allowed to the

applies the dividend to the payment of the purchase price, the amount of such dividend is included in the estimation.[8]

§ 664. Receiver's fees. "(*d*) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided,* That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions:[1] *Provided further,* That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further,* That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act."[2] The bankruptcy law further provides that Courts

trustee. *Re* Vulcan Foundry & Mach. Co., C. C. A., 180 Fed. 671. But see *Re* Stewart, 193 Fed. 791.

[8] *Re* Morse Iron Works & Dry Dock Co., 154 Fed. 214.

§ 664. [1] Where the composition was offered after the receiver had accounted and his allowance had been fixed, his fees were not thereby reduced. *Re* Miller, 243 Fed. 245.

[2] 30 St. at L. 544, § 48*d*, as amended by 36 St. at L. 838. For the former rule as to notice, see *Re* Martin Borgeson Co., 151 Fed. 780. Where a receiver turns over property in bulk without having converted it to money, it seems that his commissions may be allowed him upon the value thereof. *Re* Cambridge Lumber Co., 136 Fed. 983

of Bankruptcy may "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services."[3] In all other matters it seems that the court has full discretion as to the amount of fees that shall be given to a receiver.[4] The receiver's fees are not to be deducted from the compensation of the trustee.[5]

§ 665. Attorney's fees. The bankruptcy law, after providing for the payment of taxes, directs that the order of payments of debts that have priority shall be: "(1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by

3 30 St. at L. 544, § 2, subd. 5; 32 St. at L. 797. *Cf.* Ibid., § 48*e* quoted *supra*, § 663. See *Re* George W. Shiebler & Co., C. C. A., 174 Fed. 336; *Re* Charles Knosher & Co., C. C. A., 197 Fed. 136. *Re* Griesheimer, 209 Fed. 134. As to what is conducting business, see *Re* Charles Knosher & Co., C. C. A., 197 Fed. 136.

4 *Re* Scott, 99 Fed. 404; *Re* Sully, 142 Fed. 895; *Re* Kirkpatrick, C. C. A., 148 Fed. 811; *Re* Martin Borgeson Co., 151 Fed. 780. *Contra, Re* Richards, 127 Fed. 772; *Re* Cambridge Lumber Co., 136 Fed. 983; *Re* Weissman, 267 Fed. 588. A receiver is not entitled to compensation for services rendered by the attorney for the petitioners in instituting the bankruptcy proceedings and obtaining his appointment. *Re* Oppenheimer, 146 Fed. 140. Where the receiver has been negligent, he may be denied any commissions. *Re* Schoenfeld, C. C. A., 183 Fed. 219. Where the receiver and his counsel had acted according to their best judgment and with some justification, it was held that their expenses should be allowed, although the receivership caused more than was justified by the necessity of the case. *Re* Krause, 155 Fed. 702. See *supra*, § 322. The court appointing an ancillary receiver has power to fix his fees and provide for their payment and that of his expenses, out of any funds in its hands belonging to the estate. Fidelity Tr. Co. v. Gaskell, C. C. A., 195 Fed. 865, 874. It has been said that receivers should, in no case, receive more compensation than the trustee. Remington on Bankruptcy, § 2119; see Dunlap Hardware Co. v. Huddleston, C. C. A., 167 Fed. 433; see *Re* Leonard, 177 Fed. 503.

5 *Re.* Richards, 127 Fed. 772. Where a receiver is afterwards appointed trustee, his compensation for services in both capacities may be adjusted at the same time. *Re* James Carothers & Co., 182 Fed. 501.

the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein described, and to the bankrupt in voluntary cases, as the court may allow."[1] It further provides that the costs of administration shall include "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases,[2] to the bankrupt in involun-

§ 665. [1] 30 St. at L. 544, 563, § 64. See *supra*, § 649.

[2] The attorney for the petitioners in involuntary proceedings is entitled to compensation for all services performed by him for the benefit of the estate before the election of the trustee. *Re* Curtis, C. C. A., 100 Fed. 784; *Re* W. B. Terrell Co., 250 Fed. 317. Where there are several attorneys for petitioning creditors, the amount will not be increased, but there will be a division instead of a multiplication thereof. *Re* Coney Island Lumber Co., 199 Fed. 197. Where there was a consolidation of two proceedings, but one attorney's fee was allowed, which was equitably divided among the different attorneys who had appeared. *Re* McCracken & McLeod, 129 Fed. 621. Attorneys who filed a defective petition in involuntary bankruptcy were not allowed fees after an adjudication made upon a second petition by other creditors through other attorneys. *Re* Fisher, C. C. A., 175 Fed. 531. An attorney, who files a successful demurrer to a petition in involuntary bankruptcy and also a second petition on behalf of other creditors, was not allowed to share in the compensation, where the first petition was amended and an adjudication made upon the same, the second being ignored. Frank v. Dickey, C. C. A., 139 Fed. 744. The amount of compensation awarded varies in the different districts and is largely dependent upon the amount involved and the benefit to the estate derived from the attorney's services. In the Eastern District of North Carolina, it is the rule to pay the attorney for the petitioners a fee, not exceeding $50,, for preparing the petition, superintending the filing of the same, issuing the subpœna and preparing the schedules. No further fees are ordinarily paid him when there is no contest and he takes no steps to recover assets. *Re* Carr, 117 Fed. 572; *Re* Talton, 137 Fed. 178. In Missouri $75. *Re* Mercantile Co., 95 Fed. 123. In Virginia, $75. *Re* Woodard, 95 Fed. 955. Where the assets amounted to $100,000, and the only contest arose out of an alleged estoppel against the petitioners, in which the decision of the District Court was affirmed upon an appeal to the Circuit Court of Appeals; it was held that $2,000 was an adequate allowance for the petitioners' attorney. *Re* Curtis, C. C. A., 100 Fed. 784, Ill. Where, after a long litigation, the attorneys recovered $2,500, the petitioners' attorneys

tary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow";[3]

were allowed $1,000. Smith v. Cooper, C. C. A., 120 Fed. 230, Ga. In North Carolina, where about $30,000 were collected, about $11,000 paid to the general creditors, and a number of parcels of land were sold, $750 was allowed to the attorneys for the petitioning creditors and $500 to the attorney for the trustee. *Re* Munford, 255 Fed. 108. Where the attorneys for the petitioners collected $2,600 by a suit in another district, in which they advanced initiatory costs, secured testimony and paid the expenses of the litigation; they were allowed $150. *Re* Evans, 117 Fed. 574, N. C. It has been intimated that it should not be as much as the compensation paid to the attorneys for the plaintiff in a creditor's bill. *Re* Mercantile Co., 95 Fed. 123. Where an unsuccessful litigation was instituted by the attorneys for the petitioners; it was held that no compensation for this should be allowed them. *Re* Goldville Mfg. Co., 123 Fed. 579, 583. In an extraordinary case, when they have rendered services beneficial to the estate, counsel for creditors are entitled to compensation. *Re* Medina Quarry Co., 182 Fed. 508. See *Re* Gillaspie, 190 Fed. 88; § 421, *supra*. But not for the continuance of such services after the appointment of a trustee and his engagement of other counsel, unless the trustee abandons the litigation. *Re* Medina Quarry Co., 182 Fed. 508. The petitioners's attorney cannot ordinarily be paid for his services upon an examination of the bankrupt. *Re* Rozinsky, 101 Fed. 229. Nor for objections to claims of other creditors, which were made for the purpose of controlling the election of a trustee. *Re* Mercantile Co., 95 Fed. 123; nor for successful opposition to a composition, *Re* Kinnane, C. C. A., 242 Fed. 769; nor for any services rendered after a trustee has been elected, although he has rendered valuable services in co-operation with the trustee's attorney. *Re* Felson, 139 Fed. 275. But in a case where the trustee refuses to act, and an action or appeal is prosecuted in his name, or otherwise, by the attorneys for creditors, which results in increasing the asset, the attorney's fees will usually be allowed to them. 30 St. at L. 544, 563, § 63; 32 St. at L. 797. See *Re* Little River Lumber Co., 101 Fed. 558. A judgment creditor who set aside fraudulent conveyances within four months before the bankruptcy proceedings, was allowed a preference for his costs and expenses, although he lost his lien. *Re* Lesser, 100 Fed. 433.

[3] The attorney for the bankrupt may charge for consultations concerning the filing of a petition of voluntary bankruptcy and the preparation of the schedules. *Re* Kross, 96 Fed. 816. For attending with the bankrupt before the referee. *Re* Duran Mercantile Co., 199 Fed. 961, and also for an application for the appointment of a receiver or injunction to protect the estate before a trustee is elected. *Re* Burrus, 97 Fed. 926. He is not entitled to compensation for services in attempting to sustain a claim to an exemption, *Re* O'Hara, 166 Fed. 384; nor on a contested application, confirm a composition, Re Fogarty, 187 Fed. 773; *Re* Stolp, 199 Fed. 488;

* * * and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more cred-

Re Kinnane Co., C. C. A., 242 Fed. 769; nor for his resistance to involuntary bankruptcy proceedings, Pratt v. Bothe, C. C. A., 130 Fed. 670; Ingraham v. National Salt Co., C. C. A., 130 Fed. 676; nor for unsuccessful resistance to proceedings against the bankrupt for the fraudulent concealment of property, *Re* Felson, 139 Fed 275. It has been held that he is not entitled to compensation for services in procuring the bankrupt's discharge. *Re* Brundin, 112 Fed. 306; *Re* Gillardon, 187 Fed. 289; *Re* Duran Mercantile Co., 199 Fed. 961. *Contra, Re* Christianson, 175 Fed. 867, allowing $20 for such a service. Where, after the discharge of the bankrupt, his attorney, after considerable labor, discovered additional assets, he was allowed compensation for the same. *Re* Irwin, 177 Fed. 284. Where an attorney immediately before the bankruptcy proceedings obtained a reduction of $350 in taxes, which were a lien upon the estate, he was allowed $75 for his services, which included a journey of fifty miles to examine the records, thus occupying two days, and subsequent consultations with the district attorney. He was also allowed $25 for obtaining a stay order against the prosecution of an attachment suit pending at the time of the filing of the petition. *Re* Duran Mercanile Co., 199 Fed. 961. The amounts paid to the banrupt's attorney vary in different districts and are also dependent upon the nature of the case and the amount involved. In the Southern District of New York, where the assets are small and the schedules simple, it has been held that $30 will be a reaonable fee to the attorney for the bankrupt for the preparation of the petition and schedules, and $20 for procuring the discharge. *Re* Kross, 96 Fed. 816. This same rule seems to prevail in the districts of North Carolina. *Re* Carolina Cooperage Co., 96 Fed. 950; *Re* Smith, 108 Fed. 39; *Re* Morris, 125 Fed. 841, and in Hawaii; *Re* Stratemeyer, 14 Am. B. R. 120. In North Dakota, $35. *Re* Christianson, 175 Fed. 867. In a case in North Carolina, only $20 was allowed. *Re* Talton, 137 Fed. 178. See *Re* Covington, 132 Fed. 884, where there was an allowance of $50. Where the estate was about $30,000 and about $11,000 was paid to the general creditors, the bankrupt's attorney was allowed $200. *Re* Munford, 255 Fed. 108, 117. In New Mexico, where the assets amounted to $4,500, $50 were allowed for the preparation of the schedules, the court saying that, were the assets less, $25 would be sufficient. $25 was allowed for attending the bankrupt on several days before the referee, the court being of the opinion that no more than one day's attendance was necessary, since there was no attack upon the bankrupt's good faith. *Re* Duran Mercantile Co., 199 Fed. 961. In a case in Connecticut two attorneys for the bankrupt were awarded $2,500 to be divided equally between them,

itors, the reasonable expenses of such recovery."[4] It has been held that, where there is a deficit, the attorney's fees take precedence over a lienor upon the fund.[5] The amounts allowed attorneys are paid directly to them, and there is no necessity for the payment of an attorney's bill by a trustee or receiver before the allowance thereof to the attorney.[6] The petition for an allowance to the attorney for creditors should be made by the creditors themselves and not by the attorney.[7] It has been held that notice to creditors of applications for the allowance of an attorney's fee is not necessary, unless a rule of court otherwise directs.[8] An attorney cannot be allowed pay for clerical

it appearing from which the sum of $500 received by one of them from friends of the bankrupt was deducted. *Re* Weissman, 267 Fed. 588. The attorneys for minority stockholders are not entitled to compensation for services in resisting an adjudication of the bankruptcy of the corporation. *Re* Murphy Boot & Shoe Co., 242 Fed. 991.

[4] 30 St. at L. 544, 563, § 64; 32 St. at L. 797.

[5] *Re* Erie Lumber Co., 150 Fed. 817. Even over the holders of receiver's certificate. Smith v. Shenandoah Nat. Bank, 246 Fed. 379; see *supra*, §§ 309, 321-322. It has been held otherwise as regards a successful adverse claimant to the property or the proceeds thereof. Gillespie v. J. C. Piles & Co., C. C. A., 178 Fed. 886. The filing fees of the clerk must be paid before the attorney's fees, *Re* Darr, 232 Fed. 415.

[6] *Re* McKenna, 137 Fed. 611. But see *Re* Young, 142 Fed. 891; *supra*, § 321*a*.

[7] *Re* Young, 142 Fed. 891, 892, 893, per Purnell, D. J.: "The statute does not authorize the payment of any fee to an attorney, but expressly says, to the petitioning creditors, to the bankrupt while performing the duties in involuntary cases and in voluntary cases, as the court may allow. The allowance evidently is intended to reimburse the petitioning creditors and the bankrupt, and not to encourage a speculative practice of the law. Throwing or forcing a citizen or a firm into bankruptcy is more serious than many attorneys who file these petitions seem to think. It frequently breaks up a happy home, and places a stigma on a good name it has required years to establish. It was never intended either should be done on speculative principles."

[8] *Re* Stotts, 93 Fed. 438; *Re* Felson, 139 Fed. 275. *Contra*, *Re* Young, 142 Fed. 891, 893, S. D. N. Y. Rule 22, "All applications before referees for allowances to receivers, appraisers, trustees or attorneys, shall be heard on notice sent by mail to the creditors by the referee." It is the better practice to have the claims for attorneys' fees filed with the referee and notice thereof given to the trustee and to all parties who have appeared by attorneys in the proceedings. *Re* Huddleston, 167 Fed. 428; *Re* Stoddard Bros. Lumber Co., 169 Fed. 190. An order by a referee allowing compensation to an attor-

work which he has performed.[9] The attorneys for the trustee[10] and receiver[11] are entitled to compensation out of the estate for their professional services; but, the attorney for the receiver is not entitled to compensation for services in instituting the bankruptcy proceedings and obtaining the receivership.[12]

§ 666. Review by Circuit Courts of Appeals. Circuit Courts of Appeals may review the decisions of the Courts of Bankruptcy in three ways: by writ of error, by appeal and by summary supervision. The Circuit Court of Appeals and the Supreme Courts of the Territories in vacation in chambers as well as during their respective terms, are invested with appellate

ney may be subsequently set aside upon the application of creditors, or by the court upon its own motion. *Re* De Ran, C. C. A., 260 Fed. 732.

9 *Re* Connell & Sons, 120 Fed. 846. See *Re* Payne, 151 Fed. 1018.

10 *Re* Byerly, 128 Fed. 637; *Re* McKenna, 137 Fed. 611; Page v. Rogers, C. C. A., 149 Fed. 194; *Re* Huddleston, 167 Fed. 428. The attorney for the trustee is entitled to be reimbursed for his services and expenses in investigating the claims of creditors and resisting those which the trustee deems to be improper. *Re* Lewensohn, C. C. A., 121 Fed. 538. For a case where the attorney for the trustee was refused compensation, at the expense of creditors, for labor and services for an unsuccessful litigation in an attempt to increase the assets, see *Re* Rozinsky, 101 Fed. 229. Where the receiver was afterwards appointed trustee, a settlement of the fees of his counsel was determined in connection with the compensation awarded him for fees in the latter capacity. *Re* James Carothers & Co., 182 Fed. 501. It is misconduct on the part of a receiver and his attorneys, to agree to divide the fees between themselves or with the attorney for the bankrupt, and the receiver may be removed therefor and no fees allowed to him or his attorney in consequence thereof. *Re* Oshwitz, 183 Fed. 990. For a case where $300 out of an estate of $900 was awarded to attorneys for the receivers, see *Re* Huddelston, 167 Fed. 428. $1,000 was allowed an attorney in a case which resulted in the collection of $2,500. Smith v. Cooper, C. C. A., 120 Fed. 230, 56 C. C. A. 578, reversing the court below. See *Re* Huddleston, 167 Fed. 428, 431. Where fire insurance was due partly to a trustee in bankruptcy and partly to lienholders and the lienholders consented to its collection by the trustee, the attorney's fee for the collection was charged against the proportioned share of the lienholders. *Re* Holmes Lumber Co., 189 Fed. 178. Where the proceedings are dismissed for want of jurisdiction, the attorney for the trustee was only allowed his actual disbursements and compensation for services rendered in the necessary preservation of the estate. *Re* Eagle Steam Laundry Co., 184 Fed. 949.

11 *Re* Oppenheimer, 146 Fed. 140; *Re* Erie Lumber Co., 150 Fed. 817; *Re* Martin Borgeson Co., 151 Fed. 780; *Re* Krause, 155 Fed. 702.

12 *Re* Oppenheimer, 146 Fed. 140

jurisdiction of controversies arising in bankruptcy proceedings from the "Courts of Bankruptcy from which they have appellate jurisdiction in other cases."[1] A writ of error is the proper

§ 666. [1] 30 St. at L. 553, § 24. The words "bankruptcy proceedings" are used in the statute in contradistinction to controversies arising out of the settlement of the estates of bankrupts. First Nat. Bank of Denver v. Klug, 186 U. S. 202, 46 L. ed. 1127; First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 49 L. ed. 1051. In controversies arising in bankruptcy proceedings, and in plenary suits by and against trustees in bankruptcy, the Circuit Courts of Appeal take jurisdiction by appeal or by writ of error, as the case may be, in the same manner that they take jurisdiction of other Federal questions. See *infra* § 693. A dispute which involves a distinct and separate issue may be a controversy reviewable by appeal, although it is so far connected with the bankruptcy proceedings as to be capable of summary disposition without a plenary suit. Weidhorn v. Levy, 253 U. S. 268, 271; reversing *supra*, § 610. By "controversies arising in bankruptcy proceedings" are meant, those independent of plenary suits, which concern the bankrupt's estate and arise by intervention, or otherwise, between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors. Swift & Co. v. Hoover, 242 U. S. 107; *Re* Mueller, C. C. A., 135 Fed. 711. See Hinds v. Moore, C. C. A., 134 Fed. 221; *Re* Friend, C. C. A., 134 Fed. 778; Knapp v. Milwaukee Tr. Co., 216 U. S. 545, an intervention to establish a lien; Barnes v. Pampel, C. C. A., 192 Fed. 525; Rison v. Parham, C. C. A., 219 Fed. 176; Emerson v. Castor, C. C. A., 236 Fed. 29. But see *Re* Lee, C. C. A., 182 Fed. 579. The words "*proceedings in bankruptcy*," cover questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which occur in the settlement of the estate. *Re* Friend, C. C. A., 134 Fed. 778, 780; Schuler v. Hassinger, C. C. A., 177 Fed. 119; *Re* Charles Knosher & Co., C. C. A., 197 Fed. 136. It was held that an order making an allowance for counsel fees after a settlement pending the petition of involuntary bankruptcy but before adjudication was a proceeding not in bankruptcy but to avoid bankruptcy in which the court acted as arbitrator, and was consequently not appealable. *Re* Jacobson, C. C. A., 239 Fed. 79.

An appeal is the proper method to review a final decree or order in a proceeding by a trustee in bankruptcy for the sale of land free of liens or claims and the marshaling of the proceeds. Robert Moody & Son v. Century Savings Bank, 239 U. S. 374; *Re* Hartzell, 209 Fed. 776. See Hendricks v. Webster, C. C. A., 159 Fed. 927. Including a case where one of the respondents to the trustee's petition claims title

method of reviewing a judgment in an action at law, brought

to the land. Sauve v. M. L. More Inv. Co., C. C. A., 248 Fed. 642. In a proceeding by creditors of a partnership for the marshaling of partnership and individual assets, Burleigh v. Foreman, C. C. A., 125 Fed. 217. In a proceeding by a trustee or creditor for the preservation of the lien of a creditor's attachment and the enforcement thereof for the benefit of the estate, Globe Bank and Tr. Co. v. Martin, 236 U. S. 288; affirming *Re* Martin, C. C. A., 201 Fed. 31, 36. In a suit in equity brought by a trustee in bankruptcy in a District Court of the United States to recover property fraudulently or preferentially transferred by the bankrupt. *Re* Jacobs, C. C. A., 99 Fed. 539; *Re* Hamilton Automobile Co., C. C. A., 198 Fed. 856; Kirkpatrick v. Harnesberger, C. C. A., 199 Fed. 886; or a proceeding begun by a petition, which is in effect a suit in equity, instituted to set aside a transfer in fraud of creditors, Carey v. Donohue, C. C. A., 209 Fed. 328; Graham v. Faith, C. C. A., 253 Fed. 32; or a preference, Doroshow v. Ott, C. C. A., 134 Fed. 740; McCarty v. Coffin, C. C. A., 150 Fed. 307; Thomas v. Woods, C. C. A., 173 Fed. 585; Barnes v. Pampel, C. C. A., 192 Fed. 525; *Re* Raphael, C. C. A., 192 Fed. 874; T. E. Wells & Co. v. Sharp, C. C. A., 208 Fed. 399; Home Bank for Savings v. Lohm, C. C. A., 223 Fed. 633; *Re* Russell, C. C. A., 247 Fed. 95; Bridgeton Nat. Bank v. Way, C. C. A., 253 Fed. 731; Bassett v. Evans, C. C. A., 253 Fed. 532; Bridgeton Nat. Bank v. Ray, 253 Fed. 731; Bassett v. Evans, C. C. A., 263 Fed. 532. In a proceeding, whether instituted by petition or bill in equity, begun by an adverse claimant, to recover property from the possession of the trustee; Houghton v. Burden, 228 U. S. 161; Security Warehousing Co. v. Hand, C. C. A., 143 Fed. 32; Smith v. Means, C. C. A., 148 Fed. 89; *Re* Gold, C. C. A., 210 Fed. 410; Gibbons v. Goldsmith, C. C. A., 222 Fed. 826; Scandinavian-American Bank v. Sabin, C. C. A., 227 Fed. 579; Howard D. Thomas Co. v. Beharrell, C. C. A., 229 Fed. 691; American Piano Co. v. Heazel, C. C. A., 240 Fed. 410; Dalton v. Humphreys, C. C. A., 242 Fed. 777; or receiver, Walter Scott & Co. v. Wilson, C. C. A., 115 Fed. 284; or the bankrupt before adjudication, Triumph Electric Co. v. Patterson, C. C. A., 211 Fed. 244. But see *Re* Whitener, C. C. A., 105 Fed. 180; Mound Mines Co. v. Hawthorne, C. C. A., 173 Fed. 882; Nauman Co. v. Bradshaw, C. C. A., 193 Fed. 350. It has been held that where the only question in dispute is the jurisdiction of the court to entertain such a proceeding, this may be reviewed by a petition to revise. Gibbons v. Goldsmith, C. C. A., 222 Fed. 826. A final order is appealable when made in proceeding, instituted in the Court of Bankruptcy by a claimant, to enforce his lien upon property in the possession of the trustee or the court, Knapp v. Milwaukee Tr. Co., 216 U. S. 545; Dodge v. Norlin, C. C. A., 133 Fed. 363; *Re* First Nat. Bank, C. C. A., 135 Fed. 62; *Re* Doran, C. C. A., 154 Fed. 467; New Hampshire Savings Bank v. Varner, C. C. A., 216 Fed. 721; *Re* Breyer Printing Co., C. C. A., 216 Fed. 878; Huttig Sash

by a trustee in bankruptcy in a District Court of the United

& Door Co. v. Stitt, C. C. A., 218 Fed. 1; Feick v. Stephens, C. C. A., 250 Fed. 191; Luck v. Staples, C. C. A., 255 Fed. 637. But see *Re* Streator Metal Stamping Co., C. C. A., 205 Fed. 280; Whitney Central Tr. & Sav. Bank v. U. S. Const. Co., C. C. A., 250 Fed. 784. So, it has been held, an order establishing the lien of a third party upon property claimed by the bankrupt as exempt, Burow v. Grand Lodge, C. C. A., 133 Fed. 708; and orders directing the payment of claims that are allowed as liens, Bell v. Arledge, C. C. A., 192 Fed. 837; Stuart v. Britton Lumber Co., C. C. A., 227 Fed. 49. It has been said: that a decree or order upon a petition asserting a lien upon a fund in the hands of the trustees is not the subject of a separate appeal, Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179; Euclid Nat. Bank v. Union Trust & Deposit Co., C. C. A., 149 Fed. 975; *Re* Hawley Down-Draft Furnace Co., C. C. A., 238 Fed. 122; although it might perhaps be reviewed as incident to an appeal from the proof of the debt which the lienor claimed was due him; Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179; *Re* Loving, 224 U. S. 183; Cunningham v. German Ins. Bank, C. C. A., 101 Fed. 977. It has been said that it is not appealable if the lienor is not a creditor of the bankrupt. *Re* Columbia Real Estate Co., C. C. A., 112 Fed. 643; Sterne v. Merchants' Nat. Bank, C. C. A., 216 Fed. 862; Bernard v. Lea, C. C. A., 210 Fed. 583. *Contra*, Gaudette v. Graham, C. C. A., 164 Fed. 310. Or orders which reject or allow set-offs, Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571; *supra*, § 648; and which determine the liability of petitioning creditors for the costs of a receivership, *Re* Veler, C. C. A., 249 Fed. 632, are appealable. An appeal is the proper remedy to review an order granting, Mitchell Store Building Co. v. Carroll, 232 U. S. 379, denying, Clark v. Pidcock, C. C. A., 129 Fed. 745; or dissolving, Bothwell v. Fitzgerald, C. C. A., 219 Fed. 408; an injunction prayed by the trustee against the prosecution of an action in another court; except perhaps when the merits are not considered, *Re* Russell, C. C. A., 101 Fed. 248; Orinoco Iron Co. v. Metzel, C. C. A., 230 Fed. 40; and it has been held an injunction restraining a third person from interfering with the possession by the trustee of property claimed by both parties; Stelling v. G. W. Jones Lumber Co., C. C. A., 116 Fed. 261 (brought in the District Court); *Re* Rusch, C. C. A., 116 Fed. 270. But see O'Dell v. Boyden, C. C. A., 150 Fed. 731; *infra*, § 667. It has been held that the following orders are appealable: An order granting or disallowing claims for fees to counsel on behalf of creditors, Ohio Valley Bank Co. v. Switzer, C. C. A., 153 Fed. 362; *Re* Kinnane Co.'s Estate, C. C. A., 242 Fed. 769; but see Pratt v. Bothe, C. C. A., 130 Fed. 670; or to counsel of the bankrupt. *Re* Kinnane Co.'s Estate, C. C. A., 242 Fed. 769; or to trustees, Davidson v. Friedman, C. C. A., 140 Fed. 853; approved in Remington on Bankruptcy, § 2907; *contra*, Gray v. Grand Forks Mercantile Co., C. C. A., 138 Fed. 344, 347; and an order denying an application to re-

States to recover money[2] or property,[3] and a judgment adjudging the defendant an involuntary bankrupt after a trial by jury.[4] "Appeals, as in equity cases, may be taken in bankruptcy proceedings from the Courts of Bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;[5] (2) from a judgment granting or denying a dis-

quire a trustee to account to creditors for the rental value of property, of which he permitted the bankrupt to remain in possession; Bank of Clinton v. Kondert, C. C. A., 159 Fed. 703. Orders are appealable which require bankrupts to account for or surrender property which they have fraudulently concealed; *Re* Raphael, C. C. A., 192 Fed. 874; Jones v. Blair, C. C. A., 242 Fed. 783; but not an order directing the bankrupt to turn over money or property to his trustee when no complicated questions of fact are involved, Henkin v. Fousek, C. C. A., 246 Fed. 285; and an order granting or disallowing the claim of a bankrupt to property in the possession of the referee, which he claims is exempt. Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45. It has been intimated that an order directing the removal of a proceeding in bankruptcy from one district to another can only be reviewed by appeal. Kyle Lumber Co. v. Bush, C. C. A., 133 Fed. 688, 693. Independent plenary suits have also been said to be controversies arising in bankruptcy. Walter Scott & Co. v. Wilson, C. C. A., 115 Fed. 284; Security Warehousing Co. v. Hand, C. C. A., 143 Fed. 32; McCarty v. Coffin, C. C. A., 150 Fed. 307. But see Thomas v. Sugarman, 218 U. S. 129. A petition of revision will not lie to review an order or decree in a plenary suit. *Re* Jacobs, C. C. A., 99 Fed. 539; *Re* Rusch, C. C. A., 116 Fed. 70; Doroshow v. Ott, C. C. A., 134 Fed. 740; U. S. v. Ruggles, C. C. A., 221 Fed. 256; *Re* Vanoscope Co., C. C. A., 253 Fed. 53, an action against the bankrupt begun before the proceedings. *Contra,* Delta Nat. Bank v. Easterbrook, C. C. A., 133 Fed. 521.

[2] Turner v. Schaeffer, C. C. A., 249 Fed. 654.

[3] Delta Nat. Bank v. Easterbrook, C. C. A., 133 Fed. 521; Wm. Edwards Co. v. La Dow, C. C. A., 230 Fed. 378. An order dismissing a petition by an intervenor filed before adjudication to obtain machinery in the possession of the bankrupt claimed by a mortgagee of the land should be reviewed by appeal and not by writ of error. Triumph Electric Co. v. Patterson, C. C. A., 211 Fed. 244.

[4] Simonson v. Sinsheimer, C. C. A., 100 Fed. 426; Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200; Frederic L. Grant Shoe Co. v. W. M. Laird Co., 203 U. S. 502, 51 L. ed. 292; Duncan v. Landis, C. C. A., 106 Fed. 839; Lennox v. Allen-Lane Co., C. C. A., 167 Fed. 114. But see Lockman v. Lang, C. C. A., 128 Fed. 279. See *infra,* § 687.

[5] Judgments or orders are appeal-

charge;[6] and (3) from a judgment allowing or rejecting a debt or

able which adjudge or refuse to adjudge the respondent an involuntary bankrupt in cases where there was no jury trial appealable, although only questions of law are involved, C. C. Taft Co. v. Century Sav. Bank, C. C. A., 141 Fed. 369; Cook Inlet Coal Fields Co. v. Caldwell, C. C. A., 147 Fed. 475; which dismiss a petition in bankruptcy for want of jurisdiction. Stevens v. Nave-McCord Mercantile Co., C. C. A., 150 Fed. 71, *contra*, *Re* New England Breeders' Club, C. C. A., 169 Fed. 586, which dismiss a petition of intervention, filed by a lienor, who is not a creditor, to contest an adjudication in bankruptcy, *Re* Columbia Real Estate Co., C. C. A., 112 Fed. 643; Ogden v. Gilt Edge Consol. Min. Co., C. C. A., 225 Fed. 723. It was held that a stipulation submitting a petition in involuntary bankruptcy to the court without a jury, constituted the trial judge an arbitrator, and his decision, when supported by evidence, would not be disturbed by the appellate court. Ft. Worth Heavy Hardware Co. v. Shapleigh Hardware Co., C. C. A., 221 Fed. 257. It has been held that orders are not appealable, but reviewable only by petition, which set aside, *Re* Jacobs, C. C. A., 241 Fed. 620, *Cf. Re* Sutter Hotel Co., C. C. A., 241 Fed. 367; or which refuse to set aside an adjudication of bankruptcy, Brady v. Bernard & Kittinger, C. C. A., 170 Fed. 576; Hart-Parr Co. v. Barkley, C. C. A., 231 Fed. 913; Armstrong v. Norris, C. C. A., 247 Fed. 253; *Re* Vanoscope Co., C. C. A., 253 Fed. 53; or which adjudge an individual to be a member of a bankrupt partnership, Francis v. McNeal, C. C. A., 170 Fed. 445. These cannot be reviewed by petition so far as controverted questions of fact are concerned. Hunter, Walton & Co. v. J. G. Cherry Co., C. C. A., 247 Fed. 458; *infra*, § 668.

[6] A judgment or order confirming a composition is, in effect, a grant of a discharge. *Re* Bay State Milling Co., C. C. A., 223 Fed. 778; *Re* O'Gara, 260 Fed. 742; *Re* Gottlieb, C. C. A., 262 Fed. 730. See Mulford v. Fourth Street Nat. Bank, C. C. A., 157 Fed. 897. An order refusing to confirm a composition is in effect a denial of a discharge. *Re* McVoy Hardware Co., C. C. A., 200 Fed. 949. Consequently it has been held that they are appealable; but it has been held that where an order dismissing the petition for the confirmation of a composition was based solely upon matters of law affecting the construction of the statute and did not involve the right of the bankrupt to a discharge it was not appealable, but reviewable by a petition for a revision. *Re* Graham & Son, C. C. A., 252 Fed. 93. An order dismissing a petition for a discharge is appealable, *Re* Kuffler, C. C. A., 127 Fed. 125, although the dismissal is for want of prosecution. *Re* Kuffler, C. C. A., 127 Fed. 125. It has been held that orders are *not* appealable but subject to review upon petitions for a revision which deny motions to dismiss an application for a discharge. Lindeke v. Converse, C. C. A., 198 Fed. 618. Or dismiss an application for the revo-

claim [7] of five hundred dollars [8] or over." [9] Otherwise the right

cation of a discharge, Thompson v. Mauzy, C. C. A., 174 Fed. 611; *Re* White, C. C. A., 248 Fed. 115.

7 Postlethwaite v. Hicks, C. C. A., 165 Fed. 897; *Re* Irwin, C. C. A., 174 Fed. 642; *Re* Mueller, C. C. A., 135 Fed. 711; Adams v. Deckers Valley Lumber Co., C. C. A., 202 Fed. 48; *Re* Lane Lumber Co., C. C. A., 217 Fed. 546; Southern Cotton Oil Co. v. Elliotte, C. C. A., 218 Fed. 567; King Lumber Co. v. National Exch. Bank, C. C. A., 253 Fed. 946; *Re* Craig Lumber Co., C. C. A., 266 Fed. 692. But see Vindel v. Holgate, C. C. A., 221 Fed. 342. An order upon a petition for the reconsideration of a claim previously allowed is appealable. Kiskadden v. Steinle, C. C. A., 203 Fed. 375. It has been said: that the words "debt or claim," an order or judgment allowing which is appealable, refer only to claims that are presented for proof against estates in bankruptcy. Holden v. Stratton, 191 U. S. 115, 118, 48 L. ed. 116, 118. Where the debt or claim affected was of the value of $500 or more it was held that orders were appealable; which allowed or denied priority to claims upon applications in which the validity of the claims themselves were in dispute, *Re* Cosmopolitan Power Co., C. C. A., 137 Fed. 858; *Re* Creech Bros. Lumber Co., C. C. A., 240 Fed. 8; even when the debt was admitted and the only dispute was over the right to a priority; Cunningham v. German Ins. Bank, C. C. A., 103 Fed. 932, 935; *Re* Roche, C. C. A., 101 Fed. 956; *Re* Soudan Mfg. Co., C. C. A., 113 Fed. 804; *Re* Doran, C. C. A., 154 Fed. 467; see Ritchie County Bank v. McFarland, C. C. A., 183 Fed. 715. *Re* Chandler, C. C. A., 184 Fed. 887; Wuerpel v. Commercial Germania Tr. & Sav. Bank, C. C. A., 238 Fed. 269, *certiorari* denied, Coleman & Co. v. Tawas Co., 250 U. S. 668, 40 Sup. Ct. 14, 63 L. ed. 1198. *Re* Leterman, Becher & Co., C. C. A., 260 Fed. 543, *contra*, *Re* Rouse, Hazard & Co., C. C. A., 91 Fed. 96; *Re* Worcester County, C. C. A., 102 Fed. 808, 814; Gaudette v. Graham, 164 Fed. 311; and orders which disallowed claims because of a failure to surrender preferences, Livingstone v. Heineman, C. C. A., 120 Fed. 786; Dickson v. Wyman, C. C. A., 111 Fed. 726, *Re* First Nat. Bank of Louisville, C. C. A., 155 Fed. 100; Cooper v. Miller, C. C. A., 203 Fed. 383.

8 See *Re* Irwin, C. C. A., 174 Fed. 642. The pecuniary limit, namely five hundred dollars, to the debts or claims, judgments allowing or rejecting which are appealable, has reference to the amount that is allowed or rejected; and where a claim, which exceeds five hundred dollars, is allowed in part and in part rejected, neither the allowance or the rejection reaching the prescribed amount, there can be no appeal. Gray v. Grand Forks Mercantile Co., C. C. A., 138 Fed. 344. *Cf. Re* Cosmopolitan Power Co., C. C. A., 137 Fed. 858; Union Nat. Bank v. Neill, C. C. A., 149 Fed. 720. An appeal was entertained from an order allowing a claim for more than the jurisdictional amount and sustaining separate liens each of which was less than this although the only controversy was as to the validity of the liens. Stuart v.

of appeal in bankruptcy proceedings is not affected by the amount in controversy.[10] A question of fact can be reviewed only by appeal and not by petition to revise.[11] "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior Courts of Bankruptcy within their jurisdiction."[12]

Orders and decrees in bankruptcy proceedings, which are not appealable, can be reviewed only by a petition of review addressed to the Circuit Court of Appeals.[13] Where an interlocu-

Britton Lumber Co., C. C. A., 227 Fed. 49. It has been held that an order allowing a fee to an attorney, although less than $500, *Re* Irwin, C. C. A., 174 Fed. 642, cannot be reviewed by a petition for revision.

9 30 St. at L. 553, § 25; Ogden v. Gilt Edge Consol. Mines Co., C. C. A., 225 Fed. 723.

10 Emerson v. Castor, C. C. A., 236 Fed. 29.

11 Henderson v. Morse, C. C. A., 235 Fed. 518. See *infra* § 668.

12 Ibid., § 24. For appeals to the Court of Appeals of the District of Columbia, see D. C. Code § 226, *supra*, § 69.

13 It has been held that the following orders may be revised by a petition of review: a summary order requiring an adverse party, First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 49 L. ed. 105; Courtney v. Shea, C. C. A., 225 Fed. 358; a State receiver, Hecox v. Rollestone, C. C. A., 164 Fed. 823; State of Missouri v. Angle, C. C. A., 236 Fed. 644, *contra*, Hinds v. Moore, C. C. A., 134 Fed. 221; or the bankrupt, Fisher v. Cushman, C. C. A., 103 Fed. 860; *Re* Mertens, C. C. A., 142 Fed. 445; *Re* Shidlovsky, C. C. A., 224 Fed. 450; Henkin v. Fousek, C. C. A., 246 Fed. 285; in possession of property or a fund, to deliver or pay the same to the trustee, or the bankrupt to sign a paper, such as the endorsement of a license, Fisher v. Cushman, C. C. A., 103 Fed. 860; including an order which directs the commitment of the parties against whom it is directed until he has obeyed; Kirsner v. Taliaferro, C. C. A., 202 Fed. 57. An order directing members of a bankrupt partnership to schedule and surrender their individual property; Dickas v. Barnes, C. C. A., 140 Fed. 849. An order granting or denying a claim of exemptions; Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116; *Re* Youngstrom, C. C. A., 153 Fed. 98. An order reopening or refusing to reopen an estate that has been closed: *Re* O'Connell, C. C. A., 137 Fed. 838; *Re* Graff, C. C. A., 150 Fed. 997. An order upon the application of a widow for her right to dower in the estate of a bankrupt, who died after the adjudication; *Re* McKenzie, C. C. A., 142 Fed. 383. An order selling the bankrupt's land free of the wife's right of dower, Kelly v. Minor, C. C. A., 252 Fed. 115. An order upon the application of a trustee authorizing the sale of real estate and the bringing in of third persons asserting liens upon the same; *Re* McMa-

tory decision may be reviewed by an appeal from the final decree, a petition to revise it will rarely be granted.[14] The grant of

hon, C. C. A., 147 Fed. 68. An order directing the distribution of the proceeds of a sale by the trustee and determining priority of different claims therefrom, Morgan v. First Nat. Bank of Mannington, C. C. A., 145 Fed. 466. *Contra,* Cunningham v. German Ins. Bank, C. C. A., 103 Fed. 932, 935. An order requiring a bidder at a sale in bankruptcy to pay the balance of the purchase price, *Re* Reilly, C. C. A., 258 Fed. 121. An order fixing the compensation of the referee, Kinkead v. J. Bacon & Sons, C. C. A., 230 Fed. 362. An order in an omnibus proceeding brought to determine conflicting rights of reclamation. *Re* Pierson, C. C. A., 233 Fed. 519. An order denying a petition by a trustee to recover dividends, where the facts are not in dispute. Nelson v. Heckscher, C. C. A., 219 Fed. 682. An order in a proceeding to determine whether upon the uncontradicted facts a previous order confirming the accounts of a trustee was authorized. *Re* Kuhn Bros., C. C. A., 234 Fed. 277. An order refusing leave to intervene to contest an adjudication of bankruptcy, Ogden v. Gilt Edge Consol. Min. Co., C. C. A., 225 Fed. 723. An order authorizing the trustee to borrow money and to complete a contract made by the bankrupt, *Re* John W. Farley & Co., C. C. A., 227 Fed. 378. An order directing the distribution of the money thus earned. Ibid. An order directing the vacation of a decree made by the referee upon a bill of equity which had not been referred to him. Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. ed. —, *supra,* § 638. It has been held that commitments in contempt proceedings may be reviewed by petitions for revision. *Re* Cole, C. C. A., 144 Fed. 392; s. c., C. C. A., 2d Ct., 163 Fed. 180, 183; *Re* Goodrich, C. C. A., 2d Ct., 184 Fed. 5, 7; Kirsner v. Taliaferro, C. C. A., 4th Ct., 202 Fed. 51; Horton v. Mendelsohn, C. C. A., 249 Fed. 185; Henkin v. Fousek, C. C. A., 8th Ct., 267 Fed. 557. *Contra,* Morehouse v. Pacific Hardware & Steel Co., C. C. A., 9th Ct., 177 Fed. 337, 339. But when part of the punishment is a fine payable to the United States a writ of error is the proper remedy. Brown v. Detroit Tr. Co., C. C. A., 9th Ct. 193 Fed. 622. *Supra,* § 438. Where an order directed that a trustee be committed to jail unless he filed an account on or before a certain date a petition for revision filed prior to such day was dismissed as premature. O'Conor v. Sunseri, C. C. A., 184 Fed. 712. Upon a petition to revise an order confirming a sale of land in which the bankrupt claimed a homestead, the court reviewed the allowance of a claim the liability upon which affected the decision. Pindel v. Holgate, C. C. A., 221 Fed. 342. The Circuit Court of Appeal for the Ninth Circuit refused to entertain a petition to revise an order in an application under the Bankruptcy Act of 1867. Cresta v. Maxwell, C. C. A., 231 Fed. 448.

[14] *Re* Chotiner, C. C. A., 218 Fed. 813; *Re* Horowitz, C. C. A., 250 Fed. 106. It has been held that an order referring to a master the issues upon a petition should be reviewed by a petition to revise. *Re*

jurisdiction over appeals and petitions of review are mutually exclusive, and a case which is appealable is not reviewable by petition.[15] It has been held that, in the absence of objection, the Circuit Court of Appeals might take jurisdiction by petition of a case that was appealable.[16] Where the proper remedy is a doubtful question, it seems to be the proper practice for the party aggrieved to file a petition and at the same time take an appeal.[17]

§ 667. Practice on appeals in bankruptcy. "Appeals from a Court of Bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."[1]

Hollingsworth & Whitney Co., C. C. A., 242 Fed. 753.

15 Matter of Loving, 224 U. S. 183, 56 L. ed. 725; *Re* Mueller, C. C. A., 135 Fed. 711; *Re* Good, C. C. A., 99 Fed. 389; *Re* Worcester County, C. C. A., 102 Fed. 808, 811; First Nat. Bank v. State Nat. Bank, C. C. A., 131 Fed. 430, 433; *Re* Friend, C. C. A., 134 Fed. 778, 781; *Re* Mueller, C. C. A., 135 Fed. 711; Dickas v. Barnes, C. C. A., 140 Fed. 849; Courtney v. Shea, C. C. A., 225 Fed. 358; Chavelle v. Washington Trust Co., C. C. A., 226 Fed. 400. See *Re* Eggert, C. C. A., 102 Fed. 735; *Re* Dickson, C. C. A., 111 Fed. 726; Union Nat. Bank v. Neill, C. C. A., 149 Fed. 720. *Contra,* Dodge v. Norlin, C. C. A., 133 Fed. 363; *Re* McKenzie, C. C. A., 142 Fed. 383; *Re* Holmes, C. C. A., 142 Fed. 391; Stevens v. Nave-McCord Mercantile Co., C. C. A., 150 Fed. 71; *Re* Lee, C. C. A., 182 Fed. 579, 581.

16 *Re* Endlar, C. C. A., 1st Ct., 192 Fed. 762. See Lawhead v. Monroe Bldg. Co., C. C. A., 6th Ct., 252 Fed. 758. *Contra, Re* Mertens, C. C. A., 2nd Ct., 142 Fed. 445; Kirsner v. Taliaferro, C. C. A., 2nd Ct., 202 Fed. 51; *Re* Shidlovsky, C. C. A., 2nd Ct., 224 Fed. 450.

17 *Re* Worcester County, C. C. A., 102 Fed. 808. See *Re* Lee, C. C. A., 182 Fed. 579, 581; *Re* Creech Bros. Lumber Co., C. C. A., 240 Fed. 8.

§ 667. 1 General Order XXXVI. Citizens' Trust Co. v. Mullinix, C. C. A., 235 Fed. 875; *Re* O'Gara Coal Co., C. C. A., 235 Fed. 883; *Re* Blum, C. C. A., 244 Fed. 412.

2 30 St. at L. 544, 554, § 52. This does not relieve the trustee from filing a bond if he desires a supersedeas, Pacific Coast Casualty Co. v. Harvey, C. C. A., 250 Fed. 952. *Contra, Re* Dresser, 14 Am. B. R. 41, by Referee Dexter. See *infra,* § 703. A bond upon an appeal from an adjudication of involuntary bankruptcy is sufficient, although it runs to the original petitioners alone and other creditors joined in the petition before the adjudication. Flickinger v. First Nat. Bank of Vandalia, Ill., C. C. A., 145 Fed. 162. An application for a stay pending an appeal cannot be allowed by a circuit judge. *Re* Iron-

In controversies in bankruptcy proceedings, no appeal will lie,

clad Mfg. Co., C. C. A., 190 Fed. 320. Pending an appeal from a dismissal of the petition in voluntary bankruptcy, the District Court refused to discharge a receiver previously appointed and also refused to direct that he pay for the support of the alleged bankrupt in a sanitarium, when it appeared that the latter's wife held property which her husband had transferred to her. *Re* Ward, 194 Fed. 179. It has been held: that the failure to procure a citation and to file a bond are not jurisdictional requirements; and that leave to file these after the expiration of the statutory time may be granted, Columbia Iron Works v. National Lead Co., C. C. A., 64 L.R.A. 645, 127 Fed. 99; Lockman v. Lang, C. C. A., 132 Fed. 1; but see Noreross v. Nave & McCord Merc. Co., C. C. A., 101 Fed. 796; or defects therein may be cured by amendment after the time limited for an appeal; *Re* T. E. Hill Co., C. C. A., 148 Fed. 832; Hill v. Western El. Co., C. C. A., 214 Fed. 243, 245 citing Foster's Fed. Pr., 3rd ed., §§ 160, 161; *cf. infra*, §§ 699-702; provided that the appeal has been otherwise duly taken within the statutory period; but that the omission of a citation cannot be cured, nor new parties who do not voluntarily appear, Hill v. Western El. Co., C. C. A., 214 Fed. 243, 245, brought in after the expiration of the first term, at which the appeal can be heard. Gray v. Grand Forks Mercantile Co., C. C. A., 138 Fed. 344. See Nazima Trading Co. v. Martin, C. C. A., 164 Fed. 838. An assignment of errors must be filed or there may be an affirmance, without a consideration of the merits of the appeal. Lloyd v. Chapman, C. C. A., 93 Fed. 599; *Re* Dunning, C. C. A., 94 Fed. 709. See Gardner v. Gleason, C. C. A., 259 Fed. 755; *infra*, § 701. An appeal will ordinarily be dismissed when the record does not show that the questions of law presented by the assignments of error were not presented to and ruled upon by the court below, Fidelity Tr. Co. v. Robinson, C. C. A., 192 Fed. 562; and, if not dismissed, such questions will not usually be considered by the appellate court. Arctic Ice Mach. Co. v. Armstrong County Tr. Co., C. C. A., 192 Fed. 114, *Re* Charles Knosher & Co., C. C. A., 197 Fed. 136; Shaffer v. Koblegard Co., C. C. A., 183 Fed. 71; § 711, *infra*. *Re* Boston Dry Goods Co., C. C. A., 125 Fed. 226; *Re* Shoe & Leather Reporter, C. C. A., 129 Fed. 588; *Re* O'Connell, C. C. A., 137 Fed. 838; Carey v. Donohue, C. C. A., 209 Fed. 328; *Re* Brantman, C. C. A., 244 Fed. 101; Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., C. C. A., 246 Fed. 653; Household Supply Co. v. Whiteaker, C. C. A., 236 Fed. 730. See Osborne v. Perkins, C. C. A., 112 Fed. 127; *Re* Koenig, 127 Fed. 891; Buckingham v. Estes, C. C. A., 128 Fed. 584; *infra*, § 711. Even jurisdictional questions that might be waived will not, in such a case, be considered. Boonville Nat. Bank v. Blakey, C. C. A., 107 Fed. 891. But see *Re* Gottlieb & Co., 245 Fed. 139. Jurisdictional questions which cannot be waived will be considered, even if they were not raised below, C. C. Taft Co. v. Century Sav. Bank, C. C. A., 141 Fed. 369; *Re*

except from a final order or decree,[2] or an interlocutory order in

Hollis, C. C. A., 229 Fed. 349; and the court of review has the power to notice a plain error not assigned. Boonville Nat. Bank v. Blakey, C. C. A., 107 Fed. 891. No question not jurisdictional will be considered when the sole party aggrieved by a decision thereupon has not appealed. Sanborn-Cutting Co. v. Paine, C. C. A., 244, 672. Where a referee passed upon only one of a number of objections filed to the discharge of the bankrupt; it was held that an appeal from an order denying a discharge brought that objection alone before the Circuit Court of Appeals. Vehon v. Ullman, C. C. A., 147 Fed. 694. No bill of exceptions is required upon an appeal. Dodge v. Norlin, C. C. A., 133 Fed. 363. A complete record of the case below must be certified by the clerk and must contain in itself, and not by reference, all papers, exhibits, testimony and other proceedings necessary to the hearing in the court of review. Dodge v. Norlin, C. C. A., 133 Fed. 363; Cook Inlet Coal Fields Co. v. Caldwell, C. C. A., 147 Fed. 475; *Re* Murphy, C. C. A., 229 Fed. 988; § 704, *infra*. Only the material parts of the record need be certified. Dodge v. Norlin, C. C. A., 133 Fed. 363. Where a clerk's certificate recited that the transcript was a true copy of so much of the record and proceedings as was requested by counsel for the appellant, in the absence of anything shown to the contrary, it is presumed that the objectors to a discharge had duly appeared so as to support objections subsequently filed. Shaffer v. Koblegard Co., C. C. A., 183 Fed. 71. When an appeal is from an order of the judge upon the certificate of a referee, the proceedings before the referee need not be certified. Cunningham v. German Ins. Bank, C. C. A., 103 Fed. 932. A certificate by the referee in bankruptcy is insufficient. Cook Inlet Coal Fields Co. v. Caldwell, C. C. A., 147 Fed. 475, 478. An appeal will not be dismissed because there is no evidence in the record, where the record does not show that any evidence was taken. C. C. Taft Co. v. Century Sav. Bank, C. C. A., 141 Fed. 369. The certified transcript imports absolute verity and cannot be contradicted or explained by the evidence. *Re* McCall, C. C. A., 145 Fed. 898. It seems that documentary evidence not contained in the record may be considered in support of the judgment below. *Re* Ironclad Mfg. Co., C. C. A., 197 Fed. 280. See Dunham v. Townsend, 118 N. Y. 286; 3 Cyc. 178. Where the bankrupt is too poor to print the record, the Circuit Court of Appeals may relieve him from that requirement. *Re* Friedman, C. C. A., 161 Fed. 260, 262. See Henkin v. Fousek, C. C. A., 262 Fed. 957; § 413, *supra*. An application, because of the poverty of the bankrupt, for an order requiring a receiver to pay the cost of the transcript and the printing out of the proceeds of the bankrupt's estate in his hands was denied. Herman Keck Mfg. Co. v. Lorsch, C. C. A., 179 Fed. 485. An application for the transmission of the bankrupt's original books and records to the Circuit Court of Appeals was denied when it did not appear that they could not be transcribed or represented by photographic copies. Herman Keck Mfg.

a plenary suit granting, continuing, refusing, dissolving, or re-

Co. v. Lorsch, C. C. A., 179 Fed. 485. An appeal may be dismissed by consent without a review of the merits. *Re* Donnelly, C. C. A., 211 Fed. 118. An appeal was dismissed where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the respondents were adjudicated bankrupts in another district. *Re* Sears, Humbert & Co., C. C. A., 128 Fed. 275. Appeals will be dismissed or the decree affirmed, where the appellants have assumed below positions inconsistent therewith. *Re* National Pressed Brick Co., C. C. A., 212 Fed. 878; *Re* Ambrose Matthews & Co., C. C. A., 235 Fed. 539; *infra*, § 705. It has been held that the right to appeal is not waived by a subsequent proceeding denied because of the former decision. *Re* Elkind, C. C. A., 175 Fed. 64. A party who files no brief and does not appear upon the argument is not entitled to costs. Gandia & Stubbe v. Cadierno, 253 Fed. 139. Ordinarily the decree upon an appeal should finally dispose of the entire controversy then presented. Empress Theatre Co. v. Horton, C. C. A., 266 Fed. 657, see *infra* § 711; but when evidence was not presented below because of a misapprehension of the law on the part of the trial judge, the case may be remanded for additional proof. *Re* Mossler Co., C. C. A., 239 Fed. 262. When a decision was based upon an erroneous conclusion of law and there is no specific finding of fact that justifies the same, the Circuit Court of Appeals may, upon the reversal, direct that the facts be found by the Court of Bankruptcy. *Re* Straschnow, C. C. A., 181 Fed. 337. Bank of Commerce & Savings v. Matthews, C. C. A., 257 Fed. 292. This was done where the question was the amount of counsel fees that should be allowed. *Re* Medina Quarry Co., C. C. A., 197 Fed. 308. *Cf.* § 711, *infra*.

[2] *Re* Columbia Real Estate Co., C. C. A., 112 Fed. 643; Walter Scott & Co. v. Wilson, C. C. A., 115 Fed. 284; *Re* Berthoud, C. C. A., 238 Fed. 797; Wuerpel et al. v. Canal-Louisiana Bank & Trust Co. et al. C. C. A., 231 Fed. 934; *Re* Brookstone Mfg. Co. et al., C. C. A., 239 Fed. 697. See *infra*. § 695. An order which is final and appealable which adopts the report of a master, "as the opinion, conclusions and judgment of the court," Ragan, Malone & Co. v. Cotton & Preston, C. C. A., 195 Fed. 69; but not one which approves a master's report and overrules exceptions thereto. Walter Scott & Co. v. Wilson, C. C. A., 115 Fed. 284. Orders are not final or appealable which direct that an adjudication be set aside and a subpoena quashed if the party appears and pleads in a specified time; *Re* Sutter Hotel Co., C. C. A., 241 Fed. 367; or which permit amendments to proceedings before a final order or decree. *Re* Pechin, C. C. A., 277 Fed. 853. Or which overrules objections to the jurisdiction with leave to further plead, Board of Road Com'rs v. Keil, C. C. A., 259 Fed. 76; or which deny a motion to dismiss a petition with leave to the appellant to offer evidence, *Re* Schimmel, 203 Fed. 181; except when in such case it clearly appears upon the record that the appellant has abandoned his right to make further opposition below.

fusing to dissolve, an injunction,[3] or probably from such an order in a plenary suit appointing a receiver of property claimed by a stranger to the bankruptcy proceedings;[4] but it has been held that an order granting,[5] or denying,[6] or dissolving[7] an injunction in proceedings in bankruptcy, such as one preventing interference with property in the custody of the court,[8] and, orders enjoining the prosecution of suits without passing upon their merits[9] are not appealable. An appeal from an adjudication of involuntary bankruptcy may be taken by contesting creditors.[10] An appeal from the allowance of a claim may be taken by the trustee,[11] and if he refuses, to take it by an objecting creditor,[12] although it is the safer practice for the creditor to obtain permission to appeal in the name of the trustee.[13]

For a waiver of the objection that an order was not appealable, see Thoms & Brenneman v. Goodman, C. C. A., 254 Fed. 39, *Cf.* Lawhead v. Monroe Bldg. Co., C. C. A., 252 Fed. 758.

3 Doroshow v. Ott, C. C. A., 134 Fed. 740; O'Dell v. Boyden, C. C. A., 150 Fed. 731; Stelling v. G. W. Jones Lumber Co., C. C. A., 116 Fed. 261; *Re* Rusch, C. C. A., 116 Fed. 270, *supra* § 300.

4 See *supra* § 325.

5 O'Dell v. Boyden, C. C. A., 150 Fed. 731. But see Stelling v. G. W. Jones Lumber Co., C. C. A., 116 Fed. 261; *Re* Rusch, C. C. A., 116 Fed. 270. *Supra* § 666.

6 Clark v. Pidcock, C. C. A., 129 Fed. 745.

7 Bothwell v. Fitzgerald, C. C. A., 219 Fed. 408.

8 *Re* Russell, C. C. A., 101 Fed. 248. Orinoco Iron Co. v. Metzel, C C. A., 230 Fed. 40. But see Mitchell Store Building Co. v. Carroll, 232 U. S. 379; Rothwell v. Fitzgerald, C. C. A., 219 Fed. 408, *supra* § 666.

9 Ibid.

10 *Re* Meyer, C. C. A., 98 Fed. 976.

11 *Re* Curtis, C. C. A., 100 Fed. 784; Chatfield v. O'Dwyer, C. C. A., 101 Fed. 797. It was held that, upon an appeal from a judgment allowing claims for the costs of the administration, the trustee represented the general creditors. Gray v. Grand Forks Mercantile Co., C. C. A., 138 Fed. 344. A trustee may appeal from an order denying his motion to expunge a claim, unless a preference is surrendered. Livingstone v. Heineman, C. C. A., 120 Fed. 786. It has been held that a trustee may sustain a petition for the revision of an order dismissing a bankruptcy proceeding for want of jurisdiction. *Re* New England Breeders' Club, C. C. A., 169 Fed. 586.

12 Chatfield v. O'Dwyer, C. C. A., 101 Fed. 797; *Re* Roche, C. C. A., 101 Fed. 956; McDaniel v. Stroud, C. C. A., 106 Fed. 486. The assignee of a claim, the proof of which has been expunged may appeal from the order of expungement. Assets Realization Co. v. Sovereign Bank of Canada, C. C. A., 210 Fed. 157.

13 Chatfield v. O'Dwyer, C. C. A., 101 Fed. 797; *Re* Roche, C. C. A.,

Before the appointment of a trustee, a creditor who has been aggrieved by an order or decree may appeal therefrom.[14] A creditor may appeal from an order confirming a composition [15] or granting a discharge.[16] He may appeal from an order allowing another claim when the trustee has refused to do this; provided that the assets are insufficient to pay all scheduled claims; [17] but not otherwise.[18] Parties may join in the appeal, although they have different interests in the proceedings below and complain of different errors.[19] All persons interested in the proceedings must be made parties to the appeal, unless they are represented by the trustee.[20] "Trustees shall not be required to give

101 Fed. 956, holds that any creditor may appeal in his own name.

14 Clark v. Pidcock, C. C. A., 129 Fed. 745.

15 *Re* Gottlieb, C. C. A., 262 Fed. 730.

16 *Re* Doyle, C. C. A., 220 Fed. 434.

17 *Re* National Pressed Brick Co., C. C. A., 212 Fed. 878.

18 Ibid.

19 Crim v. Woodford, C. C. A., 136 Fed. 34; Stevens v. Nave-McCord Mercantile Co., C. C. A., 150 Fed. 71.

20 Gray v. Grand Forks Mercantile Co., C. C. A., 138 Fed. 344; Stevens v. Nave-McCord Mercantile Co., C. C. A., 150 Fed. 71, 74; *Re* Rankin, C. C. A., 214 Fed. 243. When any refuse to join, there must be a severance; *Re* Dandridge & Pugh, C. C. A., 209 Fed. 838 *infra* § 697. Upon an appeal from an order refusing an adjudication of bankruptcy, all the petitioners, including intervenors, must be joined. *Re* Dandridge & Pugh, C. C. A., 209 Fed. 838. Such an objection may be cured by the voluntary appearance of the party omitted, Hill v. Western El. Co., C. C. A., 214 Fed. 243, 245. For a waiver of such an objection see Thoms & Brenneman v. Goodman, C. C. A., 254 Fed. 39.

Cf. § 697 *infra*. Upon an appeal from an order directing the payment of money, the person to whom the payment is to be made must be made respondent; Gray v. Grand Forks Mercantile Co., C. C. A., 138 Fed. 344; except, it has been held, counsel and court officers, to whom an allowance was made upon the petition of the trustee, *Re* Utt, C. C. A., 105 Fed. 754. It has been held that all consenting creditors are necessary parties to an appeal from an order approving a composition. Marshall Field & Co. v. Wolf & Bro. Dry Goods Co., C. C. A., 120 Fed. 815. *Contra Re* Gottlieb, 262 Fed. 730. U. S. *ex rel* Adler v. Hammond, C. C. A., 104 Fed. 862; *Re* Bay State Milling Co., C. C. A., 223 Fed. 778; *Re* Gottlieb, C. C. A., 262 Fed. 730. The trustee must be made a party to an appeal by a claimant from an order disallowing his claim, even if no contest was made by the trustee below; *Ex parte* Mead, 109 U. S. 230, 27 L. ed. 914; Mead v. Platt, 17 Fed. 509; but not to one from a decision granting the fund in his hands to two or more conflicting claimants to the same. Love v. Ex-

bond when they take appeals or sue out writs of errors."[21]

Appeals to the Circuit Courts of Appeals from judgments which refuse to adjudge the defendant a bankrupt, which grant or deny a discharge, and which allow or reject a claim, "shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."[22] Appeals

port Storage Co., C. C. A., 143 Fed. 1.

[21] 30 St. at L. 544, § 52.

[22] 30 St. at L. 544, 553, § 25; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945; Norcross v. Nave & McCord Merc. Co., C. C. A., 101 Fed. 796; Postlethwaite v. Hicks, C. C. A., 165 Fed. 897; Brady v. Bernard & Kittinger, C. C. A., 170 Fed. 576; *Re* Brady, 169 Fed. 152; King Lumber Co. v. Nat. Exch. Bank, C. C. A., 253 Fed. 946. This statutory limitation applies to an appeal from an order confirming a composition, *Re* Brookstone Mfg. Co., C. C. A., 239 Fed. 697. It does not apply to an appeal from an order denying an application to revoke a discharge; Thompson v. Mauzy, C. C. A., 174 Fed. 611. Nor to an appeal from an order upon an application to reopen the estate; Youtsey v. Niswonger, C. C. A., 258 Fed. 16. Nor to an appeal from an order upon the petition of an intervener claiming the title to property held by the trustee; Bank of Ragland v. Hudson, C. C. A., 247 Fed. 241; or claiming an equitable right to money collected by the trustee, Barton Lumber & Brick Co. v. Prewitt, C. C. A., 231 Fed. 918; or to a fund subject to the order of the court; *Re* Martin, C. C. A., 201 Fed. 31; or seeking to enforce a lien, Massachusetts Bonding & Ins. Co. v. Kemper, C. C. A., 220 Fed. 847. At least when such application is separable from the proof of his claim therewith presented and although the appeal from the disallowance of the entire claim has been dismissed. Otherwise it was held not, *Re* Monarch Acetylene Co., C. C. A., 245 Fed. 741; Massachusetts Bonding & Ins. Co. v. Kemper, C. C. A., 220 Fed. 847.

The time to appeal from a judgment adjudging a defendant a bankrupt, cannot be extended by the subsequent entry of an alias adjudication to the same effect, *Re* Berkebile, C. C. A., 144 Fed. 577. It has been held: that a Court of Bankruptcy may grant a rehearing after the time for an appeal has expired, for the purpose of renewing the right of appeal, *Re* Wright, 96 Fed. 820; *Re* Hudson Clothing Co., 140 Fed. 49; *Contra*, West v. W. A. McLaughlin & Co.'s Trustee, C. C. A., 162 Fed. 124; *Re* Goldberg, C. C. A., 167 Fed. 808; Rhame v. Southern Cotton Oil Co., C. C. A., 230 Fed. 403; *Re* Stafford, 240 Fed. 155; see Judson v. Courier Co., 25 Fed. 705; but that it should not do so, except under extraordinary circumstances, even when there was no stenographer present at the original hearing. *Re* Hudson Clothing Co., 140 Fed.

to these courts in other cases must be taken within six months after the entry of judgment or order sought to be reviewed.[23]

Upon an appeal, the court of review may review questions of fact, as well as of law.[24] A question of discretion will rarely

49. The filing of a petition for a rehearing within the ten days extends the time for an appeal until the disposition of the petition. *Re* McCall, C. C. A., 145 Fed. 898. When, upon a rehearing, an order is set aside for some substantial reason other than to extend the time to take an appeal, the time to appeal begins to run anew from a subsequent order to the same effect. West v. W. A. McLaughlin & Co.'s Trustee, 162 Fed. 124. Todd v. Alden, C. C. A., 245 Fed. 462. The time to appeal does not begin to run until the order sought to be reviewed is filed in the clerk's office. Peterson v. Nash Bros., C. C. A., 55 L.R.A. 344, 112 Fed. 311; *Re* McCall, C. C. A., 145 Fed. 898. The time does not begin to run until the order is actually entered, notwithstanding a prior decision in writing. *Re* Hettling, C. C. A., 175 Fed. 65; although it is entered *nunc pro tunc* as of an earlier date, *Re* Stafford, 240 Fed. 155. The appeal is not taken until the order allowing it is filed in the office of the Clerk of the Court of Bankruptcy. Norcross v. Nave & McCord Merc. Co., C. C. A., 101 Fed. 796, *infra*, § 698. The date recited in the order does not control. First Nat. Bank of Paris, Ky. v. Yerkes, C. C. A., 238 Fed. 278. When the tenth day is a Sunday or a holiday an appeal taken on the day following is in due time. Grafton v. Meikleham, C. C. A., 46 Fed. 737.

23 30 St. at L. 829, § 11; Boonville Nat. Bank v. Blakey, C. C. A., 107 Fed. 891; *infra*, § 698.

24 Houghton v. Burden, 228 U. S. 161, 57 L. ed. —; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., C. C. A., 101 Fed. 699; Bernard v. Lea, C. C. A., 210 Fed. 585; Flanders Motor Co. v. Reed, C. C. A., 220 Fed. 642. An appeal may be decided on questions of law alone, without the consideration of any question of fact. C. C. Taft Co. v. Century Sav. Bank, C. C. A., 141 Fed. 369. A finding of fact made by the referee and affirmed by the District Court will usually be affirmed by the court of review; *Re* Noyes Bros., C. C. A., 127 Fed. 286; Buckingham v. Estes, C. C. A., 128 Fed. 584; Kenova Loan & Trust Co. v. Graham, C. C. A., 135 Fed. 717; Hussey v. Dry Goods Co., 148 Fed. 598, 78 C. C. A. 370, 17 Am. B. R. 511; Thompson v. Mauzy, C. C. A., 174 Fed. 611; Boswell Not. Bank v. Simmons, C. C. A., 190 Fed. 735; Carroll v. Stern, C. C. A., 227 Fed. 723; *Re* Hopkins, C. C. A., 299 Fed. 378.

Schmid v. Rosenthal, C. C. A., 230 Fed. 818; Walter A. Wood Mowing & Reaping Mach. Co. v. Croll, C. C. A., 231 Fed. 680; *Re* Kaplan, C. C. A., 234 Fed. 866; Continental Coal Corp. v. Roszelle Bros., C. C. A., 242 Fed. 243; International Tr. Co. v. Myers, C. C. A., 245 Fed. 110; Stephen Putney Shoe Co. v. Dashiell, C. C. A., 246 Fed. 121; *Re* Nankin, C. C. A., 246 Fed. 811; *Re* Johnson, 247 Fed. 135; *Re* Turpin Hotel Co., C. C. A., 248 Fed. 25; Peeples v. Georgia Iron & Coal Co., C. C. A., 248 Fed. 886, affirming *Re* Georgia

be reviewed,[25] especially when it concerns the administration of the bankrupt's estate.[26] It has been held: that the District Court has jurisdiction to determine whether a corporation is principally engaged in manufacturing and mercantile pursuits, and for that reason subject to be declared an involuntary bankrupt; and that, consequently, an appeal from a decision thereupon lies to the Circuit Court of Appeals and not to the Supreme Court of the United States.[27] Upon an appeal from a final decree or order, the court may review all prior orders in the proceeding, which injuriously affect the appellant;[28] but not

Steel Co., 240 Fed. 473, certiorari denied Peeples v. Georgia Iron & Coal Co., 247 U. S. 519; 38 Sup. Ct. 582. 62 L. ed. 1245; Whitmore v. Swank, C. C. A., 252 Fed. 135; Hagan v. McNeil, C. C. A., 253 Fed. 716; Manson v. Mesirov, C. C. A., 254 Fed. 799, certiorari denied, 249 U. S. 615, 39 Sup. Ct. 389, 63 L. ed. 803; *Re* Model Incubator Co., C. C. A., 255 Fed. 76; Luck v. Staples, C. C. A., 255 Fed. 637, certiorari denied 249 U. S. 605, 39 Sup. Ct. 288, 63 L. ed. 798; Dotham Nat. Bank v. Jones, C. C. A., 255 Fed. 332; Rosenberg v. Semple, C. C. A., 257 Fed. 72, affirming *Re* Gottlieb & Co., 245 Fed. 139; *Re* Lake Chelan Land Co., C. C. A., 257, 497. See La Jolla Lumber & Mill Co., 243 Fed. 1004. But not when the District Judge differed from the special master in his conclusions, Mason v. Wolkowich, C. C. A., 10 L.R.A. (N.S.) 765, 150 Fed. 699. See also Merchants' Nat. Bank of Toledo, Ohio, v. Cole, C. C. A., 149 Fed. 708, nor when there were no findings of fact by either the District Judge or the referee. Burleigh v. Foreman, C. C. A., 130 Fed. 13.

By General Order XXXVI, subd. 3. "In every case in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law." See Brady v. Bernard & Kittinger, C. C. A., 170 Fed. 576; Washington v. Tearney, C. C. A., 197 Fed. 307; *Re* Martin, C. C. A., 201 Fed. 31; Lumpkin v. Foley, C. C. A., 204 Fed. 372. These provisions seem now to be obsolete, *infra* § 669.

[25] Streeter v. Lowe, 184 Fed. 263; Bank of Dillon v. Murchison, C. C. A., 213 Fed. 147; Babbitt v. Read, C. C. A., 240 Fed. 694, *Infra* § 711.

[26] Gold v. South Side Tr. Co., C. C. A., 179 Fed. 210; Bank of Dillon v. Murchison, C. C. A., 213 Fed. 147; D. W. Standrod & Co. v. Utah Implement-Vehicle Co., C. C. A., 223 Fed. 517. *Infra* § 668.

[27] Columbia Iron Works v. National Lead Co., C. C. A., 127 Fed. 99.

[28] Stevens v. Nave-McCord Mer-

those which only injuriously affect the bankrupt or another party who has taken no cross-appeal.[29] If the Court of Bankruptcy fails to obey a mandate of the Circuit Court of Appeals, obedience thereto may be enforced by the writ of mandamus.[30] A petition of revision cannot be sustained as an appeal.[31]

§ 668. Practice upon petition for a revision. The original petition for a revision should be filed in the Circuit Court of Appeals and not in the District Court.[1] Such power of revision must be exercised on due notice and petition by any party aggrieved.[2] It has been held that all the parties injuriously affected need not join therein.[3] The petition must clearly state the questions of law involved, so as to represent a distinct issue, and be accompanied by enough of the record to show the manner in which the questions arose.[4] It is the safer practice to procure

cantile Co., C. C. A., 150 Fed. 71, 73. But see Brady v. Bernard & Kittinger, C. C. A., 170 Fed. 576. It seems that this cannot be done when the prior order was appealable. Bray v. Johnson, C. C. A., 166 Fed. 57.

29 McGahan v. Anderson, C. C. A., 113 Fed. 115.

30 *Ex parte* Chicago Title & Trust Co., C. C. A., 146 Fed. 742; reversed upon mandamus without affecting the question of jurisdiction in *Ex parte* First Nat. Bank of Chicago, 207 U. S. 61, 52 L. ed. 103. *Re* Lesaius, C. C. A., 181 Fed. 690, holding that the District Court could not amend an order that had been reversed. See § 712, *infra*. A second appeal will be dismissed as frivolous when the court of review on the first appeal has passed upon the points raised by the assignments of error and no new evidence has been submitted. *Re* Kehler, C. C. A., 162 Fed. 674.

31 *Re* Mertens, C. C. A., 142 Fed. 445; Kirsner v. Taliaferro, C. C. A., 202 Fed. 51; *Re* Shidlovsky, C. C. A., 224 Fed. 450; *Re* Reilly, C. C. A., 258 Fed. 121. But see *Re* Endlar, C. C. A., 192 Fed. 762.

§ 668. 1 *Re* Williams, 105 Fed. 906. Bridgeton Nat. Bank v. Way, C. C. A., 253 Fed. 41.

2 30 St. at L. 553, § 24. Lazarus Michel & Lazarus v. Harding, C. C. A., 223 Fed. 50. A bankrupt cannot thus obtain a review of an order for the examination of his wife. *Re* Weidenfeld, C. C. A., 254 Fed. 677.

3 *Re* Jemison Mercantile Co., C. C. A., 112 Fed. 966.

4 *Re* Richards, C. C. A., 96 Fed. 935; Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co., C. C. A., 101 Fed. 699; *Re* Baker, C. C. A., 104 Fed. 287. A petition unaccompanied by a transcript or any finding of fact will be dismissed. *Re* Throckmorton, C. C. A., 196 Fed. 656. The petition should set out the facts or the findings of facts upon which the matters of law sought to be reviewed arise. *Re* Taft, C. C. A., 133 Fed. 511; *Re* Pettingill & Co., C. C. A., 137 Fed. 840; Steiner v. Marshall, C. C. A., 140 Fed. 710. *Contra*, *Re* Baker,

the allowance of the petition, as if it were an appeal, *ex parte* by

C. C. A., 104 Fed. 287; Remington on Bankruptcy, § 2949. It has been held that the petition will be dismissed unless the record contains a statement or finding of facts, or shows that the court did not determine as one of fact the question sought to be reviewed. *Re* Pettingill & Co., C. C. A., 137 Fed. 840; Landry v. San Antonio Brewing Ass'n, C. C. A., 159 Fed. 700; Hegner v. Am. Trust & Sav. Bank, C. C. A., 187 Fed. 599. See Johansen Bros. Shoe Co. v. Alles, C. C. A., 197 Fed. 274. In the absence of findings and a transcript of the evidence, it may be presumed that the decision was justified by the facts proved. *Re* Roadarmour, C. C. A., 177 Fed. 379. King Hardware Co. v. J. G. Christopher Co., C. C. A., 222 Fed. 224; *Re* Wood, C. C. A., 246 Fed. 246; *Re* Stitt, C. C. A., 252 Fed. 1; *Re* Anderson, 252 Fed. 272; Gray v. Gudger, 260 Fed. 931. See *Re* Wood, C. C. A., 248 Fed. 246. Where the facts support the order the petition will be dismissed, although the ground of the decision below was erroneous. Davis v. Crompton, C. C. A., 158 Fed. 735. But see *Re* Sobol, C. C. A., 242 Fed. 487. The petition must set forth the decision, which it claims is erroneous, *Re* Richards, C. C. A., 96 Fed. 935; *Re* Taft, C. C. A., 133 Fed. 511; *Re* O'Connell, C. C. A., 137 Fed. 838; and it should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination. *Re* Richards, C. C. A., 96 Fed. 935. In the absence of any rule of court upon the subject, the petition was not dismissed because the transcript was not certified. Meyer Bros. Drug Co. v. Pipkin Drug Co., C. C. A., 136 Fed. 396. It is the better practice to have the petition accompanied by a certified copy of the opinion of the court below. This is required by the rules of some of the Circuit Courts of Appeal, which also, in some cases, regulate the practice upon these petitions. See appendix, *infra*. It is insufficient to set forth the opinion of the court below. *Re* Richards, C. C. A., 96 Fed. 935. The order must be recited in the petition or certified to the court of review. *Re* Richards, C. C. A., 96 Fed. 935. The finding of facts by the referee and the trial court is almost invariably conclusive, Whitney Central Tr. & Sav. Bank v. U. S. Const. Co., C. C. A., 250 Fed. 784. The opinion of the court below cannot be treated as a finding of matter of fact, unless it is made a part of the record. *Re* Pettingill & Co., C. C. A., 137 Fed. 840; but it may be looked into for the purpose of ascertaining what propositions of law were determined, *Re* Pettingill & Co., C. C. A., 137 Fed. 840; Samel v. Dodd, C. C. A., 142 Fed. 68. A question not raised, *Re* Smith, C. C. A., 203 Fed. 369; nor decided below cannot be considered, *Re* Smith, C. C. A., 203 Fed. 369; *Re* O'Gara Coal Co., C. C. A., 235 Fed. 883; Jones v. Ford, C. C. A., 254 Fed. 645. A question will not thus be considered in advance of the ruling thereupon below. Kinkead v. J. Bacon & Sons, C. C. A., 230 Fed. 363. After the mandate in regard to the petition has been transmitted to the District Court it is too late for a

a judge of the District Court or of the Circuit Court of Appeals,[5] but, it has been held that such allowance is not necessary.[6] In the absence of a rule of court upon the subject, no bond or citation is required upon a petition for a revision.[7] Reasonable notice of the hearing upon the petition should be given to the respondents.[8]

The petition for a revision does not usually bring the prior proceedings before the Circuit Court of Appeals;[9] not even, it has been held, the jurisdiction of the court below when the proceedings have been pending there for some time.[10] Questions of fact cannot be thus reviewed;[11] nor questions of discre-

person interested to intervene, so as to apply to the Supreme Court for the writ of certiorari, *Re* Nevada-Utah Mines & Smelters Corporation, C. C. A., 204 Fed. 982.

5 *Re* Abraham, C. C. A., 93 Fed. 767.

6 Meyer Bros. Drug Co. v. Pipkin Drug Co., C. C. A., 136 Fed. 396.

7 Meyer Bros. Drug Co. v. Pipkin Drug Co., C. C. A., 136 Fed. 396.

8 *Re* Abraham, C. C. A., 93 Fed. 767.

9 *Re* Pettingill & Co., C. C. A., 137 Fed. 840.

10 *Re* New York Tunnel Co., C. C. A., 159 Fed. 688. See *Re* Bacon, C. C. A., 159 Fed. 424.

11 Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200; *Re* Rosser, C. C. A., 101 Fed. 562; Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co., C. C. A., 101 Fed. 699; *Re* Whitener, C. C. A., 105 Fed. 180; *Re* Taft, C. C. A., 133 Fed. 511; Samel v. Dodd, C. C. A., 142 Fed. 68; *Re* Cole, C. C. A., 144 Fed. 392; Stevens v. Nave-McCord Mercantile Co., C. C. A., 150 Fed. 71; *Re* Graessler & Reichwald, C. C. A., 154 Fed. 478; Ryan v. Hendricks, C. C. A., 166 Fed. 94; *Re* Irwin, C. C. A., 174 Fed. 642; *Re* Stewart, C. C. A., 179 Fed. 222; *Re* Lee, C. C. A., 182 Fed. 579; *Re* Frank, C. C. A., 182 Fed. 794; *Re* Caponigri, C. C. A., 183 Fed. 307; *Re* Donnelly, C. C. A., 187 Fed. 121; Johansen Bros. Shoe Co. v. Alles, C. C. A., 197 Fed. 274; Good v. Kane, C. C. A., 211 Fed. 956; Hall v. Reynolds, C. C. A., 224 Fed. 103; Olmstead-Stevenson Co. v. Miller, C. C. A., 231 Fed. 69; Lott v. Salsbury, C. C. A., 237 Fed. 191; Wm. M. Moore Dry Goods Co. v. Brooks, C. C. A., 240 Fed. 943; Henkin v. Fousek, C. C. A., 246 Fed. 285; *Re* Pierce, Butler & Pierce Mfg. Co., C. C. A., 246 Fed. 814; *Re* Faekler, 246 Fed. 864; Hunter, Walter & Co. v. J. G. Cherry Co., C. C. A., 247 Fed. 458; *Re* Armann, C. C. A., 247 Fed. 954; Frederick v. Silverman, C. C. A., 250 Fed. 75; *Re* Rosenbaum, C. C. A., 252 Fed. 1; *Re* Canister Co., C. C. A., 252 Fed. 70; *Re* Mullings Clothing Co., 252 Fed. 667; King Lumber Co. v. National Bank of Roanoke, Va., C. C. A., 253 Fed. 946; *Re* A. Bolognesi & Co., C. C. A., 254 Fed. 770; *Re* De Ran, C. C. A., 260 Fed. 732; see § 667, *supra*. Although the evidence is not conflicting when different deductions or conclusions therefrom may reasonably be drawn, *Re* Frank, C. C. A., 182 Fed. 794; *Re*

tion unless there has been a gross abuse of discretion.[12] Nor moot questions, a decision of which cannot affect the rights of the petitioner.[13] Interlocutory orders will rarely be thus reviewed when their propriety may be considered upon an appeal from the final decree to be subsequently entered.[14] It has been said that ordinarily a Circuit Court of Appeals will not enter-

Bean, C. C. A., 230 Fed. 405. Such was held to be the finding that a creditor did not have reasonable ground to believe that his debtor was insolvent when he obtained security. Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200; *Re* Rosser, C. C. A., 101 Fed. 562; Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co., C. C. A., 101 Fed. 699; *Re* Whitener, C. C. A., 105 Fed. 180; *Re* Taft, C. C. A., 133 Fed. 511; Samel v. Dodd, C. C. A., 142 Fed. 68; *Re* Cole, C. C. A., 144 Fed. 392; *Re* Graessler & Reichwald, C. C. A., 154 Fed. 478; *Re* Eggert, C. C. A., 102 Fed. 735. But if the finding of the District Court is so wholly unjustified upon the proofs, as would require a court of review upon a writ of error to set aside a verdict of a jury for want of any evidence to sustain it, or for any other reason kindred thereto, the Circuit Court of Appeals will review it. *Re* Cole, C. C. A., 144 Fed. 392, 393. For cases where a dispute concerning the validity of a chattel mortgage and the denial of a motion to dismiss an application for a discharge were held to present questions of law upon undisputed facts reviewable by petition for revision, see *Re* Flatland, C. C. A., 196 Fed. 310; Lindeke v. Converse, C. C. A., 198 Fed. 618.

[12] *Re* Goldman, C. C. A., 129 Fed. 212; Mulford v. Fourth Street Nat. Bank, C. C. A., 157 Fed. 897; *Re* Fischer, C. C. A., 175 Fed. 531; *Re* Schulman, C. C. A., 177 Fed. 191; Lindeke v. Converse, C. C. A., 198 Fed. 618; *Re* Gunacevi Tunnel Co., C. C. A., 201 Fed. 316; Jacobsohn v. Larkey, C. C. A., 245 Fed. 538; Sauve v. M. L. Moore I. M. Co., C. C. A., 248 Fed. 642; *Re* Horowitz, C. C. A., 250 Fed. 106; *Re* Graff, C. C. A., 250 Fed. 997; *Re* Schilling, 251 Fed. 966; *Re* Weidenfield, C. C. A., 254 Fed. 677; *Re* Margolies, C. C. A., 266 Fed. 203; Birch v. Steele, C. C. A., 165 Fed. 577, the appointment or removal of a referee in bankruptcy; *Re* Throckmorton, C. C. A., 196 Fed. 656, the confirmation of a sale; *Re* Merritt Const. Co., C. C. A., 219 Fed. 555; the approval of the selection by the creditors of a trustee; Sabin v. Blake-McFall Co., C. C. A., 223 Fed. 501. It has been held that the amount of counsel fees is such a question of discretion, *Re* Grant, C. C. A., 238 Fed. 132. But see *Re* Smith, C. C. A., 203 Fed. 369; *Re* Wood, C. C. A., 246 Fed. 246, *supra*, § 422, 424.

[13] Allen v. Sweeney, C. C. A., 238 Fed. 563; Ward v. Central Trust Co., C. C. A., 252 Fed. 172. But see Lawhead v. Monroe Bldg. Co., C. C. A., 252 Fed. 758; certiorari denied; Monroe Bldg. Co. v. Lawhead, 248 U. S. 581, 39 Sup. Ct. 67, 63 L. ed. 431. See *infra* § 705.

[14] *Re* Horowitz, C. C. A., 250 Fed. 106, *supra*, § 666.

tain a petition to review any order which does not have a certain degree of definiteness and finality.[15] The statute prescribes no period of limitation within which a petition for revision must be presented.[16] This is done by the rules of some of the Circuit Courts of Appeals.[17] In the absence of such a rule it has been held that a petition for revision may and should be filed within the time usually allowed for an appeal to the Circuit Court of Appeals, namely, six months from the date of the filing of the order below.[18] It has been held that an appeal erroneously taken may be treated as a petition of review, when only questions of law are involved.[19] The phrase "within their jurisdiction," in

[15] *Re* Chotiner, C. C. A., 218 Fed. 813.

[16] See Bacon v. Roberts, C. C. A., 146 Fed. 729; *Re* Kinnane Co.'s estate, C. C. A., 242 Fed. 769.

[17] In the Second Circuit, the petitions must be filed and served within ten days, the transcript filed, and the cause docketed within thirty days thereafter, unless the time is enlarged by an order of the court. The order of enlargement must be filed before the expiration of the time. C. C. A., Rule 38, 2d Ct., 150 Fed. LIV, 79 C. C. A., LIV; *Re* Tanenhaus, C. C. A., 211 Fed. 970; *Re* Vanoscope Co., 233 Fed. 53; *Re* Armann, C. C. A., 247 Fed. 483; *Re* Armann, C. C. A., 247 Fed. 954. An extension of time by stipulation is insufficient. *Re* Brown, C. C. A., 174 Fed. 339. An order of enlargement *nunc pro tunc* cannot be made except under extraordinary circumstances. Ibid. See *Re* Strobel, C. C. A., 160 Fed. 916. The time is not extended by a motion to resettle the order, *Re* John M. Linck Const. Co., C. C. A., 225 Fed. 488. See *supra* §§ 255, 667. *Infra*, § 698.

[18] *Re* Holmes, C. C. A., 142 Fed. 391; *Re* Youngstrom, C. C. A., 153 Fed. 98. See Meyer Bros. Drug Co. v. Pipkin Drug Co., C. C. A., 136 Fed. 396. See Blanchard v. Ammons, C. C. A., 183 Fed. 556. Laches may be a ground for refusing costs, although the petition is filed before the six months have expired. *Re* Endlar, C. C. A., 192 Fed. 762. An order directing that the petitioner be imprisoned unless he files an account before a certain date will not be set aside upon a petition filed before that day, when there appears to be no error in directing the filing of the account. O'Conor v. Sunseri, C. C. A., 184 Fed. 712. *Cf.* Gaudette v. Graham, C. C. A., 164 Fed. 311.

[19] *Re* Abraham, C. C. A., 93 Fed. 767 (where all the parties appeared); Chesapeake Shoe Co. v. Seldner, C. C. A., 122 Fed. 593; *Re* Williams' Estate, C. C. A., 156 Fed. 934; Graham v. Faith, C. C. A., 253 Fed. 32. See Bryan v. Bernheimer, 181 U. S. 188, 192, 193, 45 L. ed. 814, 815, 818; Holden v. Stratton, 191 U. S. 115, 119, 48 L. ed. 116, 118. *Contra*, Dickas v. Barnes, C. C. A., 140 Fed. 849; Gaudette v. Graham, C. C. A., 164 Fed. 311; *Re* Reilley, C. C. A., 258 Fed. 121. See *supra*, § 259. For an estoppel to object to this mode of review, see *Re* Endlar, C. C. A., 192

the grant of supervisory power to the Circuit Courts of Appeals, means within their territorial jurisdiction; and they may, upon a petition for a review, revise an order of a District Court in bankruptcy when an objection to the jurisdiction was made below, if that was not the only objection, and the court did not ground its decision upon a want of jurisdiction.[20] It has been said that they cannot thus pass upon a constitutional question raised by a petition for a revision.[21]

§ 669. Review by the Supreme Court of the United States. By the Act of February 28, 1915, "judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes: * * * shall be final, save only that it shall be competent for the Supreme Court to require by certiorari upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error."[1]

Fed. 762; Huttig Sash & Door Co. v. Stitt, C. C. A., 218 Fed. 1. But see *supra*, §§ 666, 667. A stipulation that two petitions for a revision with the transcripts upon the same be printed in one appeal book, does not waive any legal objections to either of them. *Re* Strobel, C. C. A., 160 Fed. 916.

20 Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814; *Re* Seebold, C. C. A., 105 Fed. 910.

21 *Re* Abbey Press, C. C. A., 134 Fed. 51.

§ 669. 1Act of Jan. 28, 1915, ch. 22. § 4, 38 St. at L. 804 amended, Sept. 6, 1916, ch. 448, § 3, 39 St. at L. 727, Comp. St. § 1120a. By the Bankruptcy Law which was enacted prior to this statute, the Supreme Court of the United States was "invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia." 30 St. at L. 544, 553, 554, § 24. See Leggett v. Allen, 110 U. S. 741, 28 L. ed. 313; Ingersoll v. Bonroe, 154 U. S. 645, 38 L. ed. 1091; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009; James v. Stone & Co., 227 U. S. 410; Friend v. Talcott, 228 U. S. 27; Houghton v. Burden, 228 U. S. 161; Lazarus v. Prentice, 234 U. S. 263. But see Swift & Co. v. Hoover, 242 U. S. 107, 109. The Bankruptcy Act further provided: "From any final decision

It seems that this statute applies to all plenary suits brought in the Federal courts by trustees and receivers in bankruptcy.[2] It applies to controversies in proceedings in bankruptcy in which the Circuit Courts of Appeals have overruled the contention that a State statute was repugnant to the Federal Constitution.[3] The practice upon applications for such a writ of certiorari is hereinafter described.[4] The Supreme Court may review by writ of error a final decree in a suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of the Bankruptcy Act or of an authority exercised under the United States under color of such act and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of this being repugnant to the Bankruptcy Act and the decision is in favor of the validity.[5] The

of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or, 2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.'' 30 St. at L. 544, 554, § 25. See Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. ed. 128; Lumpkin v. Foley, C. C. A., 204 Fed. 372. An order denying a claim of set off was reviewed after its affirmance by a Circuit Court of Appeals, Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571. There was no appeal from an order by the District Court of the United States for Porto Rico rejecting a claim in bankruptcy. Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118. Nor from a decision upon a petition for the revision of a decree or order of a District Court, which did not allow or reject a claim, Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116; Mitchell Store Building Co. v. Carroll, 232 U. S. 379.

2 William R. Staats Co. v. Security Tr. & Sav. Bank, 243 U. S. 121; but see Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. ed. 287; *Re* Jacobs, C. C. A., 99 Fed. 539.

3 Central Trust Co. v. Lueders, 239 U. S. 11.

4 *Infra* § 689.

5 Act of Sept. 6, 1916, ch. 448, § 2, amending, Jud. Code § 237, and Act of Dec. 23, 1914, ch. 2, 38 St. at L. 790, Comp. St. § 1214, see *infra* §§ 689, 692.

Supreme Court may, by certiorari or otherwise, require that there be certified to it, for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had; where is drawn in question the validity of such law or of any amendment thereof, or of an authority exercised under the United States under color thereof, and the decision is in favor of the validity; or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of repugnancy to the Bankruptcy Act and the decision is against the validity, or where any title, right, privilege, or immunity is claimed under the Bankruptcy Act or under any amendment thereof, or any commission held, or authority exercised under the United States and under color of such Act and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed by either party under the Bankruptcy Act or under such commission or authority.[6]

[6] Act of Sept. 6, 1916, ch. 448, § 2 amending Jud. Code § 237, and Act of Dec. 23, 1914, ch. 2, 38 St. at L. 790, Comp. St. § 1214, see *infra*, §§ 689, 692. Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179, 1181; Central Trust Co. v. Chicago Auditorium, 240 U. S. 581. The Supreme Court may review the decision of such a State court which refuses to give proper effect to a discharge in bankruptcy. Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. ed. 994; Forsyth v. Vehmyer, 177 U. S. 177, 44 L. ed. 723; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362; Lesser v. Gray, 236 U. S. 70. See Winchester v. Heiskell, 119 U. S. 450, 30 L. ed. 462. And also it has been held one entered in an action by a trustee to recover assets of the estate, Rector v. City Deposit Bank Co., 200 U. S. 405, 50 L. ed. 527; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596; Miller v. N. O. Acid & P. Co., 211 U. S. 496; but not a judgment of a State court that an order setting aside to a bankrupt certain land as exempt is *res adjudicata* in an action of ejectment by parties who have bought this at an execution sale, made subsequent to the filing of a petition of voluntary bankruptcy. Smalley v. Laugenour, 196 U. S. 93, 49 L. ed. 400. Under former bankruptcy laws it was held that the Supreme Court might review said judgments or decrees of a State court which refused to give proper effect to the statute of limitations as to suits against trustees. Traer v. Clews, 115 U. S. 528, 29 L. ed. 467; or to a sale in bankruptcy. Factors' & Tr. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582; New Orleans S. F. & L. Co.

v. Delamore, 114 U. S. 501, 29 L. ed. 244; but not a judgment or decree which erroneously gave too great effect to a discharge, Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; nor a refusal to open a decree so as to allow a defendant to plead a discharge. Wolf v. Stix, 96 U. S. 541, 24 L. ed. 640. But see Winchester v. Heiskell, 119 U. S. 450, 30 L. ed. 462. See also Van Norden v. Benner, 131 U. S. cxlv, 24 L. ed. 247; Scott v. Kelly, 22 Wall. 57, 22 L. ed. 729; Boatmen's Sav. Bank v. State Sav. Ass'n, 114 U. S. 265, 29 L. ed. 174. Under the act of 1867 it was held that the Supreme Court might review in certain cases the decision of a State court against an assignee in bankruptcy who claimed title to certain property. Williams v. Heard, 140 U. S. 529, 35 L. ed. 550. But see McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771.

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 732 555 8